

SOUTH AFRICA / JUDGMENT

Phaweni and Another v Changing Tides 17 (Proprietary) Limited N.O and Others (24441/18) [2020] ZAGPPHC 612 (20 October 2020)

[2020] ZAGPPHC 612

COURT

North Gauteng High Court, Pretoria

BEFORE

H J de Vos

CASE / FILE NUMBER

24441/18

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

20/10/2020

Case

No: 24441/18

In

the matter between:

TIYANI
PHAWENI
1st APPLICANT
ID
[....]
LEBOGANG
MOLOGADI
PHAWENI
2nd APPLICANT
And
CHANGING
TIDES 17
(PROPRIETARY)
LIMITED
N.O
1ST RESPONDENT
THE
SHERIFF OF THE HIGH COURT
(ROODEPOORT
SOUTH)
2ND RESPONDENT
PURPORTED
BUYER OF THE PROPERTY IN
QUESTION
FROM 2ND
RESPONDENT
3RD RESPONDENT
THE
OFFICE OF THE TITLE DEEDS
REGISTRY
JOHANNESBURG
4TH RESPONDENT

JUDGMENT

DE VOS J

- [1] The first and second applicants issued an application set down for the 18th of March 2020, applying for the suspension of the execution of a sale of execution held on the 12th July 2019. The property concerned is known as Erf [...] Gauteng). The said property is held by virtue of deed of transfer no D3929/2015 held under a covering mortgage bond registered in favour of 1st Respondent. It is common cause that said property was sold on 12 July 2019 in execution after a judgment was granted in this court, under case number 24441/18. The said judgment was granted in favour of the first respondent (plaintiff).
- [2] The 2 applicants were the defendants, the order was granted jointly and severally against both applicants, the one paying the other to be absolved in the following terms:

“Payment of the sum of R679 419.60 with interest at the rate of 11.10 % as from 08 March 2018.”

- [3] The court further declared the said property to be specially executable. The registrar of this court was further authorized to issue a warrant of attachment in respect of the said immovable property. Subsequent to that order, the said property was sold.
- [4] The present application was issued on the 12 July 2019, the same date on which the property was sold.
- [5] The applicants contend that the sale of execution that was held on the 12 July 2019 was unlawful. The applicants further contend that:
- (i) the 1st respondent contravened the provisions of rule 46A in that there was no personal service of the application.
 - (ii) the 1st respondent did not comply with the provision of both rule 4(a), rule 6 and rule 46(7)(a).
 - (iii) The applicants seek to interdict any buyer who attended and successfully bidded on the property to obtain transfer of the said property.
- [6] Briefly stated, the applicants therefore is seeking a temporary interdict against the first respondent not to sell the property to a third party (for a period a court may deem fit), and to temporarily interdict the second respondent not to continue with the transfer of the property, (for a period that the court may deem fit). No cost order is sought.
- [7] The respondents oppose this application and the first respondent duly filed his answering affidavit. It is not disputed that the said property was sold in execution in terms of the court order on the 12 July 2019 for an amount of R262 000.00 to a certain Mr S.W Manzim. The opposing affidavit and accompanying documents was served on the 13th December 2019 at the chosen domicillium of the two applicants. This was effected by affixing it to the principal door at 8 Berlingham Street, Infra Office Park, Highveld, Centurion a chosen domicillium citandi executandi of the first applicant.
- [8] The applicants failed to set the application down for hearing. On the 24th of January 2020 the applicants were informed that the respondents have set the matter down for hearing on the 18th of March 2020. As no delivery notification was sent by the destination server it was subsequently again set down by the respondent's attorney on the 19th October 2020. Again no delivery notification was sent by the destination server. On the 28th September 2020 a notice of set down was served upon the first applicant personally. The said matter is now set down as it appears

on the return of service confirming that on the 20th September 2020 the first applicant was served personally with the documents pertaining to this application as well as the notice of set down for the 19th day of October 2020 in this court.

ISSUES

IN DISPUTE

- [9] The applicants apply for an order against the respondents in terms of the provisions of rule 45A and rule 42(1)(a), (b)(i), of the rules of court. The relief sought by the applicants is for a temporary interdict suspending the execution of the sale and a temporary interdict to prevent transfer of the property. The temporary interdict is to last for a period the court deems fit.
- [10] The relief sought by the applicants are legally untenable. Rule 45A is designed to preserve the status quo, whilst the purpose of rule 42 is to rescind a judgment. Although the application by the applicants was issued on the 12th July 2019, to date hereof, no application for the rescission of the judgment has been enrolled by the applicant. The applicants are asking for temporary interdicts. Effectively applicant is seeking a final interdict as no provision is made for a return date. It is evident from the notice of motion that no rescission of the judgment is sought by the applicants. The application is further brought on the short form and no provision is made for the notice of intention to oppose or for the filing of the answering affidavits. The applicants have further failed to provide the respondents with a notice for a service within a 15 km radius required by the rules of court.
- [11] The respondents contend that the relief sought, in its current form, is not competent and should not be entertained by the court.
- [12] Before dealing with this point it is apparent from the papers that the applicants has made no case, in the papers before me, for their contention as to why the sale in execution was unlawful. The applicants merely state that the first respondent contravened the provisions of rule 46A in that there was no personal service of the application to obtain default judgment. The papers filed in the default judgment application, however refers to a supplementary affidavit filed by Rene Caspe employed at the first respondent's attorneys offices stating that she received a call from the first applicant on the 8th June 2018 who confirmed that they have indeed received the summons in the matter and further that they are not residing at the property. The property is therefore not a primary residence of the applicants. Rule 46A does not apply. Alternatively, and even if the court should hold that rule 46A finds application, rule 46A(3)(d) provides that the court can direct the manner of service it will accept. It follows that personal service is not peremptory. It is apparent that the judge who heard the default application was satisfied with the service effected and in absence of any evidence to the contrary no case is made out to support the contention as to why the order in itself to execute was unlawful.
- [13] The applicants also allege that the first respondent did not comply with the provisions of both rule 4(a) and rule 6. The applicants however failed to set out the grounds of non-compliance in their papers. The applicants are expected to set out its case in clear and concise terms see *Renault v Mecklenberg (Pty) Ltd 1996(1) SA 75(W)*. To simply state that the first respondent did not comply with the provisions of rule 4 and rule 6 does not assist the

applicants. In the absence of setting out the facts relied upon the first respondent and all the other respondents is left in the dark as to the case it needs to meet.

- [14] The applicants further allege that the first respondent did not comply with the provisions of rule 46(7)(a). The first respondent contends that it did comply with the provisions of rule 46(7)(a). It is clear from the papers that the warrant of attachment was served on the 19 November 2018. Subsequently to that the sale in execution was arranged. There is therefore no merits in this argument.
- [15] The applicant further seeks to interdict any buyer who bidded on the property from effective transfer. Although the name of the buyer appears from the documents pertaining to the sale in execution, the said buyer is not a party to the proceedings and also has not been cited by the applicants. On these grounds alone the application should fail.
- [16] The applicants further allege in the papers in a bold and vague way that they believe that the first respondent charged legal fees without the knowledge and / or consent of the applicants. The relevant provisions in the loan agreement and specifically clause 24, specifically makes provision that the applicants shall pay on request all costs and expenses of any nature, including but not limited to all legal costs on an attorney and own client basis, including commission and those charges incurred by the respondent in taking steps to exercise or enforce the respondent's rights in terms of the loan agreement. As it appears from the first respondents opposing affidavit the applicants have for the duration of the loan agreement been provided with the home loan statement in which each and everything debited to the account has been listed and that the applicants never disputed the account. The applicants own version, as set out in the founding affidavit, admits that they are indebted to the first respondent without stating the amount. Without specifying any amount no other inference can be drawn as this allegation is speculative and without a factual basis.
- [17] In my view, the applicants have failed to make out a case that warrants the relief sought in the defective notice of motion and the application should be dismissed with costs. In terms of the agreements entered into between the 1st of 2nd applicants (as sureties) and the first respondent, the first respondent is entitled to its costs on the scale as between attorney and client.
- [18] Accordingly, the following order is made:
1. The application is dismissed;
 2. The first and second applicants are ordered to pay the costs of this application on an attorney and client scale.

H J DE VOS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 20 OCTOBER 2020

DATE OF JUDGMENT: 20 OCTOBER 2020 EX TEMPORE (22 OCTOBER 2020 JUDGMENT
TRANSMITTED ELECTRONICALLY)

APPEARANCES:

FOR THE APPLICANTS: IN PERSON

FOR THE FIRST RESPONDENT: ADV P.I OOSTHUIZEN

INSTRUCTED BY: VELILE TINTO AND ASSOCIATES INC

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Prepared on 12 October 2026 · Esheria