**EPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

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

**……..……..**

**Name: FARBER AJ** **Date:** 12 October 2023

**CASE NUMBER: 41606/2016**

In the matter between:

**NEDBANK LIMITED** **APPLICANT**

And

**NCUBE: MGIBELO** **FIRST RESPONDENT**

**NCUBE: MAGGIE** **SECOND RESPONDENT**

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**JUDGMENT**

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**FARBER AJ:**

[1] The Applicant seeks an order setting aside the interdict proceedings instituted against it by the First and Second Respondents, in which proceedings they seek to restrain it from levying execution against the immovable property which they occupy as their primary residence (the *"interdict proceedings*")

[2] The facts are relatively straightforward and may be summarised thus.

[3] On 27 February 2017 the Applicant instituted motion proceedings against the Respondents, in which proceedings it sought payment from them, jointly and severally, the one paying the other to be absolved, of the sum of R635,542.52, together with interest thereon at the rate of 6.75 % per annum with effect from 1 October 2016 to date of payment. In addition, the Applicant sought an order declaring certain immovable property especially executable. The Respondents did not signify their intention to oppose the application and on 17 May 2018 an order was granted against them for payment of the sum of R635,542.52, together with interest at the rate of 10.5% per annum, compounded monthly in arrears from 1 October 2016 to date of final payment. Costs were ordered against them on an attorney and client scale.

[4] Execution against movables was unsuccessful and on 20 March 2019 the Applicant made application to declare the property specially executable.

This application was opposed. Despite this, this Court (per Siwendu J) declared the property specially executable, subject to a reserve price of R400,000.00 being set "*for the first sale in execution*". The Respondents were directed to pay the costs of the application, jointly and severally, the one paying the other to be absolved, on the attorney and client scale.

[5] Following thereon and during April 2021 the Respondents by way of urgency launched the *"interdict proceedings*", the body of which reads as follows: -

"***BE PLEASED TO TAKE NOTICE*** *that this is an urgent application for an Interdict to the above Honourable Court by the following respondents in this matter Ncube Mgqibelo (first respondent) and Ncube Maggie (second respondent)*

*Judgement declared our family primary residence property specially executable. We hereby object to this as we do not have alternative residence or property. It will lead to homeless, destitution, misery and poverty.*

*a. Nedbank Limited*

*b. The Sheriff Meyerton Magisterial District of Midvaal – to immediately stop/restrain from executing on the "writ of execution Immovable property dated 20/01/2021.*

*c. The Plaintiff's attorneys – Lowndes Dlamini Attorneys.*

*d. The Registrar of Deeds Pretoria to stop or disregard the attachment notification from the Sheriff.*

*The whole judgement and orders granted violated the constitution of the Republic of South Africa, was unprocedural, biased, highly intimidatory. The judgement was not based on the respondents' Heads of Argument, as they were ignored, glossed-over, not read at all and overly suspicious and bullish.*

*The South African Court rules pertaining to this matter were not adhered to the decision to grant judgement was hurried and not based on facts but purely on emotions and on among other things that it could always to be stopped or interdicted.*

*We hereby exercise our constitutional and legal rights as we have the first preference habitio/occupational over the property in this matter.*

*Further be pleased to take notice that the respondent Ncube Mgqibelo (first respondent) and Ncube Maggie (second respondent) intend lodging on application for <u>leave to appeal</u> to the FULL BENCH of the Honourable High Court alternatively with the supreme court of Appeal. The leave to appeal will detail the grounds under which we are appealing.*

*<u>PROPERTY IN THIS MATTER</u>*

*Holding 16 Ophir Agricultural Holding Township, Registration Division I.R. The Province of Gauteng measuring 2,0236m squared.*

*Held by Deed of Transfer: T59087/07 situated at Plot 16 Meyerton Road Ophir Estates Meyerton."*

[6] On 8 April 2021 the Applicant signified its intention to oppose the *"interdict proceedings*" and on 4 May 2021 it delivered a notice in terms of Rule 6(5)(d). It is perhaps desirable that I quote the grounds relied upon by the Applicant in opposing the *"interdict proceedings*" as therein set forth: -

"*URGENCY*

1. *The respondents have failed to plead and/or aver the necessary allegations in support of urgency, as required by Rule 6(12) of the Rules of Court, in their founding affidavit.*

2. *Moreover, no specific prayer – with regards to urgency in terms of Rule 6(12) of the Rules of Court – is contained in the respondents' notice of motion.*

3. *In the circumstances, the Court is precluded from adjudicating the respondents' application as an urgent application in terms of the Rules of Court.*

4. *The respondents' application falls to be struck from the roll alternatively dismissed together with costs on the attorney and client scale.*

*NON-COMPLIANCE WITH THE RULES OF COURT*

5. *The respondents' application is non-compliant with the Rules of Court, specifically Rule 6 of the Rules of Court.*

6. *The respondents' application is devoid of any time-periods within which the applicant is to deliver opposition to the respondents' application (be it urgent or not), or within which to deliver an answering affidavit (should the applicant be inclined to oppose the relief sought).*

7. *Furthermore, the respondents' application is not supported by a founding affidavit commissioned before a Commissioner of Oaths.*

8. *The respondents' application falls to be struck from the roll alternatively dismissed together with costs on the attorney can client scale.*

*NO CAUSE OF ACTION*

9. *The Respondents' seek to interdict the applicant from executing the judgment and/or order granted by the Honourable Justice Siwendu*

*on 23 June 2020 – the respondents' allege that the judgment and/or order would render the respondents to be homeless, destitute and subject to poverty.*

10. *A copy of the judgment and/or order granted by the Honourable Justice Siwendu on 23 June 2020 is attached as annexure "**A**"*

11. *The judgment and/or order of 23 June 2020 was granted by the Honourable Justice Siwendu following the adjudication and determination of an opposed application in terms of Rule 46 and 46A of the Rules of Court – in terms of which the applicant sought an order to declare the immovable property of the respondents specially executable in satisfaction of the judgment debt owed to the applicant.*

12. *The first respondent appeared in person at the opposed application in terms of Rule 46 and 46A of the Rules of Court, as confirmed by the contents of annexure "**A**".*

13. *Firstly, the very issues forming the subject matter of the respondents' application (i.e. constitutional considerations, such as the availability of alternative property, homelessness, destitution, misery and poverty) were addressed and canvassed in the opposed application in terms of Rule 46 and 46A of the Rules of Court.*

14. *In the circumstances, the respondents are not entitled to interdictory relief (as prayed for in the respondent's application), when the*

*judgment and/or order of 23 June 2020 already disposed of the issues forming the subject matter of the claim for interdictory relief.*

15. *The judgment and/or order of 23 June 2020 is res judicata, alternatively, issue estoppel to the relief sought in the respondents' application for interdictory relief.*

16. *Secondly, the respondents have failed to plead and/or aver any 'clear right', or at least 'a prima facie right though open to some doubt' against the applicant, upon which they rely for purposes of their claim for interdictory relief.*

17. *The respondents have failed to disclose a cause of action against the applicant.*

18. *Thirdly, to the extent that the respondents' seek to prosecute an application for leave to appeal against the judgment and/or order of 23 June 2020, such an application for leave to appeal would stay the procedural effects of the judgment and/or order of 23 June 2023 in terms of section 17 of the Superior Courts Act no. 10 of 2013.*

19. *Differently put, an application for leave to appeal would prohibit the execution of the judgment and/or order of 23 June 2020 until such time as the application for leave to appeal was finalised by the Court a quo.*

20. *Interdictory relief is accordingly incompetent, as the respondents have an alternative remedy available at their disposal, namely the*

*institution of an application for leave to appeal against the judgment and/or order of 23 June 2020.*

*21. Again, the respondents have failed to disclose a cause of action against the applicant.*

*22. The respondents' application falls to be dismissed together with costs on the attorney client scale."*

[7] The Respondents did not deal with the points raised by the Applicant in its notice in terms of Rule 6(5)(d)(iii). They, moreover, failed to deliver the required heads of argument, practice note, list of authorities and chronology as required of them in terms of the Court's Practice Manual.

[8] Thus, and on 20 October 2021 the Applicant instituted proceedings to compel the Respondents to deliver the requisite heads of argument and practice note within 3 days from the date of service of an order requiring them to do so. On 22 October 2021 this Court (per Mdalana-Mayisela J) granted an order compelling the Respondents to deliver their heads of argument, practice note, chronology and list of authorities within 3 days. The order further provided that in the event of the Respondents failing to comply therewith the Applicant was free to again approach Court on the same papers, duly supplemented, for an order dismissing the *"interdict proceedings*". The Respondents were moreover mulcted with costs on the attorney and client scale.

[9] The order was duly served. It was subsequently rescinded and the Applicant instituted fresh proceedings for the grant to it of an order compelling the Respondents to deliver their heads of argument and practice note in the "*interdict proceedings*". On 27 July 2022 this Court (per Oosthuizen-Senekal AJ) granted an order compelling the respondents to deliver those documents "*no later than 7 (seven) days from the date of service of the order*". This order was served on the Respondents on 1 August 2022. The heads of argument and practice note were thus required to be delivered on or before 11 August 2022.

[10] However, and on 8 August 2022, the Respondents instituted proceedings to stay the compelling order of 27 July 2022. This application was opposed. On 15 August 2022 the Applicant instituted proceedings for the dismissal of the *"interdict proceedings*". This Application was set down and on 11 October 2022 the Court (per Maier-Frawley J) postponed it and directed the Respondents to file their answering affidavit by 25 October 2022. The Respondents did so and the Applicant delivered its replying affidavit in those proceedings on 8 February 2023. The Applicant thereafter filed its heads of argument, practice note, chronology and list of authorities in terms of the Practice Manual.

[11] The Respondents did not deliver corresponding documents and on 15 May 2023 the Applicant again instituted proceedings to compel the First and Second Respondents to deliver their heads of argument and practice note,

such to occur within 3 days of the service upon them of an order to that effect. This Application was opposed by the Respondents and there is no indication that it was prosecuted by the Applicant.

[12] The Applicant seeks the dismissal of the *"interdict proceedings*" on the basis of the Respondents failure to prosecute it. It is in this regard well recognized that a High Court has the inherent power, both at common law and in terms of section 173 of the Constitution, to regulate its own process (see in this regard paragraph 8 of the Judgment of *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA)). The approach to be applied in determining whether delay warrants the dismissal of an action was formulated in paragraphs [10] and [11] of that judgment thus: -

"[10] *An inordinate or unreasonable delay in prosecuting an action may constitute and abuse of process and warrant the dismissal of an action.*

*[11] There are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognized. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable and, third, the defendant must be seriously prejudiced thereby. Ultimately the enquiry will involve a close and careful examination of all the facts and circumstances, including, the period of the delay, the reasons*

*therefore and the prejudice, if any, caused to the defendant. There may be instances which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight."*

[13] Three questions arise, namely has there been an inordinate or unreasonable delay, if so, is that delay inexcusable and has the Applicant been seriously prejudiced thereby?

[14] The *"interdict proceedings*" were instituted, almost two and a half years ago. The Applicant signified its intention to oppose the matter and on 4 May 2021 furnished the Respondents with the grounds upon which such opposition was based. The Respondents have since done nothing to further prosecute the matter. To my mind this represents a very significant delay.

[15] The delay has not been explained and absent that I can only but conclude that the Respondents are unable to justify it. It seems to me that on a conspectus of the facts as a whole, the Respondents were quite content to let the matter idle so as to prevent the sale of the property which they, together with their daughter, occupied as their primary residence.

[16] I am fortified in this conclusion by the fact that despite two compelling orders the Respondents did not take the procedural steps which needed to be taken in order to secure the allocation of the matter for hearing. They simply disregarded the obligations imposed upon them under the Practice Manual.

[17] There is one further consideration which I must necessarily take into the reckoning. The *"interdict proceedings*" seek to undermine the orders of Miller AJ and Siwendu J. The matters determined by them (a money judgment in the case of Miller AJ and an order for essentially the sale of the property in the case of Siwendu J) are *res judicata* as between the Applicant and the Respondents. No attempt has been made by them to suggest otherwise and the *"interdict proceedings*" hold no prospects of success. The prolongation of the matter will hardly serve the interest of justice.

[18] The prejudice to the Applicant is manifest. While I do not believe that the institution of the *"interdict proceedings*" suspended the operation of the order of Siwendu J., the Applicant clearly believed that it would be improper for it to give effect to the order of executability while the *"interdict proceedings*" subsisted. The Applicant after all is one of the leading commercial banks in South Africa and the Respondents have throughout been undoubtedly zealous to protect their continued occupation of their primary residence. They are, to boot, unrepresented.

[19] In the exercise of my discretion I am of the firm view that the delays of the Respondents in prosecuting an application which commenced as one of urgency and the consequences attendant thereon are such that the Applicant has made good and sufficient cause for the relief sought.

In the result I grant orders: -

1. Dismissing the Respondents application to suspend the operation of the order of Court declaring specially executable the property which was encumbered to the Applicant under the mortgage bond, being annexure A4 to the founding affidavit deposed to by Mr Sipho Mbongiseni Mbatha in support of the relief sought by it under the notice of motion issued on 23 November 2016 under case number 2016/41606.

2. Directing the Respondents to pay the costs of this application, such order to operate against them jointly and severally, the one paying the other to be absolved.

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**G Farber**

**ACTING JUDGE OF THE HIGH COURT**

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| Date of Hearing: | 9 October 2023 |
| Date of Judgment: | 12 October 2023 |

**APPEARANCES**

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| For the Applicants: | Adv. Leon Peter |
| Instructed by: | Lowndes Dlamini Attorneys |
| For the Respondents: | Each in person |