IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 57682/12

15/12/17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

15/12/17
DATE

SIGNATURE

In the matter between:

WRP CONSULTING ENGINEERS (PTY) LTD APPLICANT

and

CHIEF CHUNDA ASSOCIATES CC FIRST RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] The applicant, WRP Consulting Engineers, seeks to declare the commercial property of the respondent, Chief Chunda Associates CC, especially executable in terms of Rule 46(1) of the Uniform Rules of Court and the common law.

[2] It is notable that the respondent filed its answering affidavit out of time and for this they seek condonation. The applicant does not oppose their application for condonation. In addition, the delay is not inordinately lengthy and the respondent has proffered an explanation. The respondent states that they were in negotiations with the applicant for a possible settlement of the matter. Hence, the delay in filing its answering affidavit timeously and, in my view, the stance taken not to oppose the respondent's condonation application. In the circumstances, condonation is duly granted for the late filing of the respondent's answering affidavit.

[3] The applicant case is simply that the parties had been involved in a commercial transaction. Arising from such commercial transaction a debt of R701 140.06 came to the fore. On 5 August 2014 the applicant obtained default judgment in terms of Rule 31(5) of the Uniform Rules of Court for the amount of R701 140.06 including interest at 15.5% *tempora morae*. The respondent had applied for rescission of the default judgement granted and on 26 January 2015 the respondent's application was dismissed by Rabie J of this court.

[4] The respondent having failed to satisfy the judgment necessitated the applicant applying for a warrant of execution for the attachment and removal of the respondent's movable property at its registered address, being 326 van Riebeeck Road, Glen Austin Farm Holding, Midrand. On executing the warrant the sheriff remitted a return of service indicating that an attachment was made of items in the inventory as the respondent was unable to satisfy the debt. The warrant was however suspended on instruction of the applicant's attorneys in respect of the removal as the respondent gave an undertaking to settle the debt. Having failed to fulfil the undertaking made the applicant issued a second warrant on 16 November 2015.

[5] Registered on the return of service, the sheriff states that he was unable to execute this second warrant at the registered address of the respondent as they had moved from that address. The applicant caused a tracer to be employed to trace the

respondent and on 27 January 2016 the second warrant duly amended to reflect the new address of the respondent, which in essence was the third warrant. Three attempts were made by the sheriff to execute and attach the movables but to no avail. The sheriff advised, by way of a return of non-service, that the respondent could not be found at the new address provided by the tracers. The eventuality was that the applicant had to instruct a second tracer to trace and locate the respondent. However, the second tracer traced the respondent to the very address duly established by the first tracer.

[6] On 31 March 2016 the applicant caused a fourth warrant to be issued, this time, to attach any funds in one of the respondent's bank accounts. This warrant could not be executed as the bank account had been closed as informed by the bank administrator. According to these aforesaid attempts to attach any movables of the respondent were to no avail. Added to this was the fact that the respondent was clearly evading the applicant as a creditor, in that it had changed its address after the first attached without the removal. The applicant contends that the respondent was well aware that it was trying to enforce the judgment and thus, it was going through great lengths to prohibit the success thereof.

[7] The applicant submits that one should not lose site of the fact that the respondent did make some payments towards the debt and as at 31 January 2016 the balance due in respect of the debt was R395 896.87. Accordingly, the applicant further submits that the respondent, by virtue of the first warrant of execution, has insufficient movable property to satisfy the writ issued in respect of the debt. As such it is entitled to proceed against the immovable property of the respondent in terms of Rule 46(1)(a)(i).

[8] The applicant argues that the respondent is a corporate entity and there exist properties owned by the respondent. These properties, it is so contended by the applicant, are not residential properties. Thus an attachment of the properties will not be in violation of section 26 of the Constitution.

[9] The respondent states that it has always contended *'that if any amount… should be paid …subject to the Applicant showing how it arrived at the said amount".*

The respondent also stated that it was not certain of how much is due and payable to the applicant. These are issues that would have been dealt with in the rescission application of the respondent which incidentally was dismissed and unless that order is set aside or rescinded it stands. I am therefore not at liberty to deal with issues that have already been dealt with, *res judicator.*

[10] I now turn to the defence raised by the respondent to this specific application. The respondent persists that it has in fact over paid the applicant in respect of the debt due, that being it has paid R743 000.00 to the applicant. In fact, it contends that it did not enter in any agreement for its payments to first be debited against the applicants attorney's fees first then the capital debt for which default judgment was initially granted. This it submits is what the applicant is doing in this instance.

[11] The respondent argues that the allegation that it has relocated is unfounded as this current application was served upon it at the respondent's registered address. The respondent further argued that, having received the application at its registered address is evident that it is in no way possible trying to evade the applicant. Thus, the respondent states that the applicant has failed to demonstrate that it fails or refuses to point out movable property and is thus deliberately frustrating any attempt by the applicant to execute its movable property.

[12] On my inspection of the return of service date 14 September 2016, of the current Rule 46 (1) application, it is evident to me that this application was served on the same address, 326 van Riebeeck Road, Glen Austin Farm Holdings. The applicant cannot succeed if it places reliance on Rule 46(1)(a)(i) because it has not in respect of writs 2 to 4 served these at the address where it serves this application and the first writ. In any event, the first writ where an attachment was made without a removal was suspended, in my view, that suspension should be uplifted in order for the applicant to establish if it indeed cannot realise the amount due to it at this stage.

[13] I find it apt to quote an extract from the judgment of the full court of this division, which I believe holds true in these circumstances, as the conduct of the applicant points clearly to an abuse of this courts process. In **FirstRand Bank Ltd v Folsher and another, and similar cases 2011 (4) SA 314 (GPN) at 332C – 333D**, the full court stated:

"[40] It is obviously impossible to provide a list of circumstances that might be regarded as extraordinary, which would persuade a court to decline a writ of execution. They would usually consist of factors that would render enforcement of the judgment debt an abuse of the process, which a court is obliged to prevent. See *Hudson v Hudson and Another* 1927 AD 259; and *Beinash v Wigley* 1997 (3) SA 721 (SCA) at 734F:

'(A)n abuse of the process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.'

Instances of this nature would fall into the category enumerated by Mokgoro J in *Jaftha* and encountered in *Absa Bank Ltd v Ntsane and Another* 2007(3) SA 554 (T). As is apparent from these examples, the creditor's conduct need not be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although bona fide, may be iniquitous because the debtor will lose his home, while alternative modes of satisfying the creditor's demands might exist, that would not cause any significant prejudice to the creditor."

[14] In the circumstances, the applicant has failed to make out a case for an order in terms of Rule 46(1) (a)(i) and the application falls to be dismissed with costs.

[15] Consequently the order I make is as follow:

[15.1] The application in terms of Rule 46 (1) is dismissed with costs.

W. Hughes

Judge of the High Court Gauteng, Pretoria

Appearances:

For the Applicant: M Louw
Instructed by: Barnard Incorporated Attorneys

For the Respondent: Mr D I Motsamai
Instructed by: Morolong Inc

Date heard: 09 October 2017
Date delivered: 14 December 2017