IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2009/38858

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

[Date] 26/11/2018

AP .....

In the matter between:

ABSA BANK LIMITED Applicant

and

AHMANTO HAMID AND OTHERS Respondent

JUDGMENT

KLAAREN, AJ:

[1] In a judgment of this court dated 3 January 2017, ABSA Bank Limited v Hamid Ahmanto and Another (38858/09) [2016] ZAGPJHC 355, I considered an application by the applicant [ABSA] to declare the respondent's immovable property located at Erf 9178 Lenasia (the Lenasia property) specifically executable and to authorize a writ of execution against it. After hearing both parties, I decided two principal issues, namely that ABSA had properly made out its case on its founding papers with respect to the underlying default judgment but had not complied with the proviso to Rule 46(1)(a)(ii). As noted in paragraphs 20-21 of the 3 January 2017 judgment, that proviso stems from a long line of cases within and beyond this court and provides special protections and practices in cases where judgment debtors are poor and at risk of losing their primary residence, as is potentially the case here. While it was ABSA's case that the property was not the primary residence of the first respondent Hamid Ahmanto, I concluded at paragraphs 24-33 that the papers established a dispute of fact on this issue.

[2] I thus ordered the matter set down for the hearing of oral evidence. Today's judgment covers that hearing and should be read with the 3 January 2017 judgment. The disputed fact that was the subject of the hearing is whether the Lenasia residence is the primary residence of the first respondent. It is the policy of this Division that a judge who makes an order for referral for oral evidence (as distinct from an order for referral to trial) becomes seized of the matter as a part-heard. After several attempts at rescheduling, the hearing was finally held on 2 August 2018.

[3] At the hearing on 2 August 2018, Attorney Hyde appeared for Mr Ahmanto and Advocate Ekstein appeared again for ABSA. Attorney Hyde is an attorney appointed pro bono for this matter. The counsel who worked with Attorney Hyde on this case to date, including the counsel who appeared in the 2016 hearing, have also acted pro bono. Though Attorney Hyde had made efforts which need not be detailed here, pro bono counsel was not available for this hearing. Operating without counsel and without the papers in the possession of counsel, Attorney Hyde was thus at somewhat of a disadvantage in this hearing. However, this feature was catered for with several breaks during the hearing for preparation. Further Attorney Hyde was offered collegial assistance by and access to the papers of ABSA's legal team. Procedural compliance with the 3 January 2017 order was conceded and was not in issue.

[4] One preliminary question on which argument was heard concerned recent practice directives. The two, which must be read together, are Practice Directive Number 1 dated 2 May 2018 and Practice Directive Number 2 dated 28 May 2018. These directives were made in order to allow a Full Court of this Division to consider the legal issues raised by four unopposed applications relating to foreclosures of bonds over primary residences where the provisions of the National Credit Act 34 of 2005 were applicable.

[5] Attorney Hyde submitted that to continue the hearing would be "circumventing the objective of the directives". He thus asked that the hearing be postponed sine die in light of the May 2018 Practice Directives. Advocate Ekstein distinguished this

matter from those covered in the Practice Directives on the basis that the only matter not dealt with in this case was the primary residence aspect and that the National Credit Act was not applicable to this matter.

[6] In my view, on a proper interpretation, this matter was indeed not covered by the Practice Directives. The matter was part-heard as of the date of the Practice Directives. Its narrow focus on the primary residence question may be distinguished from the broader subject matter of the cases and the legal issues referred to in the Practice Directives. As Advocate Ekstein further argued, even if the case was covered, there was no prejudice in holding the hearing for oral evidence. It was on this basis, noting also the need to finalize the case and the presence of witnesses that I decided to continue with the hearing.

Applicant's Evidence

[7] The applicant called one witness, Mr van der Walt, a member of a close corporation working as a private investigations unit. His corporation was sub-contracted by Precision Tracers and Debt Collectors on behalf of ABSA in mid-2017. He was given sight of the report compiled in 2015 on behalf of Precision Tracers and was given an instruction to conduct an investigation relevant to the first respondent's residential property. Mr van der Walt testified that his conclusion from the information available to him was similar to the Precision Tracers report from 2015: that Mr Ahmanto and his partner (Riana), his daughter (Sabjee Fahiza), and his

daughter's two minor children (the family) were not primarily resident at the Lenasia property (as had been alleged in para 32 of the answering affidavit in this case)

[8] In 2017, a member of Mr van der Walt's team visited and inspected the Lenasia property. Mr van der Walt also personally conducted an observation at a second property in Ennerdale also registered in the name of Mr Ahmanto (the Ennerdale property). Mr van der Walt testified that he stayed outside the Ennerdale property in a car for three hours from 5 am to 8 am. The Ennerdale property had come to light as the result of investigations conducted for the purposes of the applicant's replying affidavit in the 2016 hearing of this matter. I was informed that ABSA has now also launched an application against this second property of Mr Ahmanto, to declare it specifically executable and to authorize a writ of execution against it.

[9] Mr van der Walt further testified to a conversation that took place in 2017 with Mr Ahmanto where Mr Ahmanto agreed to meet Mr van der Walt at the Ennerdale house, which was a double storey and, in Mr van der Walt's opinion, a nicer residence than the Lenasia property. Mr van der Walt did not make the meeting since his mandate was then done. Mr van der Walt concluded in 2017 that Mr Ahmanto resided at the Ennerdale property.

[10] On 1 August 2018 (the day before the oral evidence hearing), Mr van der Walt also further investigated whether Mr Ahmanto, his partner, his daughter and his daughter's children lived on the Lenasia property. To do this, Mr van der Walt did a visual inspection of the Lenasia property, also speaking with the shop-keeper/tenant and with a woman at the neighbor's house about whether Mr Ahmanto and the family were resident at the Lenasia property. He stayed around about thirty minutes or an

hour. He was not able to have access to the property, other than entering the spaza shop which forms part of the Lenasia property and speaking with the tenant and shop-keeper, Naheem.

[11] With respect to Mr van der Walt's interaction with Naheem, during his direct evidence I asked Mr van der Walt whether he had spoken to Naheem about the residence, at the Lenasia property, of the first respondent and members of his family. He replied "M'Lord he wasn't prepared to answer it and to talk about them, he said that he was uncomfortable as Mr Ahmanto was his landlord."

Respondent's Evidence

[12] After ABSA had closed its case, Attorney Hyde called the respondent, Mr Ahmanto, to give oral evidence on the disputed issue. Under oath, Mr Ahmanto stated he resides at the Lenasia property, identifying it both by erf number and by street number. He stated that, while he had purchased the property earlier, he took occupation in 2009. Under questioning on direct from Attorney Hyde, Mr Ahmanto answered that he had not personally lived at any address other than the Lenasia property since that time.

[13] He further stated that the Lenasia property is partitioned and part was leased to tenants who operated a spaza-shop. Mr Ahmanto further stated that the premises were open during the day, attended by his tenant, the shop-keeper, since he was usually out working at odd jobs during day. When asked about his daily routine, Mr

Ahmanto stated: "Well, when I get up in the morning by eight o'clock I go out and do some odd jobs because I am unemployed at present sir." He also stated that Naheem, the tenant and shop-keeper, would accept summonses on his behalf and hand them to him.

[14] Mr Ahmanto stated that his partner, child, and his grandchildren left the premises sometime after he, together with these four persons, took occupation in 2009. He stated, "my wife and the children left for personal reasons." As discussed below, Mr Ahmanto was not precise as to the date when his partner and the rest of the family moved out, giving a date of 2010 in his testimony on direct. When his partner and the rest of the family moved out, the tenants at the Lenasia property expanded and took two rooms in the property, behind the spaza shop.

[15] With respect to the Ennerdale property, Mr Ahmanto confirmed that this property was registered in his name, but stated that neither he nor his partner and family have ever resided there. Mr Ahmanto further denied that he ever had a conversation with Mr van der Walt or that he ever arranged to meet Mr van der Walt at the Ennerdale property.

[16] Ahmanto stated that he was aware of the legal proceedings apparently recently instituted regarding the Ennerdale property and that Asif Gani and his family reside there. Cross-examination confirmed that Mr Ahmanto acquired the Ennerdale

property in 2006 and that it was bought as an investment. However, Mr Ahmanto also stated that he has sold the Ennerdale property.

[17] Mr Ahmanto remained consistent under cross-examination that he primarily resides at the Lenasia property and that he does not reside at the Ennerdale property. However, under cross-examination, he stated that his wife, child, and her children had left the Lenasia property in 2012.

Evaluation of Evidence Presented

[18] Attorney Hyde argued the reliability of Mr van der Walt was dubious. However, Attorney Hyde was on firmer ground in pointing out that the woman Mr van der Walt spoke to at the neighbor's residence, during his brief visit on 1 August 2018, was not necessarily the actual neighbor with detailed knowledge of Ahmanto's residence status. Of course, this was not the case with Naheem, with whom Mr van der Walt also spoke.

[19] On an assumption of reliability of Mr van der Walt's evidence, it is convenient to deal at this point with the issue of the purported phone call. Mr Ahmanto denies having a phone conversation with Mr van der Walt. Taking for the sake of argument Mr van der Walt's evidence, the offer made by Mr Ahmanto over the phone to meet at the Ennerdale property indicates a connection between Ahmanto and the Ennerdale property, but not necessarily primary residence (or even a lesser degree of residence) at the Ennerdale property. The connection could also be consistent with ownership, which Mr Ahmanto does not deny.

[20] In my view, there is little reason to reject Mr van der Walt's evidence and I do not do so. Rather, the limited extent to which it and his conclusions assist the applicant's case on this issue should be recognized. Mr van der Walt's evidence was broadly similar to the evidence presented by ABSA in its papers. It is indicative but hardly conclusive on the disputed issue.

[21] I have come to a similar conclusion with respect to the evidence of the returns of service. While Mr Ahmanto was cross examined at length on these returns, this exercise elicited little in terms of evidence beyond that alleged in the papers.

[22] I now evaluate the evidence of the respondent, Mr Ahmanto. As Attorney Hyde submitted, Mr Ahmanto has been consistent that he resides at the Lenasia property. What is clear from his evidence is that Ahmanto is the current registered owner of both the Lenasia and the Ennerdale property and that Ahmanto has testified under oath in this proceeding that he resides at the Lenasia property and that it is his primary residence. On the whole, further argued Attorney Hyde, the evidence of Mr Ahmanto was an adequate rebuttal of the prima facie evidence of returns.

[23] Is this evidence reliable and credible? Advocate Ekstein contended Mr Ahmanto's evidence should be rejected for the reason that he tailored his evidence

to suit the situation. She offered three instances whereby the court could find in this manner: first, that under cross-examination, it was stated that the family moved out in 2012, rather than the year of 2010 as given in direct; second, that Mr Ahmanto did not disclose his ownership of the Ennerdale property during these proceedings; and third, that in his affidavit he had stated he was not earning but his evidence in the hearing was that he was earning a small income from rental and odd jobs.

[24] Attorney Hyde argued that, while the evidence of Mr Ahmanto did demonstrate an element of confusion, the state of his evidence should not be characterized as dishonesty. It may be that, at least in his client's view, the odd jobs do not constitute employment. Attorney Hyde further argued that his client was confused about the dates of when his family moved out. This confusion regarding dates was evident in numerous instances.

[25] The issue for decision is not when the family moved out; the issue is whether the Lenasia property should be regarded, on the balance of the evidence presented, as Mr Ahmanto's primary residence. The consistent evidence of the respondent is that it is. Mr Ahmanto's evidence is that he usually occupies the Lenasia residence. Against this must be set the prima facie evidence of the returns of service as well as the conclusion of the private investigator hired by the bank.

[26] Of course consistent evidence may also be tailored evidence. In this case, hearing the evidence and cross-examination, I was not left with the impression that

Mr Ahmanto's evidence was tailored. While the evidence was not entirely satisfactory and the matter is hardly clear from doubt, on the whole, I accept Mr Ahmanto's evidence of his usual occupation at the Lenasia property. There was no deviation from this contention and there was no ambiguity revealed on this point in cross-examination. His account that his family moved out and that he remains at the Lenasia property is objectively plausible and fits the available evidence. This seems credible even though the dates for the moving out he has given indeed appear at best confused (since on either version (2010 or 2012) there is a discrepancy with his answering affidavit (2015)). On the narrow question referred to oral evidence, I was left at the end of the day with the sense that Mr Ahmanto's evidence was credible and reliable.

[27] As part of this holistic assessment of the evidence, I have also considered the probabilities of Mr Ahmanto's version. His version of usual occupation after his family moved out appears plausible, noting also his account of the tenant leasing an expanded set of rooms. I also find, making his version more likely, that his income matches this residence. Mr Ahmanto's earnings from odd jobs and the like (in addition to the rental income from the Ennerdale property) are consistent with his evidence of usual occupation of the Lenasia property, which is not a luxurious one.

The Bearing of the Evidence on the Issue in Dispute

[28] Advocate Ekstein contended that, per *FirstRand Bank v Folscher* 2011 (4) SA 314 (GNP); [2011] ZAGPPHC 79 (24 May 2011), even if the Lenasia property were

Mr Ahmanto's primary residence, Mr Ahmanto has an alternative dwelling available to him, the Ennerdale property. Attorney Hyde made the counterargument that the application to foreclose by ABSA against the Ennerdale property means that it does not constitute alternative accommodation. It is not necessary for me to decide this aspect. The question referred to oral evidence was the narrow one of whether or not the Lenasia property is Ahmanto's primary residence. It is not the additional question of whether or not alternative accommodation is available to him.

[29] Indeed, it may well be the case that the evidence as developed up to and in this hearing, if it had been contained in ABSA's founding affidavit, would have sufficed for the purposes of Rule 46(1)(a)(ii). In particular, it is certainly the case that Mr Ahmanto's ownership of the Ennerdale property would constitute some part of the legally relevant circumstances required to be set out in the papers by the Rule. As mentioned above, however, ABSA's case in this matter was that the Lenasia property is not Mr Ahmanto's primary residence.

[30] *Folscher* is however relevant and determinative in giving content and meaning to the disputed issue and the question of primary residence. *Folscher* was clear that "execution against a holiday home or a second house that is not usually occupied by the debtor does not trigger the application of the Rule." A home or a house that is not usually occupied is not a primary residence. *Folscher* thus equates usual occupation with primary residence.

[31] In the view I take of the matter, it is relatively difficult for the bank to overcome the sworn testimony of an owner as to the owner's usual occupation and thus primary residence, at least in a context of multiple residences and without presenting specific evidence of the owner's usual occupation anywhere else. A private investigative visit of around an hour at the claimed and credible residence does not quite suffice, at least in the circumstances of this case, without some further evidence establishing usual occupation elsewhere or otherwise undermining the respondent's contention.

[32] I thus find on a balance of probabilities and in terms of the *Folscher* judgment that the Lenasia property is Mr Ahmanto's primary residence. As such, Rule 46(1)(a)(ii)'s special practices and protections as detailed in my earlier judgment are triggered. ABSA ought to have included greater information in its papers concerning the personal circumstances of the first respondent than it did. I thus order that the application be dismissed.

Costs

[33] With respect to costs, the usual rule is that costs follow the result, with discretion for the judge with respect to the particulars of the case and particularly with respect to success. Both parties were successful on one of the two main issues argued and decided in the matter at the 2016 hearing on the opposed motions roll. I therefore propose to make no order of costs in respect of that hearing.

[34] This leaves the matter of costs for the hearing of oral evidence, where Mr Ahmanto has been successful. This case deviates from the more usual one in that the first respondent's representation has been done on a pro bono basis. Attorney Hyde has represented Mr Ahmanto in terms of Rule 40.

[35] The fact that the first respondent was represented on a *pro bono* basis is however no reason in principle not to award costs. While the first respondent will not and ought to be compensated in this *pro bono* case for the work that they were willing to and did undertake without the incentive of certain payment. See Kuhudzai and Another v Minister of Home Affairs (11034/16) [2018] ZAWCHC 103 (24 August 2018); Zeman v Quickelberge and Another (C45/2010) [2010] ZALC 122; 2011) 32 ILJ 453 (LC) (23 August 2010). See also section 92 of the Legal Practice Act (28 of 2014), addressing the recovery of costs by legal practitioners rendering free legal services.

[36] In the circumstances of this case, I thus propose to order costs on the usual party-and-party scale for the successful party, the first respondent, but limited to the hearing of oral evidence.

ORDER:

[37] I make the following order:

1. The application is dismissed.
2. The applicant must pay the legal team of the first respondent costs on a party-and-party scale for the costs associated with the hearing of oral evidence. No order is made with respect to costs associated with the 2016 motion hearing.

J KLAAREN

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 2ND AUGUST 2018

Judgment Delivered: 26th November 2018.

APPEARANCES

On Behalf of the Applicant: **ADV E EKSTEEN**

Instructed By: **JAY MOTHOBI INCORP**

011 268 3500

9 ARNOLD ROAD

ROSEBANK 2196

IN PERSON: **MR KEVIN HYDE**