

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 7567/2020P

In the matter between:

CUSTOM CAPITAL CASH ADVANCES (PTY) LTD

APPLICANT

And

GREGORY JOHN MUNDELL

FIRST RESPONDENT

**CLAIRE CATHERINE MUNDELL
RESPONDENT**

SECOND

ABSA BANK LIMITED

THIRD RESPONDENT

UMGENI LOCAL MUNICIPALITY

FOURTH RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] During August, September and October 2019 Applicant concluded three cash advance facility agreements with Pristine Mineral Water CC. Second Respondent was the sole member of the close corporation. Provisional sentence was obtained against the close corporation in the amounts of R 321 870.98, R 375 520.84 and R 751 041.69 plus interest and costs on 21 October 2020. The provisional order became final and the close corporation was placed in liquidation. No payments were made.

[2] First and Second Respondents stood surety for the principal's debt and judgment was granted against them in the said amounts referred to above on 14 June 2021. Only a few small repayments were made by First and Second Respondents.

[3] Applicant now wishes to have a property which is owned by First Respondent, namely Portion 43 (of 42) of the Farm Lot 67 No. 1465, registration division FT, province of KwaZulu-Natal in extent 21,3626 hectares held by Deed of Transfer No. T36221/2020 Situated at Crestwood Farm, Curries Post Road curries Post, KwaZulu-Natal declared executable. It is common cause that Third Respondent has a bond over the said property.

[4] There is on the papers a dispute as to whether the said property on which it is contended a bed a breakfast is operated is the primary residence of First Respondent as alleged by him. It is however common cause between the parties that as the matter is to be argued on the papers and dealt with in terms of the principle set out in the Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 H-I. It is therefore accepted that the property is the primary residence of First Respondent.

[5] The application is therefore brought in terms of the provisions of Rule 46A of the Rules of this court against First Respondent. The application is opposed by First Respondent.

[6] It was submitted by Mr. Hoar that the home was not the primary residence that First Respondent was renting a home in Cotswold Downs Golf Estate in Hillcrest for R 25 000.00 a month where his wife and children were residing and his children attending private schools. He therefore submitted that if the property is sold it would ensure that an amount of R 50 000.00 is freed up monthly for First Respondent to pay the debt

which is owing. It was further submitted that the debt has to be paid and the property is not the only place where First Respondent can stay. It is used for commercial purposes. The movables in the property is owned by a Trust and in section 65 proceedings First and Second Respondent had no disposable income.

[7] There is a valuation of the property that was done in 2019 when the property was valued at approximately R 11 million. There is a bond of R 8, 39 million registered against the property. It was submitted that First Respondent was selective on what he placed before court and that the municipal evaluation was approximately R 13 million. It was submitted that the debt had to be paid, that Applicant has made all attempts but have received a number of *nulla bona* returns and that it accordingly has no other means except to execute against the immovable property in an attempt to obtain payment of its judgment. It was further submitted that the business of the close corporation which was liquidated was moved to First Respondent and continued doing the same business. It was submitted that a reserve price of R 8.5 million should be set.

[8] It was submitted on behalf of First Respondent that it had to be accepted that it was the primary residence of First Respondent. It was further submitted that there was no valuation under oath and in this regard I was referred to the decision of *Nedbank v Msibi 2021 (4) SA 297 (J)*. It was submitted that the valuation had to be confirmed under oath and also that the valuation which is attached is some years old. It was accordingly submitted that as there had not been compliance with the provisions of Rule 46A the application must be dismissed with costs.

[9] In reply Mr Hoar submitted that Rule 46A mainly refers to judgments which are bank judgments and not as in the present case where it relates to another debt. First Respondent is not an indigent person. It was submitted that it would be appropriate if the property is declared executable as First Respondent would not suffer any prejudice if it is done. First Respondent also failed to disclose what he earned from the Bed and Breakfast which was operated on the said premises. As appears from page 147 of the papers First Respondent only made certain small payments between R 3 000.00 and R 5 000.00 on 7 occasions between April and July 2022.

[10] The issues which have to be considered when an application is brought in terms of the provisions of Rule 46A are clearly set out in the said Rule and it is not necessary for it to be repeated herein. It is indeed so that in this matter it is not a property to be declared executable by a bank due to the non-payment of a bond but that it is due to a suretyship which had been signed. Therefore there are indeed *nulla bona* returns indicating that there are no movable property which can be sold to satisfy the debt.

[11] It is apparent from a reading of the papers that indeed the furniture etc. has been placed in a Trust and that First Respondent has only made small payments and has insured that there is nothing of value which can be attached to satisfy the payment of the debt.

[12] The valuation is dated 2019 which is approximately 4 years old. There is much that could have happened to the said property in the past 4 years. It could have increased in value substantially or it could have decreased in value. One would have expected Applicant when bringing such an application to at least provide a more updated valuation of the property

which it wishes to have declared executable. If it was impossible to do so because of problems with access to the property as was submitted may be a possibility by Mr Hoar then it should have been dealt with in the papers. There is nothing in the papers why only such an old valuation is used. It has been submitted by Mr Hoar that a reserve price of R 8,5 million should be set. If this is done and that price is achieved it would result in the bond being paid and there would be no excess for the debt owing to Applicant to be paid. It would therefore appear that there would be no benefit to Applicant if that is done and it seems to me to be a pointless exercise to sell the property at a reserve price of R 8,5 million when there will be no benefit to Applicant and the only benefit that could be achieved would be that First Respondent loses his property.

[13] The practice in this division is that a valuation should not be older than six months. It is very difficult in these circumstances to establish whether indeed there is any benefit to Applicant if the property is to be sold. If the value of the property has increased then a higher reserve price can be set which could then indeed be to the benefit of Applicant.

[14] I agree with the submission by Mr Hoar that First and Second Respondent must pay the judgment granted against them. It does appear that they are leading a lavish lifestyle while this debt is not being paid and therefore the frustration of Applicant. First and Second Respondent are maintaining two expensive properties at the same time. However as set out above it does not appear to me that there would be any benefit in granting the relief claimed as there would be no benefit to Applicant due to the old valuation.

[15] It would not be to the benefit of any of the parties if no reserve price is set and it is necessary that Applicant provide an updated valuation so as to allow the court to establish whether indeed it would be to the benefit of the parties if the property is sold and secondly what the reserve price should be.

[16] It would appear to me that in the present matter the provisions of section 65 of the Magistrate's Courts Act would be of more assistance to establish whether payment can be made by First and Second Respondent or not. Section 65M of the Magistrate's Court Act will also be applicable and further in terms of section 65D of the Magistrate's Court Act First and Second Respondent can be cross examined after testifying under oath about their financial affairs. The Magistrate can accept evidence which he/she may find necessary to determine the debtors financial position or their ability to pay the judgment debt. It would appear that an interrogation in terms of section 65 would be more appropriate in these circumstances. It can then be established if First and Second Respondents are living a lavish life style and overspending and evading payment of their debt as alleged.

[17] In the circumstances in my view it will not be appropriate at this stage with the information which is at the courts disposal to grant an order in terms of the notice of motion.

[18] I have also considered whether the matter should be adjourned to allow Applicant to supplement its papers but for the reasons set out above have decided not to do so.

[19] The issue of costs however remain. It is understandable in the circumstances why Applicant has approached this Court for the relief sought.

However although Frist Respondent may be successful in the sense that no order is granted in my view the normal order that costs should follow the cause should not be granted and no costs order should be made.

Accordingly the following order is made:

The application is dismissed.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED: 17 FEBRUARY 2023

JUDGMENT HANDED DOWN: 3 MARCH 2023

COUNSEL FOR APPLICANT:

S HOAR

Instructed by:

Romer Attorneys

Kloof

Ref: Mrs Romer/rs/C20/08 (C)

c/o: J Leslie Smith & Company

Inc.

Pietermaritzburg

Ref: A Ganas/Prisha/21JL0022

Tel: 033 845 9700

COUNSEL FOR 1ST & 2ND RESPONDENTS: N S BEKET

Instructed by:

Lester Hall, Fletcher Inc

Kloof

Ref: PR113/002/CDB/YJ

Tel: 031 818 7280

c/o: Viv Greene Attorneys

Pietermaritzburg

Ref: V Greene

Tel: 033 342 2766