IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 7901/2017

9/7/2019

In the matter between:

NEDBANK	**APPLICANT**
and	
THE TRUSTTES FOR THE TIME BEING OF THE MTHUNZI MDWABA FAMILY TRUST	**FIRST RESPONDENT**
PERRY-MASON MTHUNZI MDWABA N.O. (ID: [….])	**SECOND RESPONDENT**
PERRY-MASON MTHUNZI MDWABA N.O. IN HIS CAPACITY AS TRUSTEE OF THE MTHUNZI MWABA FAMILY TRUST	**THIRD RESPONDENT**
JOY MGI MDWABA N.O. IN HER CAPACITY AS TRUSTEE OF THE MTHUNZI MDWABA FAMILY TRUST (TRUST NUMBER: IT009471/2005)	**FOUTH RESPONDENT**
ZUKO MPUMELELO MDWABA IN HIS CAPACITY AS TRUSTEE OF THE MTHUNZI FAMILY TRUST	**FIFTH RESPONDENT**

JUDGMENT

Ramapuputla AJ

INTRODUCTION

[1] This is an application for money judgment and a declaratory order arising from the loan agreement between the applicant and the respondents.

BACKGROUND

[2] On 28 November 2005 the applicant and first respondent concluded a loan agreement, in terms of which the applicant lent and advanced monies to the first respondent. On 25 March 2006 a mortgage bond was registered, at the Deeds Office in Pretoria, as security for the loan agreement over Erf 593 Kosmos Uitbruiding 5 Township, Registration Division J.Q, North-West Province, measuring 500 (five hundred) square meters, held by deed of transfer number T032102/06 and subject to conditions contained therein, especially, as to the reservation of mineral rights.

[3] Amongst the most important terms of the agreement is that the loan agreement is for an amount of R2 500 000,00. Parties agreed that the loan would be payable by way of monthly instalments of R21 934,00 over a period of 240 months.

[4] On 14 December 2005 the second respondent signed a suretyship agreement, in terms of which he bound himself in *solidum* and as a co-principal debtor for the due fulfilment of the first respondent 's obligations in terms of the loan.

[5] The first respondent failed to effect payment of the instalments due in terms of the loan agreement. As at 01 September 2016 the first respondent's indebtedness to the applicant was R2 206 712, 24. The arrears on the first respondent 's account was R55 466, 16 thereby making the account 1.99 months in arrears. On or about 10 November 2016 the applicant sent a notice in terms of Section 129(1)(a) of the National Credit Act 34 of 2005 to the first respondent by registered post.

RELIEF SOUGHT

[6] "[2] The applicant seeks orders in the following terms: 2.1. Payment of the R 2 206 712.24; 2.2. Interest on the aforesaid amount at a rate of 8.65% per annum calculated and capitalized monthly in arrears from 01 September 2016 to

date of final payment; 2.3. An order declaring the first respondents' immovable property to be especially executable for the aforesaid sum and costs; 2.4. An order authorizing the Registrar of the above Honourable Court to issue a warrant of execution in respect of the property referred above; 2.5. An order for costs on attorney and client scale; 2.6. Further and/or alternate relief."

RESPONDENT'S OPPOSITION

The respondents ' opposition was mainly based on a point *in limine.* I find it futile to pronounce on the point *in limine* as on 17 April 2018, my Sister Madam Justice Teffo ordered the applicant to serve this application on all the trustees.
The rest of the answering affidavit contains bare denials.

APPLICANT'S SUBMISSION

[7] The applicant submits that in order for the court to declare a mortgaged property executable, it is required to take the following relevant facts into consideration:

7.1. that the mortgaged property sought to be executed is to the knowledge of the applicant , not the primary residence of the respondents;

7.2. that the mortgaged property was bonded as security for the respondents' debt under the loan agreement;

7.3. that in the event that the respondent object to the property, in the event of it being its primary residence being declared executable, the respondents must place facts and submissions before the court to enable the court to consider them in terms of Rule 46(1)(a)(ii) of the Uniform Rules of the Court; and

7.4. that in terms of rule 46(1)(c) (ii) of the Uniform Rules , no writ of execution shall be issued against a primary residence unless the court having considered all the relevant circumstances orders execution against such property.

[8] Counsel for the applicant further submits that:

8.1. the immovable property is registered in the name of the Mthunzi Mdwaba Family Trust and a trust is a juristic person;

8.2. although the immovable property is used as primary residence of one of

the trustees and his children, the procedure prescribed by Rule 46A of the Uniform Rules[1] is not applicable because the property has been bought in the name of a trust which is a juristic person and such procedure does not apply to juristic persons.

RESPONDENTS' SUBMISSION

[9] Counsel for the respondent submits that:

9.1 Rule 46A does not apply when execution creditor seeks to execute against immovable property of a judgment debtor hat does not perform the function of a form of dwelling or shelter for humans (e.g. commercial immovable property) or that is occupied by juristic persons or legal entities other than humans (e.g. trusts) for use other than dwelling;

9.2. if immovable residential property is merely nominally registered in the name of a legal person or trust but used as a dwelling by the trustee or trust beneficiaries (depending on the nature of the trust deed), as the case maybe, the property falls within the ambit of Rule 46A in the event that the legal person or the trustees in their official capacity are the judgment debtors and the judgment creditor wants to execute against the property.[2]

9.3. It is common cause that the property is used for residential purposes by a natural person).

9.4. the immovable property is used as a primary residence of the first respondent (who is cited in this application in his capacity as both a trustee and a surety) and his children , therefore Rule 46A procedure is applicable .

9.5. This application is premature as not all remedies have been exhausted by the applicant in that the applicant has not attached movable property of the judgment debtor. Rule 46(1)(a)(i) provides that no writ of execution against the immovable property of any judgment debtor shall be issued unless a return has been made of any process issued against any movable property of the judgment debtor from which it appears that the said person has insufficient movable

[1] Herein referred to as Ru le 46A.

[2] The commentary on the Supreme Court Practice by Erasmus on the High Court Ru les Volume 2, Service 8, 2019 D l -632Q (the Commentary).

property to satisfy the writ.

9.6. That the bank knew that the property was purchased with the purpose of being used as a shelter and dwelling for one of the trustees.

THE LEGAL POSITION

[10] Firstly, this court has to deal with the question as to whether a trust is a juristic person for the purpose of the applicability of Rule 46A. Without getting into the discussion of the nature of trusts, it is trite law that a trust is not a legal *persona* but a legal institution *sui generis.* I take judicial notice of the fact that a trust is used as an integral part of protecting assets in the general scheme of estate planning. One characteristic of such schemes is the naming of the primary beneficiary as a trustee. For a trust to become a juristic person it must be so clothed by legislation.

The court held that "Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees , specified as in the trust instrument , that the trust can act.[3] In ***Land and Agricultural Bank of South Africa v Parker[4]*** Cameron JA elaborated: '[A trust] is an accumu lation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them - and it is only through the trustees, specified as in the trust instrument , that the trust can act."

As a general principle, the accumulation of rights and obligations vested in all the individual trustees of the Mthunzi Mdwaba Trust. This means the applicant is obliged to serve all court processes on all the trustees from the onset. This includes all Rule 46A procedures. Furthermore, the Mthunzi Mdwaba Trust is not

---

[3] *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A) 840D-H; *Commissioner for Inland Revenue v Friedman NO* 1993 (1) SA 353 (A) 370E -I.

[4] [2004] 4 ALL SA 261 (SCA)

clothed by any legislation to be regarded as a juristic person. Therefore, this trust is not a juristic person for the purpose of this inquiry.

[11] Rule 46A applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. Subrule (3) states that "every notice of application to declare residential immovable property executable shall be- (a) substantially in accordance with Form 2A of Schedule 1; (b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)(a): Provided that the court may order service on any other party it considers necessary; (c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and (d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner. Subrule (4)(a) further states that "the applicant shall in the notice of application- (i) state the date on which the application is to be heard; (ii) inform every respondent cited therein that if the respondent intends to oppose the application or make submissions to the court, the respondent must do so on affidavit within 10 days of service of the application and appear in court on the date on which the application is to be heard". Subrule (5) of Rule 46A reads as follows:

> "Every application shall be supported by the following documents, where applicable, evidencing- (a) the market value of the immovable property;
> (b) the local authority valuation of the immovable property; (c) the amounts owing on mortgage bonds registered over the immovable property; (d) the amount owing to the local authority as rates and other dues; (e) the amounts owing to a body corporate as levies; and (f) any other factor which may be necessary to enable the court to give effect to subrule (8): Provided that the court may call for any other document which it considers necessary."

ANALYSIS OF THE MATTER

[12] The applicant's submission is that since the residential immovable property is registered in the name of the Mthunzi Mdwaba Family Trust and not in the

name of a natural person, the protection afforded with regard to primary residence is not applicable. The applicant supports his reasoning on the basis of what the court said in *Absa v Mokebe*[5] case. Paragraph 50 of the case reads: "We cannot stress enough that this matter concerns and applies only to those properties which are primary homes of debtors who are individual consumers and natural persons". This submission is flawed because I have already concluded that a trust is not a juristic person for the purposes of the applicability of Rule 46A and therefore all steps prescribed in terms of this rule were supposed to be followed.

[13] Furthermore, section 26 of the Constitution accords every individual the right to access adequate housing.[6] The Constitutional Court in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*[7] stated that:

> "Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified."

[14] It is clear from the *Jaftha* case that the emphasis is immovable property that is used as a primary residence. The test is the purpose for which the property is acquired and used. The *persona* used to acquire the property is irrelevant. In order to determine whether or not the primary residence of a judgement debtor is executable, I have to consider whether the rules of court have been complied with; whether there are alternative ways of recovering the judgement debt; further take into account , among other things, the circumstances in which the judgement debt was incurred; attempts made to pay off the debt; the financial position of the

---

[5] 2018 (6) SA 492 (GJ).
[6] Section 26(1) of the Constitution.
[7] 2005 (2) SA 140 (CC) par 29.

parties; the amount of the judgement debt; whether the judgement debtor is employed or has a source of income to pay off the debt; and other factors relevant to this case. These circumstances were set out in the case of *Jaftha.*[8] Further, the applicant must state the manner in which it dealt with the respondents when it became clear that the latter was defaulting. The process of reaching the conclusion that execution was a last resort must also be disclosed.

[15] The respondents case meets the above test because of the fact that the second respondent is living in the immovable property with his children.

[16] The judgment creditor knew beforehand that the immovable property is acquired for use as a residential primary residence. Such prior knowledge is not only a requirement but also places an obligation on the applicant to establish whether any of the respondents are using the residential immovable property as their primary residence before any legal steps are commenced . Therefore the applicant's assertion that it has not established whether any of the respondents are staying in the property clearly indicates that the correct procedure was not followed before the institution of these legal proceedings.

[17] The respondents' Counsel submission that Rule 46A does not apply when execution creditor seeks to execute against immovable property of a judgment debtor that does not perform the function of a form of dwelling or shelter for humans (e.g. commercial immovable property) or that is occupied by juristic persons or legal entities other than humans for use other than dwelling is correct.[9]

[18] Her further submission that if immovable residential property is merely nominally registered in the name of a legal person or trust but used as a dwelling by the shareholders or trustee or trust beneficiaries (depending on the nature of the trust deed), as the case maybe, the property falls within the ambit of Rule 46A in the event that the legal person or the trustees in their official capacity are the judgment debtors and the judgment creditor wants to execute against the property is also correct. The property will still fall within the ambit of Rule 46A even if the trustees in their official capacity are not the judgment debtors. The trustees in their official capacity are not required to be the judgment debtors for

---

[8] *Supra* pl61-163B.
[9] The Commentary *supra.*

the property to fall within the ambit of Rule 46A. The fact that the trustees in their official capacity are the judgment debtors is not a requirement but it only signifies commitment towards payment of the debt by the trustee.

REASONS FOR JUDGMENT

[19] The underlying principle is that the judgment debtor must perform the function of a form of a dwelling or shelter for humans. The *legal persona* of the judgement debtor is of no significance. It is immaterial whether the judgment debtor is a juristic person or a natural person. The trustees in their official capacity do not have to be the judgment debtors for Rule 46A to be applicable. The second respondent is a trustee and a surety to the loan granted to the Trust. It is not essential for the judgment debtor to be a surety to the loan granted to the Trust for Rule 46A to be applicable.

[20] The right to housing is recognised as a fundamental human right by section 26(3). I also have to determine the purpose for which the immovable property was purchased and used and by whom it was used. In this case, the immovable property which is registered in the name of the trust, is purchased as a residential property and is being used as a dwelling or shelter for one of the trustees or trust beneficiary and his children. These are natural persons. What is important is that the property must be used as a dwelling by the trustee or trust beneficiaries (or by the shareholders of a company).[10] As a consequence, an obligation is placed on the judgment creditor to conduct an investigation as to the purpose for which the property is being used for and by whom.

[21] Counsel for the applicant stated that at the time of hearing of this application the respondent was in arrears for a period of more than 21 months and the arrears ran in the amount of more than R 700 000.00. He further submitted that the judgment creditor has been in contact with the judgment debtor in attempt to resolve and assist the judgment debtor to get out of the problematic situation and nothing has been resolved so far. However, no details of contact have been brought to the court's attention for consideration. The reason as to why this process was not disclosed to this court to enable it to consider the

[10] The Commentary *supra.*

suitability for granting an execution order remains unclear. This clearly indicate that the circumstances in the *Jaftha* case were not considered by the applicant.

[22] The applicant has during the hearing of this case, handed up a reserve price but failed to serve it on the respondents for their consideration and comment despite the fact that the determination of a reserve price is an issue which is provided for in the Rules of Court.[11]

[23] Counsel for the respondents, argues that this application is premature because not all remedies have been exhausted by the applicant and the applicant has not yet, for example not attached the respondents' movable property. Counsel for the applicant, on the other hand, is opposed to this view because he says, the argument was addressed under Question 6(e), paragraph 50 of the *Mokebe* case wherein the court stated that "the attachment of movables after judgment and before the realisation of the sale in execution of the mortgaged property is of no consequence due to the interpretation of s 129(4)(b) of the NCA."I must state that the view of the applicant's Counsel is completely wrong because it is clear that paragraph 50 of the *Mokebe* case only refers to instances where judgment for execution has been granted. In this case that no such judgment has been granted. In any event this paragraph relates to reinstatement of the agreement and reinstatement has not been canvassed by both parties.

[24] When considering an application under Rule 46A, I must establish whether the immovable property which the execution creditor intends to execute against, is the primary residence of the judgment debtor. If that is so, I must further consider whether the judgment debtor has at his disposal alternative means of satisfying the judgment debt. I must also consider whether execution against the judgment debtor's primary residence is the last resort. The execution creditor must have complied with all court rules and processes. I can only authorise execution against immovable property which is the primary residence of a judgment debtor, after having considered all relevant factors. All considered factors must confirm that execution against such property is warranted.

[25] The applicant has failed to protect the investment built up by the judgment

---

[11] *Mokebe* case (n I) par 53.

debtor over many years. The applicant has not only disregarded the fact that the respondent is only two months in arrears when they started legal proceedings but also the fact that the respondents have been staying in the property for more that 11 (eleven) years. The period of the arrears as compared to the period of time the respondents have been staying in the residential property is infinitesimal. The fact that the applicant instituted action against the respondent when the respondents were only two months in arrears, demonstrates the abuse that the Constitutional court intends to eliminate. I find that such approach not violates the objectives of the Constitution but it is also anachronistic.

[26] The court had on several occasions had to request the applicants to comply with procedure. In particular , the court had to order the applicant to serve processes on all the trustees. The court had to request the applicant to provide full information which will enable it to determine the reserve price. The information provided in the applicant's affidavit pertaining to the reserve price completely differs with the information provided in the supplementary heads of argument. The respondents have not been given an opportunity to respond to the information provided by the applicant pertaining to the setting of the reserve price.

[27] The information required in terms of Rule 46A (5) was not included. I am not placed in a position to consider all circumstances which will enable me to declare the property executable. I find it difficult to exercise my proper mandate of judicial oversight. In an effort to equipoise the right to housing, security of tenure and the dignity that comes with housing ownership and the judgement creditor's right to execution, I consider the fact that the residential immovable property is used by one of the trustees or trust beneficiaries with his children to be of paramount importance.

[28] I therefore conclude that sections 26(1) and (3) of the Constitution rights are implicated; this case falls under the ambit of Rule 46A and enjoys all the protections mentioned in the *Mokebe* case; this application is prematurely before the court; and the applicant did not follow the procedure as prescribed by Rule 46A and has therefore failed to comply with the rules of this court.

ORDER

1. Application is dismissed with costs on attorney and own client scale.

_____

N.E. RAMAPUPUTLA

Acting Judge, Gauteng Division of the High Court of South Africa, Pretoria

Heard on: **25 April 2019**
Date of Judgment: **09 July 2019**

APPEARANCES

On behalf of Applicant: Adv J Minnaar

Counsel : Hammond Pole Attorneys

On behalf of Respondent: Adv.

Counsel: Kekana Hlatshwayo Attorneys