

SOUTH AFRICA / JUDGMENT

Changing Tides 17 (Pty) Limited v Muriritirwa and Another (5290/2019) [2020] ZAGPPHC 132 (7 April 2020) [2020] ZAGPPHC 132

COURT

North Gauteng High Court, Pretoria

BEFORE

SJ Cowen

CASE / FILE NUMBER

5290/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Case

No: 5290/2019

7/4/2020

In

the matter between: CHANGING
 TIDES 17 (PTY) LIMITED
 Applicant/
 Plaintiff
 and
 LAZARUS
 MURIRITIRWA (ID [...])
 First Respondent
 / Defendant
 GRACE
 BEULAH MURIRITIRWA (ID [...])
 Second
 Respondent/ Defendant

JUDGMENT

COWEN AJ

- [1] The applicant , Changing Tides 17 (Pty) Ltd, has applied for summary judgment for payment of the sum of R2 362 259.66 plus interest and an order to declare certain immovable property specially executable together with various ancillary relief.
- [2] The property is known as Erf 24 Stratford Township, Registration Division JR, Province of Gauteng ('the property '). The first and second respondents are the registered owners of the property, which is held by Deed of Transfer T64720/2016. The property has been the primary residence of the respondents since it was purchased in 2016 . The respondents live there together with their three minor children and the first respondent's niece, who is a student. They regard it as their permanent home. When the respondents' purchased the property, they put down a deposit of some R2 million and the remainder of the purchase price was raised by way of a loan.
- [3] The applicant is the sole trustee of South African Home Loans Guarantee Trust ('the Trust') . The Trust is a registered credit provider in terms of the National Credit Act 34 of 2005 with registration number NCRCP1732 .
- [4] During March 2016 , the respondents concluded a loan agreement with a lender being Main Street 65 (Pty) Ltd (Registration No 2001/004041/07) ('the lender') in terms of which the respondent would borrow a capital amount of R2.3 million, and the capital, interest and other amounts due from time to time were to be repaid in consecutive monthly instalments stipulated in a schedule to the agreement. The lender is a special purpose vehicle and registered credit provider, which advances home loans to borrowers through an entity known as SA Home Loans (Pty) Ltd, also a registered credit provider. Upon breach of the payment arrangements, the lender would be entitled to claim immediate payment of the capital amount with interest and to recover interest on the balance outstanding. The respondents' obligations were to be secured by a guarantee executed by the Trust in favour of the lender and which was issued on 24 March 2016 . In turn, the respondents were to sign

an indemnity in favour of the Trust secured by a registered indemnity bond over the property, which they did on 22 March 2016. The indemnity bond was duly registered under Bond No B34786/2016 in the Deeds Registry in Pretoria on 18 August 2016. It is the security contemplated by the indemnity bond that the Trust's trustee seeks to realise through this application.

- [5] According to the respondents' home loan statement , the respondents complied with their obligations under the agreement at the outset, but fell into arrears on a couple of occasions in 2017 I early 2018. They initially managed to settle their arrears. However, during the course of 2018 , their difficulties escalated and their arrears started to accumulate . As at 14 November 2018, the arrears were at R168 490.49. At that stage, a company known as the Thekwini Fund 14 (RF) Limited sent the respondents a notice in terms of section 129 of the National Credit Act. That company had acquired the rights and obligations of the lender and was also representing the Trust in its position as guarantor. The notice was sent by registered post to the respondents' domicilium citandi et executandi.
- [6] The applicant issued summons against the respondents on 29 January
- 2019. Summons was served on the respondents on 11 February 2019. According to the summons, as at 11 December 2018, the respondents were in arrears in the amount of R193 983.11 , being some 8.03 months in arrears.
- [7] The respondents served a notice of intention to defend the action on 1 March 2019 and had by then appointed Noko Ramaboya Attorneys to represent them. The applicant then applied for summary judgment. On 4 March 2019, the respondents filed a notice of intention to oppose summary judgment.
- [8] On 29 April 2019 the applicant's representative Mr Singh deposed to an affidavit in support of the relief sought in terms of Rule 46A. By that time, the respondents were 11.04 months in arrears, calculated as at 1 April 2019, at R270 044.21.
- [9] On 6 May 2019, an affidavit opposing summary judgment was deposed to by the first respondent and confirmed by the second respondent.
- [10] The application for summary judgment was set down for 9 May 2019. On that day it was postponed to allow the applicant to comply with Rule 46A. The court seized with the matter ordered that costs be costs in the application.
- [11] The applicant then set the matter down on the unopposed roll for hearing on 17 July 2019. On 16 July 2019, the respondents filed a notice of intention to oppose the Rule 46A application together with an answering affidavit. At this stage, the respondents were still represented by Noko Ramaboya Attorneys. In view of the opposition, the application was postponed sine die. There was no order for costs. On 22 August 2019, the applicant filed a replying affidavit, also deposed to by Mr Singh. On 25 September 2019, Noko Ramaboya Attorneys withdrew as the respondent s' attorneys of record advising that the respondents

should thereafter be served directly with court process.

- [12] The matter came before me on the opposed roll on 2 March 2020 and was allocated for hearing on 5 March 2020. The applicant was represented by Mr Oosthuysen and the respondents appeared in person.
- [13] At the commencement of the hearing, the respondents requested a postponement for two reasons, first to enable them to obtain legal representation and second to enable a further opportunity to make payment of the arrears. I was informed that the respondents had taken steps to obtain legal representation but were unable to afford the deposit requirements of private attorneys. Two efforts to obtain legal aid, from UNISA and from the pro bona office, had not been successful in view of the fact that the respondents apparently did not meet their threshold requirements for assistance.
- [14] In *National Police Service Union v Minister of Safety and Security* 2000(4) SA 1110 (CC), [1] the Constitutional Court confirmed that the test to be applied when considering an application for a postponement is whether it is in the interests of justice. The Court considering such an application must exercise the discretion judicially and in light of all relevant circumstances. An applicant must show that there is good cause for the postponement.[2] This requires a full and satisfactory explanation which should be timeously made. In this instance, the respondents first requested a postponement at the hearing of the application, did not tender costs and did not supply the Court with any affidavit setting out the explanation for seeking the postponement or the circumstances in which it was sought. In view of the fact that the applicants were unrepresented, however, I considered the application on the assumption that the applicants were not aware of the manner in which the application for a postponement should have been brought and that they should not be prejudiced by their absence of representation in this regard. I also considered the application in light of the express power conferred by Rule 46A(8) that resides, in any event, with a court considering an application in terms of Rule 46A to postpone an application on such terms as it may consider appropriate.
- [15] After hearing the parties, I came to the conclusion that it would not be in the interests of justice to postpone the application and that the interests of justice demanded that finality be achieved in these proceedings. During the proceedings, I informed the parties that I would not be postponing the application and would supply my reasons later. I do so now. The application had already been postponed in July 2019 shortly after which the respondents' attorneys of record had withdrawn. Over seven months have passed since that time. Furthermore, in the respondents' affidavit opposing the Rule 46A proceedings, filed shortly before the postponement, the respondents indicated at that time that they required some eight months to make arrangements for settling the arrears. That time had lapsed shy of a week. Mr Oosthuysen, furthermore, indicated that his client would have no objection if the order sought were to be granted but suspended for a period such as a further six months. This would provide the respondents with further time to make any payment arrangements they are able to and thereby to reinstate the agreement. Considerations of prejudice must

furthermore be considered from the perspective of both parties. While the applicants' interests are substantially protected by the security they hold, they are also entitled to finality of these proceedings within a reasonable time. As regards legal representation, on the information supplied, the prospects of the respondents securing legal

aid are not good and they have had ample time to procure the services of private attorneys, should they be able to, since their attorneys withdrew. Also of significance is that they were represented at the times when their affidavits resisting summary judgment and opposing the Rule 46A application were prepared and filed and the defences raised in those affidavits are not complex. Ultimately, the main substantive dispute - both on the papers and emerging from the respondents' submissions to me - is whether further time should be afforded the respondents to settle their arrears. Mr Oosthuysen was also co-operative in taking no objection to the Court making certain informal inquiries of the respondents to facilitate the fair determination of the matter and to ensure that the Court was apprised

of relevant information.

[16] Accordingly, I turn to deal with the merits of the application. In doing so, I deal with the legal defences raised on the affidavits and the issues arising under Rule 46A. These are:

16.1. whether the Court has jurisdiction ;

16.2. whether the applicant has standing to claim the relief against the respondents;

16.3. whether the applicant's deponent is in a position to depose to the affidavit supporting the application for summary judgment;.

16.4. whether the order should be granted in light of the provisions of Rule 46A and.

16.5. whether the order should be suspended.

Jurisdiction

[17] In my view this Court has jurisdiction to determine the matter. The contention advanced was that the matter should have been heard in Johannesburg and not Pretoria. In my view, however, at best for the respondents, the Johannesburg Division of the Gauteng High Court has concurrent jurisdiction with this Court. In this regard, the indemnity bond was registered in the Pretoria Deeds Office and the loan agreement was concluded in Pretoria.

Standing and position of the applicant's deponent

[18] The respondents take issue with the applicant's standing. The complaint is linked to a complaint relating to the applicant's deponent, Mr Singh. It is trite under Rule 32 that the person deposing to an affidavit in support of an application for summary judgment must be a person who can swear positively to the facts verifying the cause of action and the amount.

[19] In short, the respondents' concern appears to be that the claim is being pursued by persons unrelated to the persons with whom they contracted. In my view, the concern is not grounded, when regard is had to the particulars of claim and the documents attached thereto. I have summarized the relationships in broad terms above. Simply put, the lender is not the person who is seeking to realise the security. Rather it is the Trust who acted as a guarantor and who seeks to realise security in the form of an indemnity bond registered against the property. Mr Singh's specific authority to act in the proceedings on behalf of his employer is confirmed by a Certificate of Authority supplied. His employer, South African Home Loans (Pty) Ltd in turn administers home loans on behalf of the lender and administers the affairs of the lender and the Trust in terms of the indemnity and the indemnity bond. His employer is also the Trustees' accountant. Moreover, the concern specifically pleaded by the respondents is factually wrong as they plead that their lenders were in fact Changing Tides 17 (Pty) Ltd. This is not so as set out above.

Rule 46A

[20] In respect of Rule 46A, the first issue for decision is whether execution against the property is warranted in view of the fact that it is a primary residence. This determination must be made in light of all relevant

circumstances,[3] which may include whether the rules of court have been complied with, other reasonable ways to pay the debt, any disproportionality between execution and other means to exact payment, the circumstances in which the judgment debt was incurred, attempts to pay the debt, the financial position of the parties, the amount of the judgment debt, whether the debtor is employed or has a source of income to pay the debt and any other relevant circumstances. In context of this case, they also include the arrears history, the debtor's payment history, the manner of compliance with section 129 of the National Credit Act, the relative financial strength of the creditor and the debtor, the occupation of the property, the position of the debtor's dependents

and whether the debtor will lose access to housing.[4]

[21] In all the circumstances of this case, I am satisfied that execution is warranted. While the applicants moved relatively swiftly between sending the section 129 notice in terms of the National Credit Act and issuing summons, the arrears amount is significant and has accumulated over time and there has been a substantial amount of time afforded to the respondents since the institution of proceedings to clear the arrears. While the first respondent is currently unemployed, the second respondent is not and while the respondents appear to be living beyond their means, they are not without means and ought not to be rendered homeless. Furthermore, as the order I make is suspended, this will afford the respondents the time that they now say that they need to put their affairs in order, avoid a sale in execution and reinstate the agreements. In this regard, there is adequate time for the respondents to seek to sell the property in a manner that is optimal for their purposes or otherwise settle the arrears if they are somehow able to.[5]

[22] The second issue is whether the Court should set a reserve price, and if so at what amount, as it is empowered to do in terms of Rule 46A(8)(e) having regard to the factors set out in 46A(9). The applicant accepts that a reserve price may be set but seeks a price that is significantly below the market value (R2 100 000) and that, on interrogation is designed to protect only its interests in recovering the debt owed and not the interests of the respondents, more particularly in recovering the deposit paid of R2 million or as much thereof as is possible. That despite the fact that the respondents' ability to recover equity that remains in the property may affect their ability to find a suitable new home for their family. The proposal makes a range of assumptions that are, furthermore, ungrounded on the information to hand, including that the respondents will refrain from paying any municipal accounts going forward and will require to be evicted. The calculation also factors in the cost of on-sale in an amount of close to R700 000.00 which includes an unexplained VAT amount of over R450 000. On the other hand, the applicant has helpfully supplied the Court with information

relating to the market value of the property being R4 600 000 (which the respondents agree is probably fair), a forced sale value (R3 500 000), the municipal value of the property (R4 100 000.00 at 6 February 2019) and municipal accounts and levies owing. As at 1 March 2019, the municipal accounts and levies were, together, in the amount of some R 125 000.00 but the respondents informed me that these had since been significantly reduced . I was subsequently supplied with a March 2020 account which reflects the outstanding amount as in excess of R140 000.00.

[23] In all the circumstances , and having regard to the factors referred to in Rule 46A)(9), I am of the view that it would be fair for a reserve price to be set at a level reasonably close to the known market value of R4 600 000.00. A price of R4 100 000.00 is fair. Should it not be realized at a first auction, the Court should be approached as contemplated by Rule 46A(9)(c) to (e).

Suspension

[24] The Court has the power in terms of Rule 45A to suspend the execution of its order. In my view the interests of justice warrant that the order be suspended in the circumstances

of this case. Indeed, Mr Oosthuysen did not dispute this and, on behalf of the applicant, suggested this would be appropriate . Mr Oosthuysen suggested a period of six months where the respondents requested eight months. An additional period of two or three months cannot prejudice the applicant and is in any event warranted in view of the Covid-19 outbreak and its social and economic impact.[6]

Covid-19

[25] This judgment is being delivered during the period of lockdown following the declaration (on 15 March

2020) of the Covid-19 outbreak as a national disaster. In terms of the Regulations issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 as amended ('the main regulations'),[7] the lockdown is in place between Thursday 26 March 2020 until Thursday 16 April 2020. Furthermore, various regulations have been made in respect of the lockdown.

[26] The court has not heard argument on the implications of the lockdown and the main or other regulations for the execution of this judgment. As the orders are suspended, there may be none in due course. However, should the need arise, the parties are encouraged to take advice and engage with each other. Should it be necessary they may approach the court for declaratory relief.

[27] The parties' attention is however drawn to the fact that a central feature of the main regulations is that for the period of lockdown every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, or seeking emergency, life-saving or chronic medical attention.[8]

[28] The parties' attention is, furthermore, drawn to the provisions of Regulation 5(e) of the Regulations issued by the Minister of Justice on 26 March 2020, as amended on 30 March 2020[9] which provide in respect of civil cases:

'(c). Service of process and execution of writs by sheriffs shall be limited to cases which are urgent and essential, including :

- (i) Service and execution of Court orders relating to COVID -19 ;
- (ii) Service of domestic violence protection orders ;
- (iii) Service of protection from harassment orders;
- (iv) Service of process relating to claims prescribing ;
- (v) Service of urgent court process relating to court hearings scheduled during lockdown ;
- (vi) Service of urgent court process in family law matters as determined in these directions; and
- (d) Service and execution of other process by Sheriffs , including evictions are not essential , and are suspended for the duration of the lockdown`.

[29] The following order is made:

29.1. The first and second respondents jointly and severally the one paying the other to be absolved are ordered to pay the applicant:

29.1.1. The sum of R 2 362 259.66.

29.1.2. Interest on the sum of R2 363 259.66 at the rate of 9.8% per annum compounded monthly in arrears from 5 December 2018 to date of payment.

29.1.3. The costs of the application, on an attorney and own client scale.

28.2 The property known as Erf 24 Stratford Township, Registration Division JR, Province of Gauteng measuring 1291 square metres in extent held by deed of transfer T64720/2016 subject to the conditions therein contained or referred to and more especially subject to the conditions in favour of Stratford Gardens Home Owners Association NPC Registration No 2001/001154/08 is declared specially executable.

28.3 The Registrar of the Court is authorised to issue a warrant of attachment in respect of the immovable property.

28.4 A reserve price is set in the amount of R4 100 000.00.

28.5 In the event that the reserve price is not attained, and subject to Rule 46A(9)(d) and (e), the applicant / plaintiff may approach the Court on these papers, duly supplemented, to reconsider the reserve price in terms of Rule 46A(9)(c) .

28.6 This order is suspended for a period of 9 months from the date of delivery of the judgment.

SJ COWEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 4 MARCH 2020

DATE OF JUDGMENT: 7 APRIL 2020

APPEARANCES

For the applicant: Mr Oosthuysen instructed by VeliloTinto & Associates For the respondents: In person

[1] At paras 4 and 5.

[2] I have also had regard, for the general principles governing postponements, to Myburgh Transport v Botha t/a SA Truck Bodies 1991(3) SA 310 (NMSC) and have considered them in light of Rule 46A.

[3] Rule 46A(2)(b) . Jaftha v Schoeman; Van Rooyen v Stoltz 2005(2) SA 140 (CC)

[4] In light of the judgments of FirstRand Bank Ltd v Folscher 2011(4) SA 314 (GNP) at 336A - G; and Nedbank Ltd v Martinson 2005(6) SA 462 (W) at 473D-E .

[5] The respondents' attention is again drawn to section 129(3) of the National Credit Act that he/she may pay to the credit grantor all amounts that are overdue together with the credit provider's permitted default charges and reasonable taxed or agreed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement.

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- [6] The Court has had regard to supplementary submissions in this regard relating to the respondents' ability to pursue an auction to sell the property .
- [7] Regulation No 318 of 18 March 2020 (GG No 43107) as amended by Regulation No 398 of 25. March 2020 (GG 43148).
- [8] Regulation 11B(1)(a)(i).
- [9] Regulation No 440 of 31 March 2020 (GG 43191)
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