

**IN THE HIGH COURT OF SOUTH AFRICA**

**REPORTABLE**

**KWAZULU-NATAL, PIETERMARITZBURG DIVISION**

CASE NO: 1156/18P

**CHANGING TIDES 17 (PTY) LTD N.O.**

**Plaintiff**

**and**

**ANDRE ANTHONY MEIKLE**

**First Defendant**

**TRACEY ANN MEIKLE**

**Second Defendant**

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**Date: 16 May 2019**

**JUDGMENT**

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**VAN ZYL, J:-**

[1] Plaintiff instituted action against the defendants, apparently a married couple, based upon their alleged failure to maintain payments in respect of a home loan, secured by a mortgage bond in plaintiff's favour over their residential property. By way relief the plaintiff claimed in its summons payment of the outstanding balance, interest thereon, costs and an order declaring the mortgaged property specially executable.

[2] Following service of the summons, the defendants entered appearance to defend and the plaintiff gave notice of its intention to apply for summary judgment. However, before the application for summary judgement could be heard the parties entered into an agreement whereby the defendants agreed to a revised payment schedule, confessed to judgment in terms of Rule 31(1), as well as an arrangement whereby the confession would not be used and the

action would be stayed, subject to their compliance with the agreed arrangements. In the result the summary judgment application was adjourned *sine die* with the defendants to pay the costs occasioned by the adjournment.

[3] Plaintiff now seeks judgment against the defendants in terms of their confessions to judgment on the grounds of their failure to adhere to the revised payment schedule, as agreed. In so doing the plaintiff relies upon the confessions to judgment as executed by the defendants as part of the settlement agreement.

[4] When the matter initially came before me in chambers I was concerned that the plaintiff sought, in addition to a money judgment, also an order declaring the residential property of the defendants specially executable.

[5] In the result I directed an enquiry to the plaintiff's attorneys, the relevant portions of which read as follows:-

*"[3] Prima facie whilst Rule 31(1)(c) is permissive of a Chambers application, leave to execute against immovable residential property is governed by Rule 46A which sets out in detail what a plaintiff needs to comply with before the Court will consider such leave.*

*[4] Plaintiff is invited to make written submissions, supported by authority, should it be so inclined, in support of the contention that leave to execute is capable of being granted in Chambers in conjunction with a money judgment in terms of Rule 31(1)(c)."*

[6] In response the plaintiff's attorneys have now made written representations seeking to persuade me that such a declaration of the property as specially executable should be granted in chambers together with and as part of the judgment on confession.

[7] Whilst Rule 31(1) does not provide for an affidavit in support of the request for judgment upon confession, a sound practice has evolved in terms of which the plaintiff's attorney usually files an accompanying affidavit recording the failure of the defendant to adhere to the settlement arrangement which gave rise to the confession to judgment being submitted to court.

[8] What the plaintiff seeks to achieve in the present matter is to combine the requirements of Rule 46A as applicable to matters where execution is to be levied against residential immovable property with the procedure envisaged in Rule 31(1)(c) where a defendant's confession to judgment is submitted through the registrar to a judge in chambers for judgment according to such confession.

[9] In so doing the plaintiff seeks to justify this abbreviated procedure by submitting that legal costs for which the defendants would ultimately be held liable, would be saved thereby. This may be so but, taken to its logical conclusion, then savings can be achieved in all matters in respect of which Rule 46A applies by eliminating the need for procedures in open court.

[10] The requirements of Rule 46A are clearly aimed at protecting the constitutional right to adequate housing enjoyed by individual natural persons. Section 26(3) of the Constitution, 1996 provides that-

***"26 Housing***

*(1) ...*

*(2) ...*

*(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."*

[11] Enabling a lay litigant to appear and make representations to the presiding officer in a court of law tasked with the decision whether or not to grant an order which would imperil the immovable property upon which the

home of the litigant is situated, is of significant importance. In addition section 34 of the Constitution affords all persons the right to “a fair public hearing before a court”.

[12] Rule 46A is aimed at facilitating the access to court of a litigant, whose home is under threat, as well as enabling the court in arriving at a just decision regarding the issue. For instance, Rule 46A(3) deals with notice of the intended court proceeding to the ‘*judgment debtor*’ and all other parties who may be affected and requires as a rule that such application be served upon the judgment debtor personally. As such the costs occasioned by the procedures contemplated in Rule 46A have been factored into the proceedings contemplated in the Rules of Court.

[13] It is, in my view, entirely inconsistent with both the Constitutional imperatives and the Rules of Court, to telescope into a single procedure a confession to judgment which, by way of exception, may be dealt with in chambers in the absence of the parties, with a proceeding which by its very nature requires to be dealt with in open court after due notice to the affected persons who may then appear and place facts or make representations to the court regarding the fate of the residential property concerned.

[14] In the present matter the plaintiff’s attorneys, in response to my enquiry submitted that these two procedures should be dealt with as one in chambers as a cost saving measure. Following my enquiry the “*Application for Judgment on Confession*” was served by the Sheriff upon the first defendant personally and upon the second defendant in her absence upon the first defendant as the person in charge of her premises. The returns of service have been included in the papers now before me.

[15] The plaintiff’s attorneys, in their written representations in resubmitting the papers seeking judgment by confession, also submitted that the combined procedure of dealing simultaneously with a money judgment and the declaration of the bonded property as specially executable, was followed in the

Gauteng Local Division, Johannesburg on the basis that the issues of liability and execution should be dealt with as one (ABSA Bank Ltd v N D Sawyer (2018/17056) [2018] ZAGPJHC 662 (14 December 2018) at para 14). That was, however, a matter where summary judgment was under consideration in a hearing in open court and is no authority, in my view, for satisfying the requirements of Rule 46A in chambers.

[16] In any event, by service of the application for judgment by confession upon the defendants there is nothing to indicate to them, as lay persons, how they are to set about adequately placing before the Judge in chambers any facts or make representations regarding the fate of the residential property concerned. Such service, in the circumstances, is therefore ineffective in satisfying the requirements of Rule 46A.

[17] After due consideration I am of the view that it is undesirable, impractical and not in the interests of justice to try and combine a judgment by confession in terms of Rule 31(3) with an application to declare an immovable residential property executable in compliance with the requirements of Rule 46A.

[18] In the circumstances I am therefore prepared to grant the money judgment by confession in chambers, but the relief sought for the declaration of the immovable property as executable will be postponed *sine die* and the plaintiff, if so disposed, may then in due course apply for such a declaration by way of application in open court and in due compliance with the legal requirements for such relief.

[19] As regards the costs incurred in delivering the extensive affidavit deposed to by Mr Mlamuli Jimmy Duma on 12 March 2019 in support of the application for judgment by confession for declaring the immovable property executable, as well as the costs incurred in applying for such relief and in responding to my enquiry in this regard, I see no justification for imposing that burden upon the defendants.

[20] In the result the following order is made in Chambers:

- a. Judgment by confession in terms of Rule 31(3) is granted in favour of the plaintiff against the defendants for:-
  - i. Payment in the sum of R1 032 575-51.
  - ii. Interest thereon at the rate of 9,80% per annum, compounded monthly in arrear from 13 December 2017 to date of payment.
  - iii. Costs of suit on the attorney and client scale, subject to the terms of paragraph (c) of this order appearing below.
- b. The relief sought in para (c) of the application for judgment by confession dated 19 March 2019 (corresponding with that claimed in prayer (c) of the particulars of plaintiff's claim) is postponed *sine die* to be dealt with in open court in compliance with the requirements *inter alia* of Rule 46A.
- c. The costs incurred by the plaintiff in delivering the extensive affidavit deposed to by Mr Mlamuli Jimmy Duma on 12 March 2019 in support of the application for judgment by confession for declaring the immovable property executable, as well as the costs incurred in applying for such relief and in responding to the Court's enquiry in this regard, including service by the Sheriff upon the defendants on 4 April 2019, shall be paid by the plaintiff and may not be recovered from the defendants.

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**VAN ZYL, J.**