

SOUTH AFRICA / JUDGMENT

Highland Gate Home Owner Association v Hurwitz (1819/2018) [2020] ZAMPMHC 42 (22 July 2020) [2020] ZAMPMHC 42

COURT

Middelburg High Court, Mpumalanga

BEFORE

Jansen van Rensburg

CASE / FILE NUMBER

1819/2018

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION

MIDDELBURG

Case :1819/2018

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

H.C. Jansen van Rensburg

Date : 22 July 2020

SIGNATURE

Case summary

Arrear levies – Issue summons – Rule 31 and 46 – Declare immovable property especially executable -Substituted service – Rescissions ito rule 42

In the matter between

THE HIGHLAND GATE HOME OWNER ASSOCIATION APPLICANT

AND

CHAD HURWITZ

RESPONDENT

JUDGMENT

JANSEN VAN RENSBURG AJ

INTRODUCTION

[1]. The applicant instituted legal proceedings against the respondent under case number 4037/2016 [1] for an outstanding amount of R 45 701-41 for levies. The application was issued on 20th January 2016 and on 28th April 2016 the applicant obtained a default judgment against the respondent for the outstanding amount due and payable for levies by the respondent to the applicant.

[2]. As at present date the respondent did not make payments of any levies to the applicant in terms of the Memorandum of Incorporation (the MOI).

[3]. The respondent alleges that the default judgment was granted in his absence but since becoming aware of the default judgment, the respondent did not take any further action against the applicant in this regard. It is now two years and two months since the default judgment has been granted against the respondent whilst the respondent has not brought an application for the rescission of the default judgment and has not made payment of the levies as required from an owner of immovable property in terms of the MOI.

[4]. For this reason the applicant brought an application in term of rule 31(4) and 46(1) of the Rules of the Superior Court for an order to declare the immovable property Erf 1[...] Dullstroom Ext 3 Registration Division J.T. Mpumalanga held under title deed T 0[...] specially executable.

THE APPLICANT

[5]. The applicant is the HIGHLAND GATE HOME OWNER ASSOCIATION (a section 21 Company) with limited liability and registration number

2005/030810/08 duly incorporated in terms of the Companies Act 71 of 2008.

[6]. The respondent bought the immovable vacant property Erf 1[...] Dullstroom Ext 3 Registration Division J.T. Mpumalanga held under title deed T 0[...] during 2008. The immovable property falls within the greater property so administered by the applicant.

[7]. ABSA has a mortgage bond of R 1 070 000 – 00 registered over the property.

[8]. In terms of the MOI [2] (adopted on 2nd February 2014), the respondents' domicilium citandi et executandi address is the physical address of the immovable property unless the respondent change that address within 30 days. [3] from the papers it is clear that the respondent did not change this domicilium citandi et executandi ever since.

[9]. The applicants' Notice of Motion has two parts. Part A deals with substituted service and Part B deals with the present

application to declare the immovable property specially executable. The responsibilities of an owner are inter alia to pay levies to the applicant for the administration of the whole estate, of which the respondent own a specific Erf which is the subject of this application.

[10]. The respondent refuse to make payment of the levies to the applicant. The applicant encountered many problems in serving a warrant of execution on an address at 1[...] G[...] E[...] Drive Silver Lakes Pretoria which indicated that the respondent was residing at this address. [4] Another winded search revealed that the respondent was residing at 2[...] S[...] Avenue Silver lakes Pretoria. [5] The respondent purportedly moved to his mother in Johannesburg. Service of the warrant of execution was unsuccessful. The applicant proceeded to serve the application on the mother of the respondent at the 2[...] S[...] Avenue Silver lakes. The applicant approached the court in terms of part A of the Notice of Motion for leave to serve its application by means of Substituted service; this was done. [6] the respondent had to serve its replying affidavit by 14th December 2018. [7]

[11]. The respondent has made no attempt to settle the levies due and payable to the applicant. At the time of the institution of legal action against the respondent, the amount due and payable to the applicant was R 45 701-41. At 4th July 2017 the outstanding amount due and payable to the applicant was R 105 195-09. The outstanding amount due and payable to the applicant consists of 52 months at that time. The respondent failed to make any payments to the applicant since 1st October 2013 (the affidavit was signed and commissioned on 22 July 2017).

[12]. The applicant submitted that it has suffered financial loss and that the outstanding balance is substantial. The respondent failed to make contact with the applicants to settle or negotiate any other arrangement in this regard. The vacant stand in not the primary residence of the respondent and section 26 of the Constitution of the Republic of South Africa Act 108 of 1996 is not applicable.

THE RESPONDENT

[13]. The respondent resides at 3[...] P[...] P[...] P[...] P[...] Street Wapadrand Pretoria. The respondent acknowledge that he bought the immovable property which is the crisp of this application from Gate Developers (Pty) Ltd for an amount of R 1 070 000 – 00 by way of a mortgage bond from ABSA Bank which was registered on 10th January 2008. [8]

[14]. The respondent acknowledged that he became and is still a member of the applicant and he is the owner of the immovable property referred to in this application. [9]

[15]. The respondent alleges that he was never informed of any payments for levies to the applicant.

[16]. The respondent alleges that the applicant instituted several legal actions against the respondent and even erroneously obtained default judgment against the respondent under case number 4037/2016. The respondent has apparently instructed his attorney to bring an application in terms of rule 42(1) of the Rules of the superior Court for the recession of the default judgment obtained by the applicant against the respondent.

[17]. The respondent alleges that the applicant had knowledge of his residential address but elected to issue summons and serve the summons on the address of the immovable property.

[18]. The respondent served a Notice to Oppose the applicants application in terms of Rule 31(4) and rule 46 of the Rules of the Superior Court. [10]

[14]. The respondent alleges that the parties should meet and settle any disputes between the applicant and the respondent. The respondent refers to the arbitration clause which should be applicable in this instance. The respondent refers to the issuing of a rescission application which is not issued. [11]

[15]. The respondent acknowledge that he refused to make payment to the applicant of any amount. [12]

[16]. Various allegations is made referring to the applicants summons.

EVALUATION OF THE EVIDENCE

[17]. It is clear from the papers that the respondent acknowledges and confirm that he is the lawful owner of the immovable property which is the crisp of this applicants' application.

[18]. It is clear that the respondent admit that he did not or does not intend to make payments of levies to the applicant based on the allegation that the respondent was not made aware of the levies to be paid and that the respondent was not informed thereof by the applicant.

[19]. The respondent alleges that the service of the applicants summons and default judgment is defective as the summons was served on the domicilium address which is a 'rock'. However, the respondent became aware of the present litigation against him and entered a Notice to Oppose the applicants application to declare the immovable property specially executable.

[20]. The respondent alleges that he is going to issue an application for the rescission of the default judgment handed down on 28th April 2016. The respondent alleges that he is going to issue an application for the rescission of the default judgment which is now in the making for four years and three months without anything happening.

[21]. In the mean time. Since 2016 the respondent refuses to make payment of the levies to the applicant who is legally in terms of the MOI entitled thereto. From the applicants view the amount of levies outstanding in 2017 was R 105 090-00 and having regard to the influx of time, due to none-payment by the respondent must accordingly have escalated further.

[22]. The respondent acknowledge that he is the lawful owner of the immovable property referred to in this application, that he resist in making any payments to the applicant based on an allegation that the respondent was not informed of the levies payable to the applicant. In this regard I am of the view that the respondents allegations and actions are not reasonable and acceptable under the circumstances. The following clauses in the MOI are of importance as it refer to examples of some specific services being provided and of which the owners are responsible to make payments to the applicant in order to sustain these services –

[22.1.]. ‘Development area’ means the land comprising of Portion 19 (a portion of protion6) of the farm Kareekraal no 135 JT held under deed of Transfer T[...] in extent 317,6275 hectares, remainder of portion 9 of the farm Kareekraal no 135 JT and Portion 24 of the farm Kareekraal no 135 JT.

[22.2.]. ‘Clause 3.3. : Membership of the association is compulsory on all the registered owners of an Erf in the development area.

[22.3.]. ‘Clause 3.12 : Every member shall comply with –

Clause 3.12.1 : The provisions of these present and any further rules and regulations passed by the ASSOCIATION in terms thereof...’

Clause 3.14 : The members shall be jointly liable for the expenditure incurred in connection with the ASSOCIATION ‘

[22.4.]. Clause 4 : Levies payable to the applicant. The clause is clear and concise as to the rights of the applicant in this clause to the reasons for and the administration of levies. The clause dealing with levies consists of four typed pages of the MOI. [13]

[22.5]. Clause 6 deals with the responsibility for payment of rates and taxes and services of the common property to the Council. [14]

[22.6]. Clause 7.1. deals with the supply of water and payment therefore. [15]

[22.7].

Clause 7.2. deals with the supply of electricity. [16]

[22.8]. Clause 7.3.8. and 7.3.9. deals with the internal sewerage and sewer reticulation plant as well as the maintenance of the internal storm water system.

[23]. It is my view that these services is not ‘free of charge’ but that levies due and payable to the applicant is used to make payments to suppliers or contractors on behalf of all the owners of property in the main enclosure which is administered by the applicant.

[24]. The respondents allegation that the sheriff served the summons 'under a rock' is in my view farfetched. The efforts by the applicant to trace the respondent shows that the applicant went out of its way to trace the respondent. Not even the service of the application on the respondents' mother was effective; the applicant had to endure legal costs to serve the notices and the application via substituted service. In this regard the applicant has no 'fault on its side' to have tried every manner to trace the respondent.

.

[25]. It is clear that the property of the respondent is a vacant piece of land and which is not the primary residence of the respondent. I need not consider rule 46A of the Rules of the Superior Court in this instance to determine whether there is alternative methods whereby the respondent could satisfy the debt owed to the applicant. For this reason the said immovable property is not classified as 'residential property' and section 26 of the Constitution of the Republic of South Africa Act 108 of 1996 is not applicable.

[26]. It is clear that the respondent is not a 'layman' and from the papers it is clear that the respondent understand the processes of the law. The respondent, other as to refer to his reluctance to pay and his reliance on an arbitration clause, has put nothing before this court as a reason not to declare the immovable property specially executable. References to a purported rescission application which is 4 years in the making must rather be interpreted as that the respondent is deliberately and wilfully frustrating the applicant and thereby enjoying the fruits of the immovable property. This is not in the interest of justice as the applicant and for that matter the remaining owners, has to bear the cost of the expenses of the respondents property whilst the respondents' defence is that he was never informed of levies to be paid to the applicant. This does not make sense as reasonableness dictate that levies is payable to maintain properties and services as referred to above.

[27]. Allegations by the respondent of purported disputes has not been proven by the respondent. For all purposes it does not take the respondents case any further. None of the purported objections or defences of the respondent is before this court and this court is not required to adjudicate any matter or allegation other as the applicant application to declare the immovable property especially executable.

[28]. The issue before the court has its origin in a summons that was issued by the applicant and served on the chosen domicile in terms of rule 4(1)(a)(iv) of the respondent whereby such service is acknowledged as proper service [17] followed by a default judgment and now the application in terms of rule 31(4) and 46 of the Rules of the Superior Court to declare the immovable property specially executable. No arbitrator has the powers or authority, other as the High Court to declare immovable property especially executable. For this reason the respondents' reliance on arbitration should fail.

[29]. From the MOI it is clear that the respondent committed himself to the contents thereof and to allege that he was not aware of any levies payable to the applicant is not reasonably possibly true. By becoming a member of the applicant, there is a binding agreement in which the

respondent agreed to and be bound by the decisions of the applicant being lawful and enforceable. There is no allegation by the respondent that the payment of levies to the applicant is unlawful or contrary to any statute or regulation or any by-laws. The only allegation is that the respondent was not aware of the payments of levies and that the respondent declined to make such payment of levies to the applicant.

[30]. The allegation by the respondent that the summons was served on the property referred to in this application which was not the domicile address of the respondent need to be analysed in the context of the allegation, the responsibility of the respondent and the application if case law.

[30.1.]. The chosen domicile was the address of the immovable property.

[31.2.]. The respondent has never changed the domicile address within 30 days after purchasing the immovable property read with clause..... For all purposes the domicile address remained

effective and the applicant served its summons on this domicile address which accordingly is 'good service'. [18]

[31]. A court is not the forum to re-negotiate terms and conditions of any contract or agreement between the parties. A courts' duty is to apply the law on the matter before it and to give a judgment; not to get involved with legal arrangements between parties. [19]

[32]. Being vacant land the court does not have to engage in setting any price for the sale in execution.

[33]. The analysis of the founding, answering and replying affidavits clearly confirms that the applicant has made out a proper case against the respondent. [20] As mentioned for the respondent to sit and wait for four years and two months with only a threat of a rescission application does not make sense. It is clear from the papers before me that the respondents' actions and delaying tactics is rather deliberate

attempts to keep the applicant hostage in a situation where the prejudice suffered by the applicant outweigh the respondents rights

by far. It would not be in the interest of justice to allow such a situation to proceed ad infinitum but rather that this court should apply its discretion to bring the matter to finality.

ORDER

The following order is made–

1. The relief in prayer 1 to 3 of the part B of the Notice of Motion is granted.

H.C. JANSEN VAN RENSBURG

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MBOMBEL DIVISION

DATE OF HEARING AND JUDGMENT: 22 JULY 2020

APPLICANTS ATTORNEY IB CHILOANE ATTORNEYS C/O TK SEGODI ATTORNEYS Cell : 071 631 3858 EMAIL: ib.chiloane@gmail.com Ref : IBC/171/CIV-NST ATTORNEY FOR THE 1ST

RESPONDENT WIEKUS DU TOIT ATTORNEYS TEL : 013 – 755 3697 EMAIL : mzizi@wdtatt.co.za

Ref : Mr Dlamini [ANS2/002](A5/19)

- [1] Page 58 annexure C .
- [2] Annexure B.
- [3] Clause 20.8 annexure B.
- [4] Windeed search annexure E
- [5] Windeed search annexure G
- [6] Page 86 bundle 1.
- [7] Page 88 bundle 1.
- [8] Page 96 bundle 2 para 6..
- [9] Page 96 bundle 2 para 8.
- [10] Page 91 bundle 1.
- [11] Page 104 bundle 2 para 43; page 118 para 6.1.2.
- [12] Page 106 bundle 2 para 51.1.
- [13] Page 149 to 152 Bundle 2.
- [14] Page 154 para 6.1. as applicable.
- [15] Page 155 para 7 as applicable.
- [16] Page 155 para 7.2. as applicable.
- [17] Amcoal Collieries ltd v Truter [1989] ZASCA 99; 1990 (1) SA A at 6 A – B; Sandton Square Finance (Pty) Ltd v Biagi, Bertoli and Vasco 1997
(2) 258 (W) at 260 C.
- [18] Van der Merwe v Bonaero Park (Edms) Bpk 1998 (1) SA 697 (T); Muller v Mulburton Gardens (Pty) Ltd 1972 (1) SA (W) at 332 G; United Building Society v Stembach 1942 (WLD) 3; Wishart NO and Another v First-Rand Bank Ltd (3459/2013) (2014) ZAKZDHC 58 (28 November 2014); Hollard's v Estate Kruger 1932 TPD 134.
- [19] Unreported case the Wilds Home Owners Association & Others v Van Eden & Others Case 53643/2009 GPHC.

[20] Tamarillo (Pty) Ltd v BNN Aitken (Pty) Ltd 1982 (2) SA 398 (A) at 430 G; Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 E – G; Townshend Productions (Pty) Ltd v Leach & others 2001 (4) SA 33 (C) at 38.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMHC/2020/42.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/highland-gate-home-owner-association-v-hurwitz-unknown-topic-ampmhc-2020>

Prepared on 9 October 2026 · Esheria