

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

Case Number: 006569/2022

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

In the

29 November 2023

DATE

SIGNATURE

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA
(REGISTRATION NUMBER: 1962/000738/06)**

Applicant

and

FAIRUZ DANIELS

First Respondent

MALIKA DANIELS

Second Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 29 November 2023.

JUDGMENT

KUBUSHI, J

[1] This is an opposed application for Summary Judgment and an application in terms of Uniform Rule (“Rule”) 46A, based on a Loan Agreement duly entered into by the Applicant and the First and Second Respondents (“the Respondents”). In terms of the said Loan Agreement, the Applicant advanced the sum of R1 100 000.00 and an additional sum of R275 000.00 to the Respondents. Pursuant to the Loan Agreement, the Respondents caused a Continuing Covering Mortgage Bond to be registered over their immovable property described as ERF 2[...] M[...] P[...] Township (“the immovable property”), in favour of the Applicant.

[2] When the Respondents failed to make regular payment in terms of the Loan Agreement and Mortgage Bond, and the amount that was owed plus interest became due and payable, the Applicant launched an action against the Respondents, amongst others, claiming payment of an amount of R1 118 808.04 and, an order declaring the immovable property, executable.

[3] The Respondents filed a Notice of Intention to Defend the matter and subsequently filed a Plea. In the Plea, they admit their indebtedness to the Applicant in the amount claimed and plead that they defaulted with their payment obligations under the Loan Agreement due to the fact that they are both unemployed. They, also, denied that they have refused to remedy the breach as stated in the Applicant's Particulars of Claim, and plead that they sought to remedy the breach by asking the Applicant to extend the duration of the Loan Agreement and pay an amount of R4 500 monthly instalment, which they are currently paying, which request, the Applicant, turned down.

[4] As regards the claim for the executability of the immovable property, the Respondents allege that it will not be in the interest of justice to grant the order for the immovable property to be declared executable for the reasons that the immovable property is their primary residence and were the immovable property to be executed, they would be rendered homeless, in the circumstances where they are not in wilful default with the loan obligation but defaulted due to being unemployed, and despite being unemployed, they are paying R4 500 *per* month. They allege in

the Plea that the prejudice they stand to suffer should the immovable property be declared executable and sold in execution, is far greater than the prejudice the Applicant stands to suffer should the order for executability not be granted considering that the Applicant can still recover the debt by allowing the Respondents to continue paying the R4 500 over an extended period. They allege, consequently, that the interest of both parties would best be served by amending the terms of the Loan Agreement and extending the duration of the Loan Agreement.

[5] After the Respondents' Plea was filed, the Applicant brought a Summary Judgment application, together with an application in terms of Rule 46A, both of which the Respondents are opposing. In the Summary Judgment application, the Applicant allege that there is no *bona fide* defence to the action and that the Notice of Intention to Defend and the Plea of the Respondents have been filed solely for the purpose of delay. The Applicant allege further that, having perused the Respondents' Plea, the Plea does not raise any triable issue, in that the Respondents have admitted their indebtedness to the Applicant as claimed in the Particulars of Claim. Furthermore, the Applicant allege that the amount that the Respondents wish to pay in an attempt to settle the arrears is way below the instalment amount of R9 617, 61, and the Applicant is not forced to agree to such an offer. It is alleged that the Respondents were granted an opportunity to pay off the arrears by way of a repayment arrangement, but they failed to honour it, and that agreement was subsequently cancelled.

[6] The Applicant alleges, as well, that the fact that the immovable property is the primary residence of the Respondents, does not give them an automatic right to housing, but is only one of the factors which are taken into consideration. The fact that the immovable property is the primary residence of the Respondents, cannot be outweighed by the Loan Agreement which the Respondents entered into knowing very well the implication thereof, so it is alleged by the Applicant.

[7] When arguing for an order that the immovable property be declared executable, it was submitted on behalf of the Applicant that a reserve price be set for the sale of the immovable property, at a sale in execution, at a value to be determined by the Court. In support of this argument, the Applicant's legal representative referred to and relied on a Supplementary Affidavit uploaded on

Caselines, which purported to set out the value of the immovable property, and to which, what purported to be a Valuation Report, is attached.

[8] The Respondents' legal representative took issue with the Supplementary Affidavit, contending that the Supplementary Affidavit is not properly before the Court because it was simply uploaded on Caselines without being served on the Respondents. The argument is that, the Supplementary Affidavit ought to have been served on the Respondents before being uploaded on Caselines, in order to give the Respondents an opportunity to engage it and provide their input, thereto. It was, also, submitted that the Valuation Report attached to the Supplementary Affidavit is not supported by an affidavit that should show how the calculations in the Valuation Report, were arrived at. Based on these discrepancies, the contention is that, there is no information before the Court in relation to whether or not a reserve price can be set for the immovable property, and, without such information, the Applicant has not made a proper case for an order in terms of Rule 46A.

[9] On enquiry from the Court, it was conceded on behalf of the Applicant that the Supplementary Affidavit was, indeed, uploaded on Caselines without it being served on the Respondents. According to the Applicant's legal representative, the Supplementary Affidavit was uploaded on Caselines on the Friday preceding the Tuesday when the matter was to be heard.

[10] In terms of Rule 46A(5), every application for an order to declare the residential immovable property of a judgment creditor executable, shall be supported by the following documents, where applicable, evidencing: the market value of the immovable property; the local authority valuation of the immovable property; the amounts owing on mortgage bonds registered over the immovable property; the amount owing to the local authority as rates and other dues; the amounts owing to the body corporate as levies; and, any other factor which may be necessary to enable the Court to give effect to sub-rule (8):¹ Provided that the Court may call for any other document which it considers necessary.

[11] Rule 46A(9) in turn, provides that in an application under this rule,² or upon submissions made by a respondent, the Court must consider whether a reserve

¹ Sub-rule 8 sets out the powers of the Court when considering an application under Rule 46A.

² Rule 46A.

price is to be set.³ In deciding whether to set a reserve price and the amount at which the reserve price is to be set, the Court shall take into account – the market value of the immovable property; the amounts owing as rates and levies; the amounts owing on registered mortgage bonds; any equity that may be realised between the reserve price and the market value of the property; reduction of the judgment debtors' indebtedness on the judgment debt and whether or not any equity may be found in the immovable property; whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation; the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold; the prejudice which any party may suffer if the reserve price is not achieved; and any other factor which in the opinion of the Court is necessary for the protection of the interests of the execution creditor and the judgment debtor.⁴

[12] It is trite that Rule 46A applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. Furthermore, Rule 46A(5) requires that such application be supported by documents. The provisions of this sub-rule are said to be imperative, even though fact bound.⁵ In addition, these are the documents which in terms of Rule 46A(9) the Court has to take into account when the Court has to consider whether a reserve price is to be set. The Applicant has applied for Summary Judgment, as well as an application to declare the immovable property executable in terms of Rule 46A. It is not in dispute that the Applicant's application is not supported by the documents required by the sub-rule 46A(5), the Applicant has conceded to same. In an attempt to cure this defect, the Applicant uploaded a Supplementary Affidavit on Caselines, which purports to furnish the documents that are required in terms of sub-rule 46A(5) to support the application and which the Court should take into account when considering whether a reserve price is to be set.

[13] The gravamen of the Respondents' complaint is that the Applicant did not serve the Supplementary Affidavit and thus they were not able to engage it before the hearing of the matter. The legal representative of the Respondents only became aware of it on Monday whilst preparing for the hearing on Tuesday. Besides, even if

³ Rule 46A(9)(a).

⁴ Rule 46A(9)(b).

⁵ Erasmus: Superior Court Practice Vol 2 at D1-632T.

it had been served on the Respondents on the Friday it was uploaded on Caselines, it would have been on short notice. Such a service would not have allowed the Respondents ample time to engage it and to provide their input, if any.

[14] It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person. This principle translates into service of any subsequent documents and notices in any proceedings on any party to the litigation. The Applicant having failed to serve the Supplementary Affidavit before uploading it on Caselines, cannot rely on it in support of the Rule 46A application, as it is not properly before Court. Similarly, since the Supplementary Affidavit is not properly before Court, it adversely impacts on the Rule 46A application which must be supported by the documents required in terms of Rule 46A(5). The immovable property, cannot, under such circumstances, be declared executable.

[15] The Applicant's legal representative submits that the Court is not bound by the Valuation Report that is attached to the Supplementary Affidavit when exercising its discretion to set the reserve price, as it can take into account a myriad of factors in arriving at what is deemed a reserve price. This submission holds no water. The Court's discretion in setting the reserve price, must be informed by the factors that are stated in Rule 46(A)(9). Without these factors, the Court would not be able to exercise the discretion and would not be able to set a reserve price. Having found that the Applicant cannot rely on the Supplementary Affidavit, it means that there are no factors as required in Rule 46A(9) to assist the Court in exercising its discretion to set the reserve price. Such a defect is not fatal to the application. The application can be postponed to afford the Applicant an opportunity to rectify the discrepancies as earlier highlighted.

[16] In *Mokebe*,⁶ the Full Court held that it is both desirable and necessary for a money claim and a claim for a declaration of executability under a mortgage bond to be heard simultaneously. It was, further, held that there is *"a duty on banks to bring their entire case including the money judgment, based on a mortgage bond, in one proceeding simultaneously"* and that should a matter require postponement for whatever reason, *"the entire matter falls to be postponed and piecemeal adjudication is not possible"*.

⁶ Absa Bank Ltd v Mokebe and Related Cases 2018 (6) SA 492 (GJ) at 506C – 507A and 508C – D.

[17] Even though it can be found that there is no *bona fide* defence to the Applicant's claim or that the Respondents Notice of Intention to Defend and Plea are filed solely for the purpose of delay, the Summary Judgment Application cannot be decided alone. It must be decided together with the Rule 46A application which ought to be postponed.

[18] Consequently, the Summary Judgment and the Rule 46A Applications are postponed *sine die* and the Applicant is ordered to pay the costs occasioned by such postponement.

E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 17 October 2022

Date of judgment: 29 November 2023

APPEARANCES:

For the Applicant: Adv. B Kubek-Manyelo instructed by Hannes Gouws & Partners Inc.

For the First & Second Respondents: Mr. S Keka instructed by Legal Aid South Africa.