IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

Reportable	Yes ~~/ No~~

CASE NO: EL 1535/2017
ECD 4135/2017
Date heard: 28 January 2021
Date delivered: 11 February 2021

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD **APPLICANT**

and

WONGA SIMTEMBILE MALUSI **RESPONDENT**

JUDGMENT

NOTYESI AJ:

INTRODUCTION:

[1] The application had been launched on 03 April 2019 in terms of rules 46 and 46A of the Uniform Rules of Court for an order declaring immovable property, specially executable for the amount of R3 954 690,18, interest thereon and costs.

[2] The respondent, Mr Wonga Simthembile Malusi, delivered his notice to oppose on 10 April 2019, and his answering affidavit on 21 June 2019. Thereafter, the applicant delivered its replying affidavit on 11 July 2019. The application was heard on 28 January 2021.

[3] It was conceded by the applicant that as at the time the application was set down for hearing on an opposed basis, the respondent had since effected payment of the arrears and was up to date with all his arrears. Based on the fact that the arrears had been settled in full, the application for execution had become academic. The only issue that that had fallen to be decided was that of the costs occasioned by the application for execution.

[4] The applicant, in his rule 15A practice notice set out the issue for determination as follows:

> *"That the applicant is entitled to the costs occasioned by the application in terms of Rule 46 as read with Rule 46A of the Uniform Rules of Court, and such costs to be on the scale as between attorney and client in accordance with the loan agreement and mortgage bond."*

[5] Mr *Wood*, who appeared for the applicant, reiterated that the only issue to be decided was that of costs. He submitted the trite legal position that in considering the costs of the application, the court has to consider which party would have been successful on the merits of the application. Mr *Mhlanga*, did not argue to the contrary.

[6] Mr *Wood*, pointed out that I should consider the following factors:

(a) when the application was issued, the respondent had been in arrears in the amount of R652 948, 60;

(b) that the last payment made by the respondent prior to the institution of the application was R100 000, 00, which was paid on 13 December 2018;

(c) that the respondent has effected payment of the arrears as *ad hoc* payments and that the arrears are accordingly now up to date; and

(d) that, as a result of the outstanding amount, the applicant was entitled to institute the application and that the respondent is accordingly liable for the costs of the application.

[7] Mr *Mhlanga*, submitted that once the arrears were effectively paid and the stop order reinstated, the bond was automatically reinstated. The applicant was not entitled to proceed with the execution application. The respondent attacked the applicant's decision to institute this application after obtaining summary judgment against the respondent on 4 September 2018. The submission by Mr *Mhlanga* was that, until that judgment sounding in money was executed, the applicant should not have launched this application. The respondent submitted that he had assets for the realisation of the summary judgment.

DISCUSSION

[8] The trite legal principle on costs is that they generally follow the event. This means that the successful party must be awarded costs. This is the basic Rule on which the court exercises its discretion in adjudicating the issue of costs. The principle that costs should follow the event can only be departed on good cause shown. *Masande Ladlokova v Minister of Correctional Services and Another* (see unreported decision of the Eastern Cape Judgement under Case No.: 1076/2006 delivered by Pakade, J and authorities referred to therein).

[9] There must be substantial success before a party can be said to have been successful for the purpose of having costs awarded in his or her favour. In *Fleming v Johnson & Richardson* 1903 TS 319 Innes CJ said at 325:

> *"It is a sound Rule that where a plaintiff is compelled to come to court and recovers a substantial sum which he would not have recovered had he not come to court, then he should be awarded his costs."*

[10] This principle was confirmed in numerous cases by the Supreme Court of Appeal such as *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488 and the recent case of *Stiff v QData Distribution (Pty) Ltd* 2003 (2) SA 336 (SCA). In the latter case Mthiyane JA had the following to say at 343 C-D:

> *"Nor has it been the practice to deny full costs to a party who achieved substantial success. In Golding v Torch Printing & Publishing Co (Pty) Ltd & Others 1948 (3) SA 1067 (C) at 1092 a plaintiff who had succeeded on all the major issues raised but failed on some minor issues, was held to be entitled to all his costs. In casu the plaintiff has been found to be entitled to payment of its full claim together with mora interest and has been unsuccessful only on a minor issue. In the exercise of our discretion and having regard to the above principle, there is no basis for denying the plaintiff its full costs."*

[11] In this matter the proceedings were instituted on 3 April 2019 after unsuccessful attempts were made to execute the summary judgment. A writ of execution was issued out of court on 21 September 2018. A return of service dated 4 October 2018 indicates that the respondent informed the sheriff that he was unable to pay and had no executable property other than the bonded property, and the sheriff issued a *nulla bona* return. On the same day, the respondent allegedly signed a *nulla bona*-certificate wherein he admitted that he was unable to pay and had no property to satisfy the judgment debt.

[12] Surprisingly, on 13 December 2018 the respondent paid a sum of R100 000 and, thereafter, he made the following payments:

- R20 000, on 7 March 2019;
- R120 000, on 1 April 2019;
- R200 000, on 17 May 2019;
- R145 000 on 28 May 2019.

- R100 000, on 4 June 2019; and
- R150 000, on 3 July 2019.

[13] The debit order in the sum of R47 552, 05 was processed on 7 June 2019 and it was indeed honoured. The respondent makes these allegations in his answering affidavit:

> *"On the 7th of June 2019, an amount of R47 552, 05, was through a stop order, and by the applicant herein deducted from the respondent's account, I have to point out that this is indicative of the automatic reinstatement of the mortgage bond and is in line with the Nkatha Judgment. The payments alleged herein above are all attached herein as, WSM-04,"*

[14] In its response, the applicant admitted all the payments referred to above and the stop order, but sought to counter the respondent's allegations by alleging that *"despite the payments, the home loan account of the defendant/respondent as at the date herein is 1.44 months in arrears and is in arrears in the sum of R68 711, 32. This is after consideration has been taken to the payment of R150 000, 00 paid on Wednesday, 3 July 2019."*

[15] Mr *Wood* further pointed to the return of service and the *nulla bona*-certificate to justify the launch of this application. The return of service and *nulla bona-certificate* are disputed by the respondent. The probabilities are overwhelming in light of the admitted payments made subsequent to the judgment that the respondent had means, other than the mortgage property, to settle his indebtedness to the applicant.

[16] The concession that the applicant was no longer pursuing the main relief in this application is only contained in the applicant's heads of arguments, which were served on 09 of September 2020. There is no specific date when the applicant became aware that the arrears had been settled. The applicant has not deemed it necessary to file a supplementary affidavit dealing with the allegations relating to the date of payment in respect of the alleged outstanding

arrears, upon which the applicant relied to justify an order of costs in this application pursuant to the receipt of the respondent's answering affidavit.

[17] I am satisfied that the respondent effectively reinstated the mortgage bond during or about June 2019 when the amount of R47 552, 05 was processed through a stop order which was received by the applicant. There was no basis to continue with this application after this payment was received in June 2019. The applicant is in possession of its own records. The applicant should know when payments are received and the status of the account. The respondent, correctly in my view, argued that in accordance with the judgment of *Nomsa Nkatha v First National Bank and Others* (CCT73/15) [2016] ZACC 12; 2016(6) BCLR 794(CC); 2016(4) SA 257 (CC), the bond with the applicant was reinstated. The evidence shows that the bond was reinstated during June 2019 when the deduction of R47 552, 05 was processed and honoured.

[18] I do not agree with Mr *Wood* that the respondent should have made a tender of costs at that stage. The reinstatement of the bond is a matter of law. The applicant should have known, once it received the respondent's answering affidavit that it was not going to obtain any relief other than a costs order. It should have demanded for costs from the respondents. There is no indication that the applicant before delivery of the heads of argument, had informed the respondent that it was no longer pursuing the application, but only insists on costs. The respondent was entitled to oppose the application after the agreement had been revived.

[19] That is not the end of the matter. At the time the application was instituted the respondent was in arrears and the application was initially set down for hearing on 16 April 2019. The applicant was armed with the return of service and the *nulla bona*-certificate which both documents, indicate that the respondent was unable to pay and had no movable property other than the mortgage property. When the application is considered before the delivery of the answering affidavit, the applicant was justified to launch and pursue the application. The applicant had an unsatisfied summary judgment and the account of the respondent was in arrears. The court hearing the application would have

considered all those factors including the circumstances of the respondent. In my view, the applicant is entitled to costs, but excluding all the costs incurred after delivery of the answering affidavit.

[20] The parties in their contract agreed that legal costs for debt recovery will be as between attorney and own client. The court must be slow to interfere with the contract of the parties. On the basis of the agreement between the applicant and the respondent contained in Clause 1.2.3.1, costs will be on attorney and client scale.

CONCLUSION

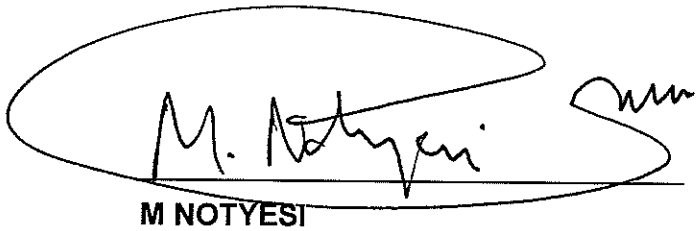
[21] I am satisfied that this court retains its discretion in awarding costs to a successful party. I have considered the conduct each party in this litigation. I have also taken into account the fact that the applicant in the summary judgment initially included the rule 46 and 46A application, though it was not pursued at the hearing of the summary judgment in line with the practice directives, as Mr *Wood* correctly submitted.

[22] I have pointed out that the applicant was entitled to institute the rule 46 and 46A application and pursue such application, before the delivery of the answering affidavit. However, the application should not have been pursued after the delivery of answering affidavit. I make an appropriate order of costs, taking into account all the circumstances of this case, which I have set out above.

[23] In the result, it is ordered that:

1. **The respondent pay the applicant's costs of the application up to the delivery of the respondent's answering affidavit, such costs to be paid on an attorney and client scale.**

2. **The costs referred to in para 1 shall exclude the reserved costs of 25 June 2019 in terms of which, each party is directed to pay its own costs.**



M NOTYESI
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant	:	MR C B WOOD
Instructed by	:	DRAKE FLEMMER & ORSMOND Quenera Park 12 Quenera Drive Beacon Bay East London
Counsel for the Respondent	:	MR MHLANGA
Instructed by	:	Ezwena Attorneys C/o Precious Muleya Attorneys 19 Quanza Street Quigney East London