

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Farisani [2023] ZAGPPHC 542; 57108/2019 (7 July 2023)

[2023] ZAGPPHC 542**COURT**

North Gauteng High Court, Pretoria

BEFORE

HJ De Wet

CASE / FILE NUMBER

57108/2019

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA GAUTENG DIVISION, PRETORIA****CASE****NO: 57108/2019****(1) REPORTABLE: NO****(2) OF INTEREST TO****OTHERS JUDGES: NO****(3) REVISED****DATE: 7/7/2023****SIGNATURE:**

In

the matter between:

FIRSTSTRAND

BANK

LIMITED

Applicant/Plaintiff

and

LIVEHUWANI

MULLICENT LUCIA FARISANI

(ID:

8[...])

Respondent/Defendant

JUDGMENT

DE WET AJ:

1. This is a summary judgment application and an application in terms of Rule 46A to declare the Respondent's property executable.
2. Advocate F de W Keet on behalf of the Respondent raised two points in limine, firstly that a supplementary affidavit in the Rule 46A application was not properly commissioned. The Commissioner of Oaths certified that the deponent is a male, although from reading of the affidavit the deponent is apparently a female legal secretary. Secondly, that the affidavit should in principle not be allowed as "supplementary affidavits are not catered for".
3. The Respondent referred to ABSA Bank Ltd v Botha and Others, 2013 (5) (SA) 563 (GNP), where Justice Kathree-Setiloane refused to allow the founding affidavit in a summary judgment application as the commissioner of oaths certified that the deponent was a male person whilst the deponent describes herself as a female by virtue of using the word "manageress".
4. Justice Kathree-Setiloane found that:
 - 4.1. the regulations promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 require that the affidavit must be signed in the presence of a commissioner of oaths and the aforesaid discrepancy justify the inference that the deponent had not signed the affidavit in the presence of the commissioner of oaths;
 - 4.2. the situation was compounded by the reference in the certificate of balance to the deponent as a manager:

"Are both the certificate and the commissioner of oaths wrong? or is the title "manageress" inappropriate? What is the court to believe? The court should not be placed in a situation where it is required to speculate as to the gender of a deponent to an affidavit and, more particularly, whether the deponent had, in fact, sworn to and signed the affidavit in the presence of the commissioner of oaths. Simply put, the court should not be called upon to speculate on the question of whether the verifying affidavit, in an application for summary judgment, is an affidavit or not. Accordingly, on the face of it, the plaintiff's verifying affidavit is inherently contradictory and irregular, and for that reason I find that it does not constitute an affidavit as contemplated in rule 32(2) of the Uniform Rules of Court." (par 13); and
 - 4.3. the application for summary judgment was an irregular proceeding and prejudiced the defendant in the context of the summary judgment application (par 10 – 14).

5. Mr Roos on behalf of the applicant, contended that the regulations promulgated under the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963, are directory in nature and the court has a discretion to condone non-compliance insofar as there has been substantial compliance with the regulations (see: *S v Msibi*, 1974 (4) (SA) 821 (TPD) at 828 - 829; *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk*, 1979 (3) SA 391 (TPD) and *Capriati v Bonnox (Pty) Ltd and Another*

[2018] ZAGPPHC 345 (10 May 2018)).

6. It is unclear who exactly commissioned the affidavit and attended to the attestation thereof. The full names of the commissioner cannot be gleaned from the stamp. An attorney seemingly attended to the commissioning of the affidavit, and although the commissioner's physical street address can potentially be Church Street or Stanza Bopape Street, Pretoria, the stamp is unclear to say the least. Paragraph 1 of the supplementary affidavit furthermore reads:

"I, the undersigned, Amberdowie, hereby declare under oath as far as:

- 1) I am an adult legal secretary in the employ of Velile Tinto & Associates Inc, situated at ..., and the Applicant/Plaintiff's attorney of record in this matter."
7. One cannot determine the identity of the commissioner of oaths as his full names and business address does not appear below his signature as required in terms of regulation 4 of the aforesaid regulations. It is uncertain whether the deponent is male or female. She describes herself as "an adult female", but it appears from the certification that the deponent is a male person "...That He Knows And Understands The Contents Of This Affidavit...". The discrepancy raises the question whether the deponent signed the affidavit in the presence of the commissioner of oaths. The identity of the deponent and the capacity in which he/she deposed to the affidavit (as a legal secretary or an attorney), is unknown.
8. The purpose of the affidavit is to assist the court in its judicial oversight to protect the respondent's constitutional right to adequate housing, as provided for in Section 26(3) of the constitution. It is incumbent upon the applicant to place all relevant factors before court when it moves an order that the debtor's property be declared executable. The deponent describes the nature and extent of the respondent's default in respect of the capital and interest; outstanding municipal

rates and taxes and levies, and purports to confirm the current market value of the property by means of a valuation:

8.1. The "FirstRand Property Valuation Report" is not confirmed under oath and neither is the "LightStone Scheme Valuation". According to the LightStone Scheme Valuation" the municipal valuation of the property amounts to R490 000.00, and the market value according to the "Automated Valuation" is R480 000.00. A sworn valuation is required (see: *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) at par 57);

8.2. The statement consists mostly of inadmissible hearsay/opinion evidence and there is no attempt to disclose the source of the information or the origin of the documentation attached to the statement (see: *Chairman, Independent Electoral Commission v Die Krans Ontspanningsoord* 1997 (1) SA 244 TPD at 248C-E);

8.3. The averments in paragraph 3 of the affidavit that the applicant "...has on numerous occasions attempted to assist the Respondent/Defendant to rectify the Respondent's/Defendant's default and arrears on the account" constitutes hearsay twice removed. The conclusion in paragraph 3.3, namely that the respondent has been informed of her default "and that failure to remedy his/her/their default would result in judgment against her, attachment of the immovable property, Sale in Execution, as well as eviction from the property" is not even based on hearsay facts and nothing but an unsubstantiated conclusion/opinion;

8.4. It is alleged that it appears from the account statements dated 27 October 2021, that on the said date "...the Respondent/Defendant was in arrears with instalments in the amount of R100,249.50, which is calculated to be approximately

28.98 months in arrears. The arrears accumulated partially as a result of sporadic and/or non-payment of the instalments

made by the Respondent/Defendant from 29 DECEMBER 2017 to 27 OCTOBER 2021." The statement of account does not corroborate these averments and a document annexed thereto (possibly to substantiate the averments), is wholly illegible.

9. The supplementary affidavit is important. However, in the absence of evidence in respect of the present market value and the arrears, it serves very little purpose. I am under the circumstances not prepared to condone the non-compliance of the regulations in respect of the commissioning of the supplementary affidavit.
10. Although Rule 46A does not cater for supplementary affidavits, I would under normal circumstances allow a succinct supplementary founding affidavit to deal with the market value of the property, local authority's valuation of the property; the amount owed on the mortgage bond; the outstanding levies and a possible reserve price, if the information in the initial founding affidavit has become dated. That is however subject thereto that the applicant clearly affords the respondent an opportunity to file a supplementary answering affidavit to deal with these aspects. The present application is an interlocutory application and a formal application to amplify the papers will only lead to unnecessary costs (see: *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd and Others* [2006] ZASCA 51; 2006 (4) SA 292 (SCA) at par 10; *Visser Citrus v Goede Hoop Citrus (Pty) Ltd and Others* 2014 (5) SA 179 WCHC at par 37 – 38). The supplementary affidavit is however not properly commissioned and in light of its other shortcomings, it is not entered into evidence.

11. Even if the supplementary affidavit does not meet muster, the application should still be considered in light of the initial founding affidavit deposed to by Mr Mokoena, an operations manager in the employ of the applicant, on 21 February
2020. Annexed to this affidavit was a sworn valuation report by a Mr Henning who estimated the market value on R500 000.00. It furthermore seems that on 27 January 2020 the outstanding rates and taxes amounted to R28 485.42 and the property value as per local authority amounted to R450 000.00, and that outstanding levies amounted to R22 521.02 on 13 February 2020. The deponent however testified as follows:

“ It is therefore humbly submitted that, in the event that the above Honourable Court is convinced that a reserve price is necessary given the circumstances of this matter, a reserve price of R859 800.06, being the forced sale value less outstanding rates and taxes, is appropriate.”

This submission is clearly wrong and the affidavit probably contains a typing error. The fact remains that the affidavit does not address the aspect of a reasonable reserve price.

12. On 20 March 2021 the respondent filed an affidavit in response to the founding affidavit. It amongst others appears from her affidavit that:
 - 12.1. the unit constitutes her primary residence and that the unit/flat is very well maintained;
 - 12.2. she is not married and self-dependent;
 - 12.3. she does not own any other property and that a forced sale will infringe her right to adequate housing;
 - 12.4. she informed the applicant during September 2019 of the challenges she experienced in her new practice;
 - 12.5. a forced sale of her property would probably only raise half of the value of the property; and
 - 12.6. the valuator omitted certain items and the similar units are being sold at R590 000.
13. The proper adjudication of the applications is of obvious importance to the respondent as it can directly impact on the right to adequate housing. It is important that any decision should be based on the correct facts in relation to inter alia the nature and extent of the respondent's default and the current market value of her property.
14. In light of the foregoing I am of the opinion that the Rule 46A application is presently not ripe for hearing and that the parties should be afforded an opportunity to amplify the papers in the Rule 46A application. The matter is postponed for the simultaneous adjudication of the summary judgment and the Rule 46A application (see: the full court decision in Absa Bank Ltd v Mokebe and Related Cases 2018

- (6) SA 492 (GJ) at par 29. Although it is my distinct impression that some of the procedural delays were caused by the respondent, the matter cannot proceed as a result of the aforesaid shortcomings in the applicant's case and that the applicant should bear the wasted costs occasioned by the hearing.

I therefore make the following order:

1. The Rule 46A and the summary judgment applications are postponed sine die;
2. The applicant can, if so advised, within 15 (FIFTEEN) days of this order, file a supplementary founding affidavit that addresses the aspects that have to be canvassed in terms of Rule 46A(5); the appropriateness of a reserve price and any other aspects that it deems appropriate;
3. The respondent can, if so advised, within 15 (FIFTEEN) days after receipt of the supplementary founding affidavit, file a supplementary answering affidavit that admit or deny the applicant's allegations and set out the reasons and grounds of opposition and raise any other aspects the respondent deems appropriate; and
4. The applicant is to pay the respondent's wasted costs occasioned by the hearing.

HJ DE WET

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 24 January 2023 Date of judgment: 7 July 2023 Attorneys for the applicant/ plaintiff: Velilo Tinto & Associates Inc Tinto House Cnr Solomon Mahlangu (previously Hans Strydom Avenue) & Disselboom Streets 0062 Wapadrand E-mail: service@tintolaw.co.za Tel:

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