REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 39085/2016

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

DATE 29/04/22 SIGNATURE

In the matter between:

ERF 23 MAGALIESIG CC **APPLICANT**

AND

FIRSTRAND BANK LIMITED **FIRST RESPONDENT**

SHERIFF, SANDTON NORTH **SECOND RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by

the Judge or his/her secretary. The date of this judgment is deemed to be 29 April 2022.

JUDGMENT

NDLOKOVANE A J

INTRODUCTION

[1.] This is an application for a declaratory order that the sale in execution of the immovable property of the applicant be declared unlawful and invalid as well as other ancillary relief, alternatively be set aside.

THE PARTIES

[2.] The applicant is a close corporation with its place of business situated at 8 Jaynic Mews,Troupand Avenue,Magaliesig;

[3.] The first respondent is FirstRand bank Limited, a public company and credit provider registered in terms of the laws of the Republic of South Africa and in terms of National Credit Act 34 of 2005("the NCA"), with its registered offices situated at FNB Towers,27 Diagonal Street, Johannesburg, Gauteng Province. The second respondent is the Sheriff of this honourable court, operating in the Sandton North jurisdiction with its registered offices situated at 24 Rhodes Street, Kensignton B, Randburg, Gauteng Province.

FACTUAL BACKGROUND

[4.] The salient factual background to this matter is as follows. The applicant, duly represented by Ms. Jacqueline Motshekgwa, its sole member, through a mortgage loan granted to her by the first respondent bank purchased the immovable property situated at 8 Jaynic Mews,Troupand Avenue,Magaliesig.

[5.] The applicant experienced some difficulties with regard her monthly earnings. This brought some financial hardships to bear. On 17 May 2016, court processes were instituted against the applicant and the court on 8 October 2016, granted an order against the applicant in terms whereof, the property was declared specially executable. At the time of the order the amount owing on the bond to the first respondent was R1 195 236,83.

[6.] The first respondent through second respondent sold the property to a third party, Mr. Harbans Ashley Singh who is not joined to these proceedings for an amount of R1.2 million, without the reserve price. I hasten to mention that before me, is another application to join Mr. Singh and/or the new owner as the third respondent, which I shall revert to later in my judgement.

[7.] The declaratory application is opposed by the first respondent only and the joinder application remain unopposed.

[8.] The relief sought by the applicant in the Notice of Motion is to the following effect:
"a) Setting aside the sale of the property known as 8 Jaynic Mews,Troupand Avenue,Magaliesig, sold by the Second Respondent to the First Respondent for R1,2million.
b) Ordering that the Second Respondent- re-auction the property at the premises of the second respondent for an amount of not less than R1,6million.
c) costs of suit against the first respondent".

POINT *IN LIMINE*

[9.] In its answering affidavit, the first respondent raised a point *in limine* of non- joinder, in that it sold the property to Mr. Singh for either for R1.1 million or R1.2 million as it is not clear in the papers. The latter had complied with its obligations in terms of the conditions of sale, and as such, he has a direct and substantial interest in the relief which the applicant seeks herein but has not been joined as a party hereto. This contention is conceded to by the applicant and in the same application before me, the applicant seeks to address this and had filed a joinder application for my consideration.

[10.] From the founding papers *ex facio*, it is clear that Mr. Singh has a direct and substantial interest in the application but is not a party hereto. Failure to join an interested party is sometimes a fatal shortcoming, but the court may, in any event, not grant an order in the absence of such party.[1] I shall return to this point later in my judgement. In ***SA Riding for the Disabled Association v Regional Land Claims Comissioner:2017(5) SA1 (CC) at 5A-D***, it was said,

> *"[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.*
>
> *[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene…".*

[11.] Another point *in limine* was raised by the applicant in its replying affidavit, relating to the authority to depose on behalf of the first respondent by Mr Roy Gomes. The grounds of the attack lies in the absence of an appointment of Gomes from a certificate as set out from paragraphs 3.1.1-3.1.3 of the applicants' replying affidavit. The first respondent is accordingly challenged to provide evidence of the authority of Gomes in accordance with the authorisation signed by one Singh of the first respondent.

[12.] It is trite that where matters involve corporate bodies or associations, as it is the case in the present matter, there is no need for the deponent to an affidavit to be authorised to depose to an affidavit in motion proceedings. However, the institution of the proceedings thereof must be authorised by the legal entity purporting to sue.

[13.] There are various cases dealing with the issue of authority. I shall simply highlight a few relevant ones for purposes of determining the issue *in casu*. In ***Eskom v Soweto City Council[2],*** the court held as follows:

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[1] ***Mahlangu v Mahlangu and Another (1339/2020) [2020] ZAMPMHC 5 (14 May 2020) para 4.***

[2] 1992 (2) SA 703 (W) at 705

"The care displayed in the past about proof of authority to bring legal proceedings appeared to have been inspired by the fear that a person might deny that he was a party to the litigation carried on in his name.
The later view, reflected in Rule 7(1) of the Uniform Rules of Court, is that, if the attorney concerned is authorised to bring an application on behalf of the applicant, the application necessarily is that of the applicant. There is no need for any other person, whether (s)he is a witness or someone who becomes involved especially in the context of authority, to be additionally authorised. It is thus sufficient to know whether the attorney acts with authority. Apart from more informal requests or enquiries, Rule 7(1) provides the machinery for challenging an attorney's authority to act. Use should not be made of heads of argument, textual analysis and submissions about the adequacy of the words used by a deponent about his own authority".

[14.] In the present case, Mr. Roy Games, a legal manager employed by the first respondent deposed to an answering affidavit on behalf of the first respondent. Further, he states that by virtue of his employment with the first respondent, he has access to the books and accounts and other records relating to the matter and have perused same. He is not the attorney of record. From the principles held in above authorities, he need not do any more than what is stated in the answering affidavit as set out in its paragraphs 1-5. I find therefore no merit in the point in *limine* raised by the applicant in its replying affidavit and same must fail.

ISSUE FOR DETERMINATION

[15.] In her heads of argument on behalf of the applicant and also during oral submissions, Ms Lesipa, counsel for the applicant submitted that auctioning of the property which is utilised by the applicant as residential property and in fact resides with her two minor children, without a reserve price was not in compliant with the full bench decision of Mokebe[3] , wherein the court held that unless exceptional circumstances are placed before the court, by the bond holder, the property must be sold at a reserve price.

[3] 2018(6) SA 492(GJ)

It is common cause that the property was indeed sold without a reserve price and was also sold below the market value and same has caused Ms. Jacqueline Motshegwa, irreparable prejudice. Further, Ms Lesiba impressed that although the property is in the name of a close corporation, Ms Motshekgwa is the only sole member thereof and utilises the property for residential purposes and in fact resides with her two minor children.

[16.] In contrast, Mr. Minnaar on behalf of the first respondent and its answering affidavit and during oral submissions contends that the applicant's understanding of the correct legal position in this regard is contrived and flawed. In that, the judgement, declaring the property executable, was granted on 20 October 2016, whereas, the sale, in terms of which the property was sold, was conducted on 4 June 2019. Also that rule 46A came into operation on 22 December 2017 and that the Mokebe judgement was delivered on the 12th September 2018.Therefore, at the time the judgement, declaring the property executable was granted, the provisions of rule 46A were not applicable as same only came into operation on 22 December 2017. In light of the aforesaid, the first respondent submits that there was no obligation on them to place any facts before the honourable court regarding the setting of a reserve price, same is conceded by the applicant in its replying affidavit. Also, that the first respondent contends that when the executability judgement was granted on 20 October 2016, that court became *functus officio*: and that there was no way to retrospectively approach the honourable court to set the alleged applicable facts before court.

[17.] This brings me to consider the crisp questions raised in the papers before me, whether, it was necessary for the first respondent to have applied the provisions of uniform rule 46A when the sale was conducted? Put differently, does the provisions of uniform rule 46A have retrospective effect and whether rule 46A is applicable where the property is registered in the name of a legal p*ersona* as it is the case in the present matter?

THE APPLICABLE LAW

[18.] Prior to the amendment of Uniform Rule 46 and the promulgation of Rule 46A, the execution procedure that lenders followed was prescribed by the former Rule 46, the latter which did not *per se* require the intervention of a court. It was an administrative process controlled by the judgment creditor with the assistance of the Sheriff and the Registrar. The substitution of Rule 46 in 2010 introduced specific and detailed provisions applicable to court oversight. This, in turn, requires full disclosure of all relevant facts to the Court when judgment is sought as any monetary judgment may impact on the discretion which a court is required to exercise when execution is sought. The executionary relief has become an integral part of the lender's cause of action and is required to be set out when it makes its claim or, at least, it forms part of the relief when it makes a claim.

[19.] Variations in foreclosure practice had grown in the various jurisdictions. In particular, a practice had arisen in several jurisdictions to postpone applications for leave to execute against immovable property, usually for a period of six months, in order to allow the defendant, the opportunity to bring arrear bond amounts up to date.

[20.] In other jurisdictions, evidence that attempts had been made to execute against movables (ordinarily, a *nulla bona* sheriff's return) would be required by the court before it would allow execution against immovable property. As such, a creditor was obliged to seek a monetary judgment and thereafter execute against movables despite it being more time consuming and costly to do so, and the proceeds of the sale of movables very rarely, if ever, being sufficient to satisfy the debt. This approach was criticised by some commentators, perhaps rightly so, as it resulted in the loss of a debtor's worldly possessions and did little to avoid the inevitable sale of immovable property.

[21.] Clearly, an intervention was required to achieve a consistent and fair approach. Enter the Mokebe and Hendricks judgments.

The Judgments

[22.] On Friday, 13 April 2018, four unopposed applications relating to foreclosure of bonds over primary residences where the NCA was applicable, were selected at

random and referred to a full bench of the South Gauteng High Court. The judgment was handed down on 12 September 2018 and was reported as ***ABSA Bank Limited v Mokebe*** and three related matters[4])("Mokebe judgement")

[23.] A day after the full bench judgment of the Gauteng Local Division was delivered, the Western Cape High Court referred a number of foreclosure matters for hearing before a full bench, reported as ***Standard Bank of South Africa Limited v Hendricks and Another and related matters*** [5]('the Hendricks judgement").

[24.] It is important to note that both the Mokebe and Hendricks judgments come about in the context of, and the findings are accordingly restricted to, matters where the property in question is the primary residence of the debtor.

[25.] The *Mokebe* and *Hendricks* judgments have brought considerable consistency and certainty to the foreclosures practice. In particular, the court's emphasis on the importance of it being in the interests of both debtors and bondholders to dispose of foreclosure matters quickly and cost effectively, rather than in a protracted and expensive "piecemeal "fashion, is to be welcomed.

[26.] An interesting additional issue, which the Western Cape bench explored, was whether Rule 46A constitutes a substantive change to the law and was therefore beyond the authority of the Rules Board to implement, as it had purported to do. The court in this regard concluded that setting of reserve price is a matter of procedural law in that it is concerned with the manner in which the judgment is executed (the conduct and procedure of the sale) and it is therefore within the authority of the Rules Board to introduce rules to this effect. Further, the stance adopted in *Mokebe* regarding the setting of reserve prices, namely that courts should always have regard to the circumstances; that they should generally set a reserve price; and that it will be the exception that courts do not do so. It was noted however that the court is not

[4] [2018] 4 All SA 306 (GJ
[5] 2019] 1 All SA 839(WCC) (14 December 2018)

obliged to set a reserve price but it must consider the factors set out in rule 46A(9)(b) when it makes this determination. This is so since as a matter of substantive law, the court has judicial oversight concerning the declaration of executability of immovable property that is the primary residence of a debtor. Rule 46A(9) provides a mechanism through which the court exercises such judicial oversight and does not amend or add to the substantive law.

EVALUATION

[27.] To answer the crisp question(s) in the present case, whether, on a proper interpretation, the introduction of Rule 46(A) had retroactive effect? It is common cause that the execution order was granted in 2016, where no intervention of court was needed to set the reserve price in matters relating to primary residence. **In *National Director of Public Prosecutions v Carolus*[6],** where the following was said: "*An important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the legislature clearly intended the statute to have effect*. See: ***Peterson v Cuthbert and Company Ltd 1945 AD 420 at 430***".In ***Bellairs v Hodnett and Another 1978 (1) SA 1109 A***, *it was said that not only is there a presumption against retrospective activity, but "even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions* …" (at 1148 F – G).*The basis of this presumption was stated in* ***Carolus (supra at par. 36)*** *to be elementary considerations of fairness which dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. Reference was also made to* ***Du Toit v Minister of Safety and Security 2009 (1) SA 176 SCA in par. 10*** *with reference to an English decision that "generally there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that…".*

[6] 2000(1)ALL SA 302(A)(1December 1999)

[28.] Similarly, in the present matter, a careful consideration of the introduction of uniform Rule 46A does not indicate any provision that is expressly stated to be retrospective in its operation. Therefore, from the authorities above mentioned it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions. I accordingly find that rule 46A does not apply retrospectively.

I therefore agree with the submissions made on behalf of the first respondent that under the circumstances, at the time of approaching the court for execution order, they had no obligation in law to approach the court to set a reserve price where the property is a primary residence.

[29.] This then brings me to the next question for determination whether the protection as aforesaid is extended to juristic persons as the applicant in the present. I hasten to mention that the applicant indeed is a juristic person and the property under review was bought by it. However, it is common cause that at the time of the sale of the property the sole member of the applicant was utilising the same for residential purposes. Nonetheless, considering the discussion of the authorities above, whether or not the protection extends to juristic entities in this case is neither here nor there, as rule 46A will not apply retrospectively.

[30.] Based on the finding I have made in respect of the main application relating to the retrospective application of rule 46A, I see no need to deal further with the issue of joinder discussed *supra* as it has become mute.

[31.] With regards to costs, it cannot be disputed that issues of executability of primary residence have constitutional connotations and therefore, litigants that seek judicial intervention cannot be penalised. Accordingly, despite the first respondent being successful in the main, I make no order as to costs.

ORDER:

[32.1] In the result, the applicant is not entitled to the declaratory order she seeks and accordingly the main application is dismissed.

[32.2] No order as to costs.

N.NDLOKOVANE A J

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Applicant Counsel	Adv. Lesipa	
Attorney for the Applicant	:	Ledwaba Attorneys
Counsel for the First Respondent	:	Adv. J Minaar
Attorney for the First Respondent		Hammond Pole Majola Attorneys
Date of Hearing		: 17 February 2022
Date of Judgment		: 29 April 2022

Judgment transmitted electronically