IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISON, PRETORIA)

(1) **REPORTABLE: YES/NO**
(2) **OF INTEREST TO OTHER JUDGES: YES/NO**
(3) **REVISED.**

……………..……………............ ……………………
SIGNATURE **DATE**

Case No: A410/2018

In the matter between:

VAN NIEKERK, THEO PETRUS **APPELLANT**

AND

ABSA BANK **RESPONDENT**

JUDGMENT

KHUMALO N V

Introduction

[1] The Appellant Mr P N Van Niekerk, is appealing against the judgment and order delivered (as per Tuchten J) in the above Honourable Court on 8 December 2017 in favour of Absa Bank Limited, the Respondent.

[2] The appeal is with leave granted by the *court a quo* to the full bench of this court. The *court a quo* granted the Respondent a Summary Judgment for payment of home loan debt amounts ("the debt") that the Appellant owed the Respondent together with an order declaring specially executable the Appellant's residential immovable property that he mortgaged in favour of the Respondent in security of the debt, and authorizing and directing the Registrar to issue a warrant of execution.

[3] The Appellant filed his application for leave to appeal the whole judgment on 29 January 2018 and was on 30 July 2018 granted leave to appeal only against the order declaring the property specially executable and authorizing the Registrar to issue a warrant in that regard. For the sake of convenience, I shall continue to refer to the Defendant in the main action as the Appellant and the Plaintiff in the main action as the Respondent.

[4] On 12 November 2018 the Appellant delivered its belated Notice to Appeal in terms of which it sought an order upholding the appeal and varying the order of the *court a quo* with an order dismissing the application for Summary Judgment. The Appellant therefore sought to appeal against the whole judgment when he was granted leave to appeal the order only on the execution of the immovable property.

[5] On 27 November 2019 the appeal was as per directive of the Judge President transferred from the High Court, Pretoria to the Local Division, Johannesburg where it was enrolled for hearing on 12 February 2020. The Appellant sought a postponement. The Registrar in Pretoria then set the appeal down for hearing on 10 March 2021 and then again on 21 August 2021. Finally, it was set down for 16 February 2022.

[6] The Appellant, subsequent thereto, sought in his heads of argument a different relief based on a contention that Rule 46A proceedings, (an amendment to Rule 46 that came into effect on 22 December 2017 in terms of a Government Notice No. R. 1272 dated 17 November 2017) are applicable to foreclosure matters that were decided prior to the date the Rule came into effect (retrospectively). The Appellant alleged that the challenge on the execution order was also brought against the background of the decision in *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) and *Standard Bank of South Africa Ltd v Hendricks* and Related Cases 2019 (2) SA 620 (WCC), the question being whether when granting the order, the court a quo was required to set the reserve price.

[7] In terms of Rule 46A the court is empowered when authorizing execution against the primary residence to, inter alia, order the inclusion in the conditions of sale of any condition it may consider appropriate, set a reserve price for the sale, (see Rule 46A8(e)), having regard to the factors listed in Rule 46A (9) (b) and generally to make any appropriate order (Rule 46A (8)(i)). As a result:

[7.1] The execution creditor that seeks to execute against the residential immovable property of a judgment debtor is obliged to apply to court on notice to the Judgment debtor and any other affected parties, for an order declaring the property executable, required to put before court the relevant factors to be considered if execution warranted (see Rule 46A (2) (b)).

[7.2] The judgment debtor or any other interested party is also afforded the opportunity to oppose the Application to declare the property specially executable or to make submissions which are relevant to the making of an appropriate order, for instance in relation to the reserve price (see Rule 46A (6) (a) and 46A 9) (a)).

[7.3] It is therefore necessary for a court to determine whether a reserve price should be set based on all the factors placed before it by both the creditor and the debtor when granting an order declaring the property to be specially executable, Rule 46A (9)

[8] It is important to note that Rule 46A came into operation after the order of Tuchten J on 8 December 2017, an aspect that both parties are agreed upon, hence the Appellant refers to the contention between the parties to be the retrospective application of Rule 46A.

[9] Furthermore, neither did the Appellant raise the Rule 46A contention on 29 January 2018 when he was seeking leave to appeal nor in his notice to appeal filed on 12 November 2018. The contention was raised for the first time on appeal in the Appellant’s extended heads of argument. The two decisions referred to by the

Appellant that is Mokebe *supra* and Hendricks *supra* were decided in 2018 and 2019, respectively.

[10] The Appellant argued that all execution orders that were granted before the Constitutional judgment but not yet put into effect are unconstitutional and the Respondent would be required to follow the Constitutional process (Rule 46A) on any executions that still have to take place.

[11] In that regard the Appellant yet again submitted that the appeal court *in casu* is not being required to decide on or grant a reserve price or apply the Rule 46A process, but to order that the Respondent is required before executing, to bring this Application before another court, for the purpose of dealing with the matter in terms of the provisions of Rule 46A, on the basis that the Constitutional declarations are retrospective unless otherwise ordered by the court; referring to the statement in *Maise v Greater Germiston Transitional Local Council,* (CCT 54/00) [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) (4 July 2001) that:

> "the current position is that the Constitution assumes the full retrospective effect of Constitutional invalidation and empowers the court declaring its invalidation to limit its retrospective effect"

[12] The Rule has not resulted in the Constitutional invalidation of any statute or regulations but sought to enhance the procedure under Rule 46 by adding further

requirements that will make sure the process is fair and just to both parties. Further, for the relief sought by the Appellant, the matter does not have to be decided by an Appeal Court.

[13] The Appellant further requires the court to also recognize and declare that the previous way of execution that forbid the reserve price was unconstitutional and the execution orders made before Rule 46A came into effect invalid, therefore Rule 46A that allows a reserve price to be set should be followed in each of those cases including *in casu.*

[14] The Appellant submits that on the basis of such declarations, the Appeal court can in essence decide this case in his favour and not true that such a decision would open floodgates.

[15] Appellant argues that in Mokebe *supra* the court in deciding that "reserves prices should be present except in exceptional circumstances" made it clear that its judgment in this matter was based on the Constitution as opposed to existing common law or interpreting statutes.

[16] The material facts of this matter being common cause, with no issue arising in that regard, a position confirmed by the Appellant, the only issue the Appellant seeks the Appeal Court to clarify is the retrospective effect of Rule 46A, (which however brings into question whether failure by the court to consider a reserve price prior to the coming into effect of the Rule that introduced such a requirement,

can be a subject of appeal (that being the connotation of the argument on retrospective application of the Rule).

[17] The Appellant as a result emphasized that what he is asking for, is to be treated like every other execution debtor since the decision in 2018 and if the Respondent had agreed to that at the time, this matter could have been resolved a long time ago.

[18] The Respondent already offered to launch the Application. On 17 May 2021 prior to the third set down on 21 August 2021, the Respondent wrote to the Appellant, as follows:

> "*We have recently been notified, that the appeal in respect of paragraphs C and D (on the executability) is accordingly set down before the full bench on 21 August 2021. In light of the pending appeal, we hold instructions to propose the following:*
>
> *3.1. Your client withdraws his pending application/notice;*
>
> *3.2. Upon receipt of the notice of withdrawal our client agrees to file a reserve price application in terms of Rule 46A of the Uniform Rules, wherein it will place the requisite information and documents before the Honourable Court and accordingly seek a reserve price. Once this reserve price application is granted our client shall commence with the necessary execution steps, which will include the sale of the property at a Sheriff's auction.*"

[19] The Appellant concedes that the offer in that regard was recently made by the Respondent but nevertheless persists that he still requires the matter to proceed saying, after the trouble he has been put through, he wants a decision to be made by the court not only for himself but for the benefit of other judgment debtors in the same position.

[20] He in addition seeks a general declaration to be made that the Rule 46A is applicable also to the orders on executability that were made prior to the amendment.

[21] The issue the Appellant is now raising even though a question of law, was not part of the contention before the *court a quo* when the matter was adjudicated upon as the amendment had not yet come into effect, and also when the leave to appeal was considered, even when the notice to appeal was filed. The general rule being that the Appellate Courts will not entertain entirely new issues on appeal. A fact that the Appellant is well aware of, since he seeks an order for the matter to be referred back to court for a hearing in terms of Rule 46A to consider the imposition of a reserve price.

[22] However, outside what has been offered by the Respondent, for the court to make such an order, a finding on the proceedings in the *court a quo* will have to be made based on a Rule that was not yet operational. The factual requirements for an adjudication on that issue were not canvassed. Otherwise, the Appeal Court has no jurisdiction to hear matters where the issues are purely for academic purposes or where there are no live issues between parties.

[23] The Respondent has in response, on the other hand raised (2) two points *in limine* with regard to the validity of the Appeal, in brief that:

> [21.1] The Appellant's notice to appeal that was filed on 12 November 2018 following the leave granted on 30 July 2018 was not only out of time; but
>
> [21.2] Contrary to the leave to appeal granted, in that the Appellant sought an order overturning the whole judgment.

[24] Furthermore the Respondent also opposes the Appellant's conduct of raising Rule 46A issue only in the heads of argument, when it was not live or part of the proceedings when leave to appeal was sought.

[25] On the Respondent's final point, normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim or defense would have succeeded if it had been so brought, it militates against fair administration of justice.

AD Condonation

[26] Rule 49(2) states "If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within twenty days after the date upon

which leave was granted or within such longer period as may upon good cause shown be permitted.“

[27] The Appellant did not file a Condonation Application for his late filing of his notice to appeal even though his notice to appeal was delivered (5) five months after the leave to appeal was granted. In *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 23 the Court held that:

> “It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation of the non- compliance with the rules . . . . Of great significance, the explanation must be reasonable enough to excuse the default.”

[29] The Appellant was reminded of his failure to apply for condonation before the Appeal was set down for hearing. On 29 March 2021 the Respondent launched an Application for the dismissal of the appeal. The Appellant has still failed to comply, notwithstanding being put on term prior the appeal. Such disregard and flagrant impunity should not be excused as discouraged in *Tshivhase & Another v Tshivhase & Another* 1992 (4) SA 852 (A) at 859E-F, by Nestadt JA said that:

> “this court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are’ and that this applies ‘even where the blame lies solely with the attorney.“

[30] As a result, considering the indication that the issue raised cannot be for determination by the Appeal Court, the tender made by the Respondent and the failure by the Appellant to properly bring the matter before court, due to a failure to apply for condonation, there is no basis to decide on the matter.

Ad contrary notice to appeal

[31] Furthermore the relief sought by the Appellant for an order that dismisses the Summary Judgment Application is indeed contrary to the leave to appeal that was granted by the *court a quo*, which was on prayer C, D and E of the Judgment (executability of the immovable property). The notice of appeal is, as far as it seeks the dismissal of the whole order of the Summary Judgment, a nullity.

[32] The notice is also contrary to the admission made by the Appellant’s in his heads of argument that, there is no contention on the facts of the matter and the only order he seeks is a declaration on the retrospective effect of the Rule 46A Amendment. The order sought on the Application of Rule 46A is also importuned with particular shortcomings that have already been indicated, that as far as this

matter is concerned the issue is purely academic and primarily not to serve any purpose.

[33] As a result, the following order is made

1. The Appeal is dismissed with costs

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N V Khumalo

Judge of the High Court

Guateng Division, Pretoria

I agree

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D M Davis

Judge of the High Court

Gauteng Division, Pretoria

I agree

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N V Noncembu

Acting Judge of the High Court

Gauteng Division, Pretoria

DATE OF HEARING OF THE APPEAL:	26 JANUARY 2022
DATE OF JUDGMENT:	NOVEMBER 2022
ATTORNEY FOR APPELLANT:	THE STATE ATTORNEY PRETORIA
ADVOCATE FOR APPELLANT:	Adv P de JAGER SC Adv M BOTMA
ATTORNEY FOR RESPONDENT:	LOUBSER VAN DER WALT INC.
ADVACATE FOR RESPONDENT:	Adv S MULLIGAN SC

Adv P VENTER