

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 2490/2018

In the matter of

**THE BODY CORPORATE OF OAKMONT**

**APPLICANT**

and

**ALFRED KALU ORIE AWAH**

**RESPONDENT**

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**JUDGMENT**

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**DLAMINI AJ:**

**INTRODUCTION**

- [1] The applicant is THE BODY CORPORATE OF OAKMONT, a body corporate duly established in terms of section 36 of the Sectional Titles Act, 1986, read together with section 2 of the Sectional Titles Schemes Management Act, 2011. The applicant is tasked with the management of the sectional title scheme known as OAKMONT established under scheme number SS[...] and with chosen domicile situated at 3[...] O[...] A[...], Unit F[....] O[.] A[...] Office Park, Randburg, and Johannesburg.
- [2] The respondent is ALFRED KALU ORIE AWAH, a major male person with birth date 16 September 1956 who is the registered owner of unit 3 in the sectional title development known as OAKMONT, scheme number SS[...] situated J[...] C[...] G[...] E[...], ZANDSPRUIT, EXT [...]. City of Johannesburg, Gauteng Province.
- [3] The applicant seeks the following orders:-
- 3.1 seeking the respondent's immovable property known as Unit [...], O[...], J[...] C[...] G[...] E[...], Zandspruit, Ext [...] declared executable in terms of Rule 46 of the Uniform

Rules of Court and that a warrant of execution be authorised and issued against the Property;

3.2. an order authorizing it to restrict and/or limit the water supply to the Property to an amount of 6000 litres per month unless and until the respondent makes payment of the arrear water consumption charges amounting to R 6 628,01 for the period 25 March 2014 to 24 August 2017;

3.3 an order authorizing the sheriff to grant a contractor, nominated and appointed by applicant access to the Property in order to restrict/limit the water supply;

3.4 an order holding the respondent liable for the attorney and client costs incurred by the applicant

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[4] The applicant entered into a management agreement with AIV Properties Specialists in terms of which AIV Properties Specialists was appointed as the applicants managing agent, to amongst other things to control, manage and administer the applicant's common property.to deal with the collection of its financial contributions and to generally manage its affairs.

[5] Every owner of a unit in a sectional title development automatically becomes a member of the scheme's body corporate when a sectional title is transferred into his name. The Respondent became a member of the applicant on the 3<sup>rd</sup> March 2010 when the property was registered in his name.

[6] The applicant's statutory obligations, arising from section 37 of the Sectional Titles Act of 1986 (ST Act) and section 3 of the Sectional Titles Scheme Management Act of 2011 (STSMA) include the following:-

(a) the establishment of a fund, sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common property, for the payment of rates and taxes and other local authority charges, for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation of the body corporate;

(b) to require the owners, including the respondent, to make contributions to the fund established by the applicant for the purposes of satisfying any claims against the body corporate;

(c ) to determine the amounts to be contributed by its members;

(d) to raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections;

(e ) to control, manage and administer the common property for the benefit of all owners.

[7] The applicant alleges that the Respondent despite his statutory obligation to contribute to the applicant the respondent has failed to do so. As at the 12<sup>th</sup> September 2017, the respondent was indebted to the applicant in the sum of R202 410,00. Despite having become the owner on the 3<sup>rd</sup> March 2010, the respondent failed and continues to fail to make any payment. As the results of the respondent's failure, instituted legal proceeding, obtain warrants of execution and attempted to execute such warrants.

[8] Applicant alleges that it is unable to execute its judgment as it appears from the Sheriff return that the Sheriff was unable to serve the warrant of execution due to the fact that the respondent is not residing at the unit, but that it was in fact occupied by a tenant Miss Cynthia Pillay and further that the Respondent is currently in Nigeria.

[9] In an effort to collect its debts, the applicant entered into a settlement agreement with the respondent's son, who was apparently duly authorised by the respondent to enter into settlement agreement with the applicant.

The material terms of which, was that the Respondent acknowledge his indebtedness to the applicant and agreed to make payment in the sum of R40000, 00 before February 2016.

## RESPONDENTS CASE

[10] In his replying papers the Respondent raised various points in *limine*

(a) Authorization from the Body Corporate of OAKMONT to depose.

The Respondent argues that the deponent Andre Steward was not duly authorised to depose to an affidavit on behalf of the Applicant.

(b) The second point in line

The Respondent argues that the applicant has failed to annex all the relevant documentation as read in accordance with Rule 46(A) 5.

(c) Third point in line.

This point deals with the requirements of Rule 6(1) of the uniform rules of court read as follows:

6(1) Save where proceedings by way of petition are prescribed by law, every application must be brought by notice of motion supported by an affidavit as to the **facts upon which the application relies for relief.**

6.2 The “**facts upon which the applicant relies on relief**” entails the following:-

6.2.1 The applicant’s locus standi;

6.2.2 The facts indicating that the court has jurisdiction’

6.2.3 The cause of action on which the applicant relies. The respondent is entitled to raise an objection in *limine* that the founding affidavit does not make out a *prima facie* case for the relief claimed;

6.2.4 The evidence in support of the application.

[11] The Respondent main difference appears to be that the applicant’s statement of the respondent arrear levies and related charges incorrectly includes legal cost and interest.

The respondent further submits that the applicant has not complied with either rule 46 and rule 46 (A) of the Uniform Rules of Court.

[12] The Respondent submits that the applicant has not made out a case for a final order to limit the supply of water and to cut electricity to the property.

[13] It’s my view that the Respondent first point in *limine* has now become mute as the applicant has satisfactorily dealt with and annexed the necessary resolution in this regard.

[14] The relevant provisions of Rule 46 of the Uniform rules of court read as follows:

46(1) (a) Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgement debtor shall be issues unless:

- (i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person as insufficient movable property to satisfy the writ; or
- (ii) such immovable property has been declared to be specially executable by the court or where judgement is granted by the registrar under rule 31(5).

The next question is whether the respondent qualifies for judicial oversight as provided for in the Rule 46 (A).

The relevant provisions of Rule 46(A) of the Uniform rules of court read as follows:-

46(5) Every application shall be supported by the following documents, where applicable, evidencing:-

- (a) the market value of the immovable property;
- (b) the local authority valuation of the immovable property;
- (c) the amounts owing on mortgage bonds registered over the immovable property;
- (d) the amount owing to the local authority as rates and other dues;
- (e) the amounts owing to a body corporate as levies; and
- (f) any other factor which may be necessary to enable the court to give effect to subrule (8).

There is a distinction between rule 46 and rule 46A. Rule 46 deals specifically with the execution against immovable property other than the residential immovable property of a judgment debtor, the underlying principle being that, save where immovable property has been specially declared executable, execution shall not be issue against immovable property until movable property has been excused and it appears that the movable is insufficient to satisfy the writ.

Rule 46A on the other hand deals with execution of the debtor's residential immovable property alternatively is primary residence.

The court in *First Rand Bank Ltd v Foldable* said the following:-

- (a) The judicial oversight that must be exercised is therefore limited to those instances
- (b)

[15] In my view the property does not fall within the definition in respect of the property as defined in Rule 46 (A).

The Respondent in his confirmatory affidavit states the following:-

“Alfredo Kalu Orie Awah formally temporarily resident at a Pinehurst, J[...], C[...], G[...], E[...], B[...], Northriding, South Africa, and permanently resident in resident No.21 U[...] Street, Nigeria.

The respondent goes on in saying “since the 11<sup>th</sup> November 2012 had been bed ridden on account of debilitating illness and is now unable to move limbs or travel out of permanent resident” in Nigeria).

It is thus clear from the above that firstly, the property is not the respondent's principal primary and the only dwelling.

The Respondent when he was even still in South Africa was resident at a P[...] J[...] C[...] G[...] E[...]. Further that he has since the 2012 been resident in Nigeria and has not even on the hearing of this matter returned to South Africa.

[16] Respondent further avers that he has acquired the following properties:-

- (i) Unit 153 SS W[...] height, B[...] Street, V[...] V[...], E[...] 62, Gauteng.
- (ii) Unit 69 SS W[...] height, B[...] Street, V[...] V[...], E[...] 62, Midrand, Gauteng
- (iii) 9 P[...], J[....] C[...] Golf Estate, B[....] Rd, Northriding.
- (iv) 3 O[...], J[...] C[....] Golf Estate, B[....] Rd, Northriding.

It is apparent from the above list that the respondent has acquired the property purely for commercial gains. Alternative the above list shows that the property is not to deal with the collection of its financial contributions and to generally manage its affairs.

[17] The question to be answered here is whether:-

1.1 the respondents qualities for judicial oversight as provided by the uniform Rule 46(A) or 46(1) of the uniform rules of court.

1.2 we the respondent's indebtedness can be disputed on *bona fide* grounds

[18] In this regard the applicant submits that the respondent in his capacity as judgement debtor does not reside at the property sought to be declared specially executable and has in fact relocated to Nigeria.

That the respondent is currently leasing the property and collecting rental from this parties, further the applicant obtained three separate judgements against the respondent amount to R128 000,00, excluding interest and legal fees. Accordingly, plaintiff submit that the respondent does not enjoy the protection offered by Rule 46(A) and has satisfied the jurisdictional requirements contained in Rule 46(1) a.

[19] The respondent denies that he does not enjoy judicial oversight in respect of the property in terms of Rule 46(A). The Respondent contends further that Applicant's submission that the respondent is permanently residing in Nigeria is correct.

[20] The relevant provisions of Uniform Rule 46(1) (a) read as follows:-

**46(5) Every application shall be supported by the following documents, where applicable, evidencing:-**

- (a) the market value of the immovable property;**
- (b) the local authority valuation of the immovable property;**
- (c) the amounts owing on mortgage bonds registered over the immovable property;**
- (d) the amount owing to the local authority as rates and other dues;**
- (e) the amounts owing to a body corporate as levies; and**
- (f) any other factor which may be necessary to enable the court to give effect to subrule (8).**

The relevant provisions of Uniform Rule 46(A) read as follows:-

(1) "This rule applies whenever an execution creditor seeks to execute against the residential immovable property of the judgement debtor".

(2) A court considering an application under this rule must:-

- a. establish whether the immovable property which the execution creditor intends to execute against as the primary residence of the judgement debtor.

[21] The court in FirstRand Bank Ltd v Folscher expresses the Rule 46(A) as follows:-

**46(5) Every application shall be supported by the following documents, where applicable, evidencing:-**

- (a) the market value of the immovable property;**
- (b) the local authority valuation of the immovable property;**
- (c) the amounts owing on mortgage bonds registered over the immovable property;**
- (d) the amount owing to the local authority as rates and other dues;**
- (e) the amounts owing to a body corporate as levies; and**
- (f) any other factor which may be necessary to enable the court to give effect to subrule (8).**

[22] In my view the property does not fall within the definition in respect of the property as defined in Uniform Rule 46(A).

In the power of attorney that the respondent signed authorising his son to act in his behalf he says the following, "I am quoting the power of attorney in full:-

**THIS POWER OF ATTORNEY** is given this 10<sup>th</sup> day of NOVEMBER 2016, by **ALFREDO KALU ORIE AWAH**, Nigerian Citizen, born on the 16<sup>th</sup> of September 1965 with passport number A[...], formally temporarily resident at 9 P[...], J[...] C[...] Golf Estate, B[...] Road, N[...], South Africa, but domiciled in Nigeria, and permanently resident at No. 21 U[...] Street, Off O[...] J[...], A[...], Abia State, Nigeria (The Donor).

WHEREAS:-

A. I, ALFREDO KALU ORIE AWAH (the Donor), a Citizen of Nigeria, maintained temporary residence in South Africa, at 9 P[...], J[...] C[...] Golf Estate, B[...] Road, N[...], South Africa until circa 11<sup>th</sup> November 2012.

B. And I, the Donor, acquired the following properties in South Africa:

- (i) Unit 153 S[...] W[....] height, B[...] S[...], V[...] V[...], E[...] 62,, Gauteng.
- (ii) Unit 69 S[...] W[...] height, B[....] S[...], V[...] V[...], E[...] 62, Midrand, Gauteng
- (iii) 9 P[...], J[...] C[...] Golf Estate, B[....] Rd, N[....].
- (iv) 3 O[....], J[...] C[...] Golf Estate, B[...] Rd, N[....]

C. And I, The Donor, since the 11<sup>th</sup> of November 2012, had been bedridden on account of debilitating illness and is now unable to move my limbs or travel out of my permanent residence at No. 21 U[...] S[....], Off O[....] J[...], A[...], Abia State, Nigeria;

D. It has become expedient for me, the Donor, to appoint a proxy to act for me on my behalf in matters requiring my acts, for the protection of my interests in South Africa and elsewhere;

**NOW THEREFORE, KNOW YE ALL MEN:**

[23] From this Respondent power of attorney emerges the following that The Respondent has since 2012 left South Africa is now staying in Nigeria.

That during his stay in South Africa, he was not permanent resident at the property he says he was formally temporary resident at 9 P[....]t, J[...] C[...] G[...] E[....].

Further that, unit 3 the property is one of the four properties that he has acquired for financial gain.

[24] The Respondent son whom he authorised to defend this action, avers that the Respondent has permanently left South Africa due to illness to reside in Nigeria. The son then alleges that when he returns to South Africa (we don't know when) he intends to make the property his formal residence.

[25] It is thus my view that the property is not the Respondent principal resident and as such does not enjoy the judicial oversight envisaged in Uniform Rule 46(A) and defined in the Folsce case supra.

[26] I agree with the applicant submission that the debt has been incurred under the circumstances which places an untenable financial burden on the remaining members of the applicant.

The respondent continues to receive monthly rental on the property but fails to pay the levies and his debt stands at amount of R270 000,00 and continuing with interest.

The applicant has no other remedy. The Sheriff's has noted that respondent does not stay at the property but other tenants are occupying it. Respondent has continued that he is now permanently staying in Nigeria.

[27] The respondent contends that the arrear levies and charges of in the applicant statement is incorrect, in that it incorrectly includes legal costs and interest as result of which the respondent submits that the applicant debt is not accurate and reliable.

[28] I concur with the applicant that this application concerns the enforcements of judgements that has been granted. The question of the respondent debt is therefore *res judicata*.

[29] In my view, the Sheriff's return clearly indicates that there are no immovable belonging to the Respondent at the property. Thus the applicant has met the requirements of Rule 46(1)(a)(i)

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**J DLAMINI**  
**ACTING JUDGE OF THE HIGH COURT**

**Appearances:**

**On behalf of the Plaintiff  
Instructed Rabie Attorneys  
c/o Jordaan & Wolberg**

**Adv J Vorster**

**On behalf of the Defendant  
Instructed Ingrid Kettles Attorneys  
c/o A Le Roux Attorneys**

**Adv D. Moodliyar**

**Heard on the 03<sup>rd</sup> September 2019  
Judgment handed down on the 20<sup>th</sup> September 2019**