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

CASE NO: 21428/2016

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

7 September 2020
DATE SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

CROUSE, RICHARD MARK First Defendant

CROUSE, RENE Second Defendant

JUDGMENT

LAMPRECHT AJ:

[1] This matter was allocated to me on 11 August 2020 from the trial roll. I on that date made the following order:

[1.1] The trial is postponed *sine die*.

[1.2] The wasted costs occasioned by the postponement will be costs in the cause of the action.

[2] When handing down the order I undertook to provide reasons for the order. I do so now.

[3] The postponement was granted pursuant to a postponement application launched by the defendants, opposed by the plaintiff.

[4] The plaintiff's claims against the defendants arise from building loan agreements concluded between the parties during 2005 and 2006 respectively. Amounts advanced in terms thereof were secured by two mortgage bonds, registered in favour of the plaintiff over an immovable property owned by the defendants. It is common cause that the immovable property is the defendants' primary residence.

[5] In its summons issued during 2016, the plaintiff *inter alia* alleged that the defendants are in arrears with instalments, that the full balance owing under the bonds had accordingly become fully due, owing and payable and that the defendants were indebted to the plaintiff as at 9 June 2016 in the sum of R631 053.52, together with interest thereon.

[6] The bonds as read with the building loan agreements are credit agreements regulated by the National Credit Act, 34 of 2005 ("the NCA").

[7] The plaintiff furthermore alleged that the defendants had applied for debt review in terms of section 86 of the NCA, but that the plaintiff, as it was entitled to do and 60 days having elapsed since the date of the application for debt review, on or about 6 May 2016 delivered notices in terms of section 86(10) of the NCA.

[8] Having in its summons drawn the defendants' attention to the provisions of section 26(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 and having made related allegations in this regard, the plaintiff also incorporated a prayer for the immovable property to be declared specially executable and for a Writ of Execution to be issued, as envisaged in terms of Rule 46(1)(a) of the Uniform Rules of Court.

[9] On 4 June 2020 and pursuant to an application by the plaintiff in terms of Rule 130(4), opposed by the defendants, Adams J made an order directing the plaintiff to deliver a notice in terms of section 86(10) of the NCA and giving directions relating to the manner in which such notice had to be delivered to the defendants and the relevant debt counsellor. The order provided that the hearing of the main action between the parties would be stayed until the plaintiff had complied with the order, insofar as it related to the delivery of a notice in terms of section 86(10).

[10] The application in terms of section 130(4)(b) of the NCA was evidently motivated *inter alia* by the defendants' allegations in their existing special pleas and plea on the merits, filed during February 2017, to the effect that -

[10.1] the section 86(10) notices previously sent by the plaintiff were sent to the incorrect address;

[10.2] the defendants had never received these notices; and

[10.3] the notice had not been properly served on the relevant debt counsellor.

[11] On 20 July 2020, approximately three weeks prior to the trial date, the plaintiff filed a notice of intention to amend. The core amendments sought to be introduced by the amendment, were as follows:

[11.1] An increase of the quantum of the plaintiff's claim (together with consequential amendments of the arrear amounts) to bring it in line with an updated amount alleged to be outstanding and in arrears as at 26 June 2020.

[11.2] A replacement of the previous certificate of balance annexed to the particulars of claim, with an updated certificate of balance.

[11.3] Pursuant to the section 130(4)(b) application and the order granted by Adams J on 4 June 2020, to introduce additional averments regarding the plaintiff's alleged compliance with that order, to the effect that further notices in terms of section 86(10) of the NCA had been delivered to the defendants and the relevant debt counsellor on or about 2 July 2020.

[11.4] Inserting (as new paragraphs 46 to 53) allegations regarding the plaintiff's compliance with the provisions of Rule 46A(5) and 46A(8) of the Uniform Rules of Court as well as annexing documents, as envisaged and required by the relevant rule, relating to the market value of the immovable property, a municipal evaluation in respect thereof as well as amounts owing to the municipality as rates and taxes.

[11.5] The latter proposed amendment incorporated comprehensive allegations, in the first instance in support of the contention that it is not necessary to set a reserve price (should the immovable property be declared executable), alternatively in support of allegations regarding an appropriate reserve price.

[12] No objection having been filed to the proposed amend, the plaintiff on Tuesday, 4 August 2020, three clear court days prior to the trial, filed its amended pages.

[13] The defendant erstwhile attorneys of record withdrew on 5 August 2020, and a notice of appointment of new attorneys was filed on 6 August 2020.

[14] The defendants' new attorneys, having requested that the trial be postponed by agreement with such request having been refused by the plaintiff, on Friday, 7 August 2020, served the application for a postponement. Answering and replying affidavits were exchanged between the parties on 9 and 10 August 2020 respectively, during the long weekend prior to the trial date.

[15] The defendants in the application for postponement, supported by an affidavit deposed to by its new attorney of record, advanced two grounds as to why the matter had to be postponed:

[15.1] Firstly, the late filing by the plaintiff of its amended pages, described by the defendants to be substantial, and which it was submitted required the filing of consequential amendments. The defendants contended that they should be afforded the normal 15-day time period provided for in Rule 28(8) from the date on which the plaintiff's amended pages were filed, to file their own consequential amendments.

[15.2] Secondly, that a fee dispute had developed between the defendants and their previous attorneys of record, with the latter at a late stage requiring a deposit in order to proceed to trial, resulting in the previous attorneys withdrawing on 5 August 2020 and their new attorneys being appointed the following day, on 6 August 2020.

[16] The plaintiff in opposing the application principally contended as follows:

[16.1] That the defendants' new attorney, who deposed to the affidavit supporting the postponement application, lacks the required personal knowledge regarding the allegations deposed to by her.

[16.2] That the application for postponement was a delaying tactic.

[16.3] That the amendments effected to the particulars of claim are not substantial.

[16.4] That the plaintiff had during a pre-trial conference held on 2 July 2020 indicated that it may wish to amend its particulars of claim – the defendants were aware of this and were also aware of the nature of the amendments that were going to be effected, having agreed to evidence of the plaintiff's valuator being adduced by way of affidavit.

[16.5] The defendants have had adequate time to attend to consequential amendments to their plea.

[17] The principles applicable regarding postponements are well established. The postponement of a trial is an indulgence, the granting whereof falls within the discretion of the Court. A party requiring a postponement should furnish, under oath, full reasons for such request and has the onus to persuade the Court to grant a postponement. A party seeking a postponement must fully explain the reason for his unpreparedness and the unreadiness should not be due to delaying tactics. Applications for postponement should be brought without delay.[1]

[18] Where fundamental fairness and justice justify a postponement, the Court may in an appropriate case allow an application for postponement, even if the application was not timeously made. Considerations of prejudice will ordinarily constitute the dominant

component of the total structure in terms of which the discretion of Court will be exercised. What the Court primarily has to consider is whether any prejudice caused by a postponement to the adversary of the applicant can fairly be compensated by an appropriate order for cost or any other ancillary mechanisms. [2]

[19] Any lack of personal knowledge by the defendants' newly appointed attorney is unrelated to the basis upon which I concluded that the trial should be postponed. This aspect accordingly did not assist the plaintiff and requires no further elaboration.

[20] During argument the defendants (correctly so, in my opinion) conceded that the amendments introduced by the plaintiff insofar as they relate to the quantum of its claim, the arrears, as well as the alternative allegations pertaining to section 86(10), could by no means described as being substantial, requiring a postponement. These aspects accordingly also require no further consideration or discussion.

[21] In considering the application for postponement, I considered the provisions of Rule 46A, introduced by GN R1272 of 17 November 2017 and which came into operation on 22 December 2017, some two and a half years prior to the trial date, to be of material importance.

[22] Rule 46A(2)(a) provides that whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor, a Court considering an application under the rule must –

[22.1] establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

[22.2] consider alternative means by the judgment debtor of satisfying the judgment debt other than execution against the judgment debtor's primary residence.

[23] In terms of Rule 46A(2)(b) a Court is precluded from authorising execution against immovable property which is the primary residence of a judgment debtor, unless the Court, having considered all relevant factors, considers that execution against such property is warranted.

[24] In terms of Rule 46A(3), where application is made to declare a residential immovable property executable, a respondent opposing the application is afforded a time period of 10 days after service of the application to oppose the application or make submissions to the Court.

[25] Rule 46A(5) provides that every application is to be supported by documents evidencing the market value of the immovable property, the local authority evaluation of the immovable property, the amounts owing on mortgage bonds registered over the immovable property, the amount owing to the local authority as rates and other dues, the amounts owing to a body corporate as levies and any other factor which may be necessary to enable the Court to give effect to subrule (8).

[26] In an application context, a respondent is obliged to admit or deny allegations made by an applicant in the founding affidavit and set out reasons for opposing the application and grounds on which the application is opposed. (Rule 46A6(b))

[27] In terms of Rule 46A(8), a Court considering an application under the rule may *inter alia* –

[27.1] of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;

[27.2] order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;

[27.3] set a reserve price;

[27.4] postpone the application on such terms as it may consider appropriate; and

[27.5] refuse the application if it has no merit.

[28] In terms of Rule 46A(9)(a) in an application under the rule, or upon submissions made by a respondent, the Court must consider whether a reserve price is to be set. Numerous factors are to be taken into account in deciding whether to set a reserve price and the amount at which it is to be set. These factors include -

[28.1] the market value of the immovable property;

[28.2] the amounts owing as rates or levies;

[28.3] the amounts owing on registered mortgage bonds;

[28.4] any equity which may be realised between the reserve price and the market value of the property;

[28.5] prospects of reduction of the judgment debtor's indebtedness on the judgment debt;

[28.6] whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;

[28.7] the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;

[28.8] any prejudice which any party may suffer if the reserve price is not achieved;

[28.9] any other factor which in the opinion of the Court is necessary for the protection of the interest of the execution creditor and the judgment debtor.

[29] The importance of affording a judgment debtor an adequate and full opportunity to consider and deal with all aspects relevant to the question of whether immovable property constituting a primary residence of such judgment debtor should be declared executable, whether it is necessary to set a reserve price, as well as the price at which it should be set, if applicable, is self-evident. It is also underscored by the provisions of Rule46A.

[30] The constitutional implications of declaring immovable property constituting the primary residence of judgment debtors executable and the importance of judicial oversight during this process, have been highlighted in numerous judgments, including in the full bench decision of the North Gauteng High Court, Pretoria, in *Firstrand Bank Limited v Folscher & Another and similar matters*[3] as well as by the Constitutional Court in *Gondwana v Steko Development.*[4]

[31] In *Absa Bank Limited v Njolomba & Another*[5], Fisher J made the following observations:[6]

> [3] There have, of late, been salutary moves in the statutes, case law, rules, and practice directives to introduce a measure of flexibility into the execution process where it is sought to execute against the home of a debtor. These laws and rules emanate from an accepted need to promote the objects of our Bill of Rights and especially the requirement that all relevant circumstances be considered before depriving a person of his or her home. They include the requirement that immovable property not be executed against without judicial oversight being brought to bear thereon and the recent introduction of rule 46A into the Uniform Rules, which requires that the court 'consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor's primary residence'. The cases have required stringent adherence to notice and service requirements and the furnishing of details in relation to the steps taken to manage the indebtedness of the debtor. Recent amendments to rule 46 of the Uniform Rules require the consideration by the court of alternative means of satisfying the judgment debt. These changes impose an even more rigorous investigative function on a court faced with an application for a declaration of executability and require still more information to be forthcoming in relation to the debtor's circumstances and the value of the property. This assists in setting appropriate reserve prices and other sale conditions in the event of execution against the property becoming necessary. However, the process has, as its main endeavour, to maintain the mortgage loan and to rehabilitate the debtor if at all possible.

[32] In light of the above considerations and having regard to the nature of the amendment and allegations contained in paragraphs 46 to 53 of the amended particulars of claim, filed on 4 August 2020, I formed the view that this portion of the amendment is indeed substantial, as was contended on behalf of the defendants. Paragraphs 46 to 53, consisting of some 5 pages, introduced comprehensive and new allegations, intended to deal with the requirements of Rule 46A.

[33] I accordingly concluded, with due regard to requirements of fundamental fairness and justice, as well as to potential prejudice to the defendants should a postponement not be granted, that the trail should be postponed. The defendants would then have a proper opportunity to consider the allegations, consult with their legal advisors, effect any consequential amendments to their pleadings and prepare for trial concerning any issues arising therefrom.

[34] The final aspect requiring consideration is the plaintiff's argument to the effect that the defendants agreed that the evidence of the plaintiff's valuator could be adduced by way of affidavit, that the defendants were aware of the nature of the amendment that was going to be effected by the plaintiff, including in regard to rule 46A, and that the defendants agreed that they would effect any necessary consequential amendments required.

[35] Paragraph 9 of the minutes of the 2 July 2020 pre-trial conference records that an agreement had previously been reached that the evidence of the plaintiff's valuator could be adduced by way of affidavit. It is also apparent from the minutes, as read with the defendants' answer (filed on 15 July 2020) to the plaintiff's agenda dated 2 July 2020, that a potential amendment by the plaintiff of its particulars of claim and a consequential amendment by the defendants of their Special Pleas and Plea on the merits had been envisaged.

[36] There is however nothing to suggest that the defendants were aware of the precise nature or ambit of the envisaged amendment of the plaintiff's particulars of claim or that they agreed that they would file consequential amendments prior to the trial date, irrespective of the nature of the amendments or the date by which the plaintiff effected its own amendment to the particulars of claim. An agreement to this effect is not only inherently unlikely but is also neither recorded in the pre-trial minute nor can it be inferred from the defendants' answer to the plaintiff's agenda.

[37] It was on this basis that I concluded that the matter was not ripe for trial and should be postponed *sine die*.

[38] It is so that the postponement was caused, predominantly, by the late filing by the plaintiff of its amended pages. The defendants themselves however at the last moment appointment new attorneys of record and sought a postponement on this additional

ground. The defendants also delayed substantially in launching the postponement application, which was only served on Friday, 7 August 2020. Additionally, and in circumstances where it was not clear whether and, if so, to what extent the defendants intend raising any matters of substance in response to the plaintiff's Rule 46A considerations, warranting a postponement of the matter, I concluded that the wasted costs occasioned by the postponement should follow the result of the action. I accordingly held that the wasted costs occasioned by the postponement should be costs in the cause of the action.

[39] These are the reasons for the order handed down on 11 August 2020.

André Lamprecht
Acting Judge of the High Court
Gauteng
Johannesburg

Date of hearing and order:	11 August 2020
Date of reasons for judgment:	7 September 2020
Counsel for the plaintiff:	Ms D Strydom
Instructed by:	Bezuidenhout Van Zyl & Ass Incorporated
Counsel for the defendants:	Adv B Bester
Instructed by:	Jennings Incorporated

[1] *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (Nm).

[2] *Myburg Transport* above at 311B - E

[3] *Firstrand Bank Limited v Folscher & Another and similar matters* 2011 (4) SA 314 (GNP) at 332C-333D.

[4] *Gondwana v Steko Development* 2011 (3) SA 608 (CC) at 626F-G.

[5] *Absa Bank Limited v Njolomba & Another* 2018 (5) SA 548 (GJ).

[6] At 550E-551C.