

SOUTH AFRICA / JUDGMENT

Dainfern Homeowners Association v Roodt and Others [2023] ZAGPPHC 282; 82688/2017 (5 May 2023)

[2023] ZAGPPHC 282

COURT

North Gauteng High Court, Pretoria

BEFORE

E C Labuschagne

CASE / FILE NUMBER

82688/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case

No: 82688/2017

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES/NO

SIGNATURE:

In

the matter between:

DAINFERN
HOMEOWNERS ASSOCIATION
Applicant
and
DANIEL
FRANCOIS
ROODT
First Respondent
ID:NO
5[...]
KARIN
ROODT
Second Respondent
FISTRAND
BANK
Third Respondent
THE
CITY OF JOHANNESBURG
METROPOLITAN
MUNICIPALITY
Fourth Respondent

JUDGMENT

- [1] The Dainfern Homeowners Association applies for an order to declare the immovable property of the First and Second respondents (hereafter “the respondents”) specially executable in terms of Rule 46A, the property in question being the primary residence of the respondents.
- [2] The respondents’ property, namely Erf 7[...], 6[...] G[...] Avenue, Dainfern, Gauteng is located within a luxury property development of which the applicant is the homeowner’s association.
- [3] The third respondent to the application is FirstRand Bank, whose interest has fallen away when the first and second respondents settled the outstanding bond due to FirstRand Bank prior to the hearing of this matter.
- [4] The fourth respondent is the City of Johannesburg, to whom the applicant alleges the first and second respondents owe rates and taxes.
- [5] It is common cause that the first and second respondents have not paid levies to the Dainfern Homeowners Association since 2008. The first and second respondents’ benefits as members of the applicant were is suspended when they fell into arrears. Such suspension is provided for in the rules under which the applicant administers the Estate. At the time of suspension of their benefits by the applicant the outstanding amount in levies was insignificant and could easily be settled. However, the respondents refused and failed to pay any further levies up to the present.

- [6] A number of default judgments have been obtained against the first and second respondents in the Magistrates' Court, Randburg which remain unsatisfied. The first and second respondents contend that such judgment debts cannot be executed as they have become superannuated in terms of the Magistrates' Court Rules.
- [7] The liability of the first and second respondents to pay levies arises from their membership of the applicant, which membership attached to all property owners within the Dainfern Estate.
- [8] On 5 December 2017 the applicant instituted an action against the first and second respondents for outstanding levies in the amount of R183 131.51. On 3 January 2018 the first and second respondents (hereafter referred to as "the respondents") entered an appearance to defend. An application for summary judgment was successfully resisted when the first and second respondents were granted leave to defend on 19 February 2018. The applicant then served a notice of bar on the respondents on 17 April 2018, and, failing to serve their plea, the applicant proceeded with a default judgment before the Registrar on 31 August 2018. The order granted against the respondents was for payment of R183 131.51, and interest on the amount at 10,5% per annum from date of summons to date of final payment. An order for costs of R200.00 plus Sheriff costs was also included. This is the order which the applicants seek to enforce by means of Rule 46A, and which the respondents seek to be set aside by means of counter-application.

The rescission application:

- [9] The first and second respondents brought a rescission application of this judgment on 24 January 2022. I first need to decide the rescission application. In order to do so, it is necessary to determine which rule governs an application for rescission in such circumstances. The first and second respondents expressly relied on Rule 42 as well as the common law as a basis for the application. However, where the judgment is granted in default of filing a plea, following a notice of bar, the correct rule would be Rule 31(5)(d), which reads:
- "(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court."*
- [10] The first and second respondents had knowledge of the judgment for more than 3 years before the application for rescission was launched.
- [11] The DHA contend that the rescission application is not competent in that the respondents have, by their conduct, waived their right to apply for a rescission. This submission is based on the extension of the principle of peremption in appeals to rescissions in *Zuma v Secretary of the Judicial Services Commission 2021(11) BCLR 1263 (CC)* at par [101].

[12] Following the granting of default judgment by the Registrar on 31 August 2018, a writ of execution on movables was served on the first and second respondents on 16 October 2018. At the time of such

execution, the first and second respondents advised the Sheriff that they do not have sufficient assets or funds to satisfy the

judgment

debt, and a nulla bona return was entered.

[13] The Rule 46A application was launched on 20 May 2019, in order to give effect to the execution of the aforesaid default judgment. The first and second respondents opposed this application and participated in its proceedings. The lateness of their answering affidavit gave rise to an application for condonation which

served before Francis-Subbiah AJ (as she then was) on 20 May 2021. That matter was postponed in order to give the respondents an opportunity to avoid the consequences of a Rule 46A application.

[14] It is apparent from a transcript of the proceedings before Francis-Subbiah AJ, that the issue of a rescission application, was mooted by the court and accepted by the first respondent.

[15] The first respondent stated that he definitely intends bringing a rescission application. The court warned the first respondent to act promptly and not to take another two years, to which he responded:

“No no no. I realise that. No, I have left it too long. I have been guilty, I have left it too long but I do realise the utter seriousness of it and that we could lose our home if I do not do anything about it. But I am ... even if I have to work 24 hours every day on this issue, I will solve it and can tell you this, that we have reserves ... you know to make sure that we can confront all these difficulties and resolve these financial issues. So, payment is not the problem.”

[16] The respondents however did not act with the promptness conveyed to Francis-Subbiah AJ. In a letter of 26 October 2021 the respondents were again warned of the need to bring a rescission application, but nothing was done. The rescission application only saw the light of day on 24 January 2022. It was served two days before the Rule 46A proceedings were to be heard before Fourie J. That led to a postponement of the Rule 46A proceedings.

[17] The period to be covered in an application for rescission, in order to explain the delay, would be a period 20 days after judgment was granted. The explanation for the delay in the papers is flimsy. The respondents have not attempted to explain in detail why the application for rescission was not timeously brought and why more

than 3 years expired since they became aware of the judgment before it was launched.

[18] The first respondent, acting in person, submitted that he could not get to the rescission application for a number of reasons. These included that he was overseas on a few occasions. He however then conceded that he did not give enough attention to the rescission application, since he did not take it very seriously.

He was of the view that the amount was paltry and that no court would grant an order declaring a primary residence executable. This perception has permeated the submissions made by the first respondent. He tried recanting on the issue whether he took the need for a rescission application seriously or not. His conduct indicates that, despite knowing of the judgment, and despite knowing of the need for a rescission application, he did nothing about it until January 2022.

[19] The first respondent contends that the judgment debt contain interest

that, in his view had become prescribed. He regarded the court order as invalid. His defences to not paying levies included the contention that, as their membership was suspended, he was absolved from paying levies as no services were being rendered to the respondents. One would expect the first respondent to have brought a rescission application with alacrity if these defences were available. Rather than acting proactively, the respondents have taken a supine approach to the execution process.

[20] The Rules of the Dainfern Homeowners Association provide for interest

on outstanding levies to become part of the debt due- ie arrear interest is capitalised. If there was a dispute regarding levies the rules provide for an alternative dispute resolution process including mediation or arbitrations. The first respondent did not establish that he exercised these rights to challenge the correctness of the levies imposed on the respondents. Rather, he ceased paying levies all together and this has been the position since 2008.

[21] The evidence establishes that there has been an undue delay. There is

no acceptable explanation for why the respondents permitted the action to proceed by default when they were clearly aware of the

action, since they filed a notice of opposition. The reasons for the delay thereafter in bringing the rescission application has also not been fully explained for the full period of the delay. The delay should be fully explained for the full period in sufficient

particularity to place the court in the position to understand the reasons for the delay.(See Buffalo City Metropolitan

Municipality v Asla Construction 2019 (6) BCLR 661 (CC) at par [52]). This was not done. In fact, the delay in bringing the rescission application appears to be wilful. The respondents were repeatedly warned of the need for a rescission to avoid further execution. The failure to bring such application for more than three years is consistent with the waiver of the right to bring a rescission application, despite being repeatedly warned of the need to do so, and despite protestations of his intention to do so urgently.

- [22] The next question is whether, despite the delay, the delay should be condoned. One consideration in this regard is that the respondents are acting in person. However, the respondents have been involved in so much litigation since 2018 that there is a demonstrable degree of proficiency in drafting papers and presenting argument not usually found with a lay litigant. Another consideration is the age of the respondents. I take this into account. However, there is a countervailing consideration. When the first respondent embarked on his resistance campaign he was 51 (he is now turning 66). It is the same staunch refusal to budge that has resulted in the default judgment at hand. The refusal to pay any levies at all for almost fifteen years erodes this consideration.
- [23] The merits of the defence that the respondents seek to raise has not been established. The first respondent has advanced a calculation of levies of R47 000.00 being due, rather than R183 000.00. However, the calculation does not take into account special levies, penalties and interest. The prospects of establishing a defence on prescription and calculation errors is, to my mind, poor. He did not even tender payment the amount he thinks is due. There is therefore no basis to condone the delay.
- [24] The upshot of the aforesaid is that the application for rescission falls to be dismissed.

The Rule 46A application: Discussion

- [25] Rule 46A was introduced to protect property owners against losing their primary residence for paltry amounts due in terms of judgments. (See *Gundwana v Steko Developments* 2011 (3) SA 608 (CC)) The need to preserve the constitutional rights of persons to adequate housing underlie the need for judicial restraint in ordering the executability of primary residences.
- [26] Rule 46A(5) impels the court to take into account a number of considerations. These are considered below.

26.1 The first is the market value of the property concerned. The most recent valuation of the property places its market value at R3,7 million.

26.2 The forced sale value was initially stated to be R2,5 million, but has been increased in terms of the latest valuation to R3 million.

26.3 The local authority valuation of the property is higher than its market value and stands at R4 233 000.00.

26.4 There was initially an FNB bond over the property, but following court proceedings between FNB and the respondents, the respondents settled the outstanding bond in total, paying approximately R1,1 million. There is therefore no bond on the property.

26.5 The amount owed to the local authority in respect of rates and taxes was R441 025.14 as at 2 March 2023.

26.6 The final consideration under the aforesaid subrule requires the court to take into account any other factors. The applicant suggested that the existence of at least three other default judgments against the respondents in the Magistrates' Court, based on non-payment of levies, is a relevant consideration. These judgments may however be superannuated. Their enforcement is therefore not imminent, but the judgments only prescribe after 30 years. Dr Roodt thought they had prescribed after three years.

26.7 Unsuccessful attempts by the respondents to stop execution of the

judgment

debt has resulted in costs orders against the respondents, which have been taxed and which are in excess of R100 000.00.

26.8 A further consideration is the fact that the respondents have not paid levies since 2008. Although their benefits have been suspended, i.e. they may not vote and cannot utilise the clubhouse or

gym, there are still certain benefits that they have enjoyed. These include at least the provision of security and the tidying and upkeep of public spaces and gardens. The respondents' failure to pay even an amount which they regard as fair is disconcerting.

It smacks of schadenfreude.

26.9 The respondents repeated indications to the Sheriff that there are no movables or money to pay the judgment debts has resulted in a nulla bona in these proceedings and in other proceedings.

26.10 What is however perplexing is the repeated assurance by the first respondent that he has reserves available to settle the judgment debt if forced to do so. The fact that he settled a bond with FNB in the amount of R1,1 million does indicate his ability to pay. This is therefore not a case of indigent persons whose primary residence is at risk.

26.11 I have considered alternative means of avoiding the loss of the primary residence of the respondents. The first of these would be to require the respondents to merely pay the debt, based on the assurance that there are available funds to do so. However, the recalcitrance shown by the respondents in complying with their obligations to pay levies and the persistent refusal to pay, or tender payment of what they regard as reasonable, means that the respondents should face the consequences if this recalcitrance were to surface again.

26.12 The respondent contend that the Rule 46A relief should be refused because he and his wife are elderly, and the property is their primary residence.

26.13 He contends that the amount due in terms of the judgment debt is disproportionate to the loss of a primary residence and would constitute an improper infringement of the respondent's right to adequate housing.

26.14 The respondent further contends that relevant considerations include that he and his family have been residing at this property for 29 years, that the property is unbonded and that it is his perception that the Homeowners Association are hellbent on getting rid of them by selling their property at auction.

26.15 The amount of the judgment debt is relatively small compared to the value of the property. This is a consideration that is taken into account. The countervailing consideration is that the first respondent is prepared to risk his primary residence for an amount he says he can pay.

[27] The rights of the applicant as the holders of a judgment debt can also not be perpetually thwarted. A successful litigant is entitled to satisfaction of his judgment debt. It is an incident of section 34 rights – a right to have a dispute resolved finally. Otherwise it would be left without remedy. That would be unconstitutional.

The applicant's constitutional right of access to the court includes the right to effective execution of judgments. Where those rights affect the rights of a person to adequate housing, in that his or her primary residence is at stake, it requires judicial oversight of competing sec 34 rights. (See *Mkhize v Umvoti Municipality* 2012 (1) SA 1 SCA at par [14]). In *Gundwana v Steko Developments* 2011 (3) SA 608 (CC) the Constitutional Court warned against primary residences being declared specially executable for paltry amounts due in terms of judgment debts. The Constitutional Court however stated that, only where there is disproportionality between the means used compared to other available means, that alarm bells would start ringing.

[28] If there were other means of securing satisfaction of the judgment, it would have to be explored. The respondents have staunchly refused to pay anything, despite having the resources to do so. The means are only disproportionate if there is a disconnect between means and ends. The disproportionality lies not merely in the amount due compared to the value of the property but in the means sought to procure satisfaction of the judgment. Not every instance of a primary residence being declared specially executable for a relatively minor amount would be unlawful or unconstitutional. It is a case by case enquiry involving the weighing up of all relevant considerations.

[29] The respondents contend that declaring their property executable would be an infringement of their right to adequate housing. They contend that they need to live in a house that can house a library of

8000 books with fast internet. The books have been sold in execution and are not relevant. The constitutional right to adequate housing is in any case not assessed from a subjective vantage point, but from an objective vantage point. The concept of adequate housing, as referred to in the National Housing Act, is a reference to modest accommodation. This would include a 40 square metre home with two bedrooms, a bathroom and a kitchen. The constitutional right to adequate housing does not constitute an entitlement to live in a luxury estate like Dainfern.

[30] The risk of the respondents losing their primary residence only arises if they do not settle the outstanding judgment debt. Based on the utterances of Dr Roodt, he is in a position to settle that debt, and has indicated that he would do so in order to save his home from being sold on auction.

[31] In the premises I intend granting an order declaring the respondents'

property specially executable, but to suspend such order for two months, during which period the respondents have an opportunity of settling the full outstanding amount or agreeing a payment regime with the applicant. In the absence of payment or such a payment regime, the sale in execution should proceed.

[32] With that in mind it is necessary to determine an appropriate reserve

price. The starting point of determining an appropriate reserve price would be to utilise the forced sale value of R3 million.

32.1 An updated municipal account indicates that the respondents owe the City of Johannesburg Metropolitan Municipality rates and taxed of R441 025.14. This amount has to be deducted from the forced sale value.

32.2 The outstanding levies due to the applicant have been calculated by the DHA as being an amount of R1 623 248.78. This is a calculation which was redone by Ms Moonsamy, utilising the interest

in the Prescribed Rate of Interest Act. In terms of her recalculation, the outstanding levies would total R686 807.99,

if applying simple interest. I do not intend resolving the dispute whether compound interest or simple interest is appropriate.

I, however, intend utilising the amount of R686 807.79 as the amount of outstanding levies due to the applicant, simply because the exercise involves a primary residence, and the respondents are to be given the benefit of the doubt in determining an appropriate reserve price. I therefore intend deducting the amount of R686 807.99, rather than the amount of R1 623 247.78.

32.3 The applicant contends for a reserve price of R935 726.79. A reserve price is not, in my opinion, to be determined with a degree of accuracy flowing from a purely arithmetical exercise. In my

mind, a fair reserve price for the property would R1,9 million.

[33] In the premises, the following order is made:

1. The application for rescission of the judgment of 31 August 2018 is dismissed with costs.
2. An order is granted declaring the first and second respondents' property below specially executable in terms of rule 46(1)(a)(ii):

ERF 7[...], Dainfern

Registration Division JR, Province of Gauteng

Measuring 836 square metres in extent,

Held in terms of Deed of Transfer 4[...].

3. The Registrar is authorised and directed to issue a writ of execution against the aforesaid property of the First and Second Respondents.
4. The sheriff is authorised to sell the aforesaid immovable property, subject to a reserve price of R1,9 million.
5. The aforesaid declaration is suspended for 60 days from date of this order, to afford the first and second respondents an opportunity to settle the outstanding capital and interest, alternatively to agree to a payment plan acceptable to the applicant.
6. In the event of failure to pay or to agree on a payment plan within 60 days, the aforesaid declaration will come into force.
7. The first and second respondents are to pay the costs of:
 - 7.1. the rescission application;
 - 7.2. the application in terms of Rule 46(1)(A)(ii);
 - 7.3. the condonation application; and
 - 7.4. the reserved costs occasioned by the postponement of the matter on 17 October 2019, on an attorney and client scale, as provided for in the Rules the Applicant.

E C LABUSCHAGNE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for handing down is deemed to be 05 May 2023.

APPEARANCES

FOR THE PLAINTIFF: ADV. A MARÉ FOR THE FIRST DEFENDANT: IN PERSON (DR ROODT)

HEARD ON: 04 MAY 2023 DATE OF JUDGMENT: 05 MAY 2023

JUDGMENT

- DAINFERN HOMEOWNERS ASSOCIATION v ROODT AND OTHERS

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