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

CASE NO: 36598/2016

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
12/01/2021

In the matter between:

TECHNOLOGIES ACCEPTANCES RECEIVABLES (PTY) LTD	**APPLICANT**
and	
LESIBA JOHANNES THLAKO	**FIRST RESPONDENT**
VIOLET MOKOKO MOJELA	**SECOND RESPONDENT**
ABSA BANK LIMITED	**THIRD RESPONDENT**
IN RE:	
TECHNOLOGIES ACCEPTANCES RECEIVABLES (PTY) LTD	**FIRST PLAINTIFF**
FINTECH UNDERWRITING (PTY) LTD	**SECOND PLAINTIFF**

and

BOTLE BJA LESIBA TRADING AND **FIRST DEFENDANT**

LESIBA JOHANNES TLHAKO **SECOND DEFENDANT**

JUDGMENT

MOOSA AJ:

INTRODUCTION

[1] This is an application wherein the applicant seeks an order in terms of Part B of the application in the following terms:

a). Declaring the first respondent's undivided share in an immovable property described as Unit [....] Tygerberg, Berea, Gauteng, Scheme Number 122/1992, City of Johannesburg held under Deed of Transfer Number ST22373/2002 ("the property") specifically executable.

b). Ordering that a writ of execution is issued in respect of the property, as envisaged in terms of Uniform Rule 46 (1) (a).

c). Costs of suit on the attorney client scale against the first respondent.

[2] The first respondent is indebted to the applicant in the following amounts:

a). payment of the amount of R 68 085.01

b). interest on the amount of R 68 085.01 calculated at 6% above the prime interest rate as applicable from time to time per annum, calculated from date of service of summons, to date of final payment, both days inclusive.

c). costs of R 200.00 plus Sheriff's fees.

[3] The second respondent has been cited as an interested party herein, in so far as she holds an undivided share in the property. The applicant does not seek relief against the second respondent, save for costs, in the event of opposition.

[4] The third respondent has been cited herein as an interested party, insofar as a mortgage bond is registered in it's favour over the property. No relief is being sought against the third respondent, save for costs, in the event of opposition.

[5] The applicant has been unable to satisfy the judgment debt since November 2016 and the applicant contends that no other possibility exists that the judgment debt may be liquidated within a reasonable period, without having to execute against the first respondent's undivided half share in the property.

FACTUAL BACKGROUND

[6] The applicant leased equipment to the first Botle Bja Lesiba Trading and Projects CC ("first defendant") in terms of a master rental agreement ('agreement').

[7] The first respondent bound himself as surety for all payments due to the applicant by the first defendant in terms of the agreement.

[8] The first defendant failed to make payment due to the applicant in terms of the agreement, resulting in the applicant obtaining judgment on 14 November 2016 against the first defendant as principal debtor, and the first respondent as surety for, inter alia, payment of a capital sum, together with interest and costs.

[9] The applicant was unable to execute the judgment debt, in respect of the first defendant, who no longer conducts business. Further, the applicant has been unable to execute the judgment debt against the first respondent's moveable assets.

[10] The applicant argues that the only mechanism available to execute the judgment, and to obtain payment of the judgment debt, is to have the first respondent's undivided half share in the immovable property specifically executable.

[11] The applicant submits further that it does not have any intention to sell the first respondent's half share in the property. However, the purpose underlying the relief sought is to secure the applicant's position by ensuring that the property cannot be sold and transferred to a third party, without the judgment debt owed to the applicant first being satisfied.

DEFENCE RAISED BY THE RESPONDENTS

[12] The first and second respondents have raised the following points *in limine*, to the extent that the application is defective insofar as it does not comply with Chapter 10 of the Practice Manual in the following respects:

a). the applicant's founding affidavit fails to contain the statements referred to in *Sanderson, Jessa and Dawood;*

b). the applicant's founding affidavit fails to draw the first and second respondent's attention to the provisions of Rule 46A and Rule 46A(6) of the Rules of Court;

c). the applicant's founding affidavit fails to set out the information required in Rule 46A(5)(a)-(e) of the Rules of Court to assist this Court in furnishing a reserve price for the property at a judicial sale in execution;

d). the failure of the applicant to draw attention to material issues and to provide critical information to the Honourable Court renders the application incomplete, and contravenes the Practice Manual and Rules of Court;

e). as a consequence of the aforementioned contraventions and omissions, the first and second respondents are unable to answer and deal specifically with these issues and are severely prejudiced.

f). The respondents raise a further point *in limine* to the extent that the relief that the applicant is seeking is that of an interdict, in that it requires to

prevent the first respondent from selling his undivided half share. However, such relief is being sought via an application to have the property specifically executable. The respondents contend that this is irregular and an abuse of the judicial process.

[13] In the alternate and in the event that the points *in limine* fail, the respondents further submit as follows:

a). It is common cause that no order is sought against the second respondent and that the applicant only seeks to have the undivided half share of the property in the name of the first respondent to be declared executable.

b). The property is a small flat, wherein members of the first respondent's family are residing with the second respondent, who is his mother.

c). The first respondent resided in the property with his family from 2001 and subsequently left the property as there was insufficient living space, and is currently renting a flat in Troyville, Johannesburg.

d). The first respondent intends moving back into the property when circumstances permit.

e). The half share in the property owned by the first respondent constitutes his primary residence.

[14] The respondents argue that in the circumstances the applicant is not entitled to the relief sought.

ANALYSIS

[15] I have carefully considered this matter and do not deem it necessary to burden this judgment with all the arguments that have been raised by counsel during the hearing of this matter, as well as in their heads of argument. I do so for the sake of brevity and to avoid unnecessary prolix, as the issue to be determined is in my

view simple and crisp. I accordingly do not intend to get bogged down with all the turbulence that has been created during the hearing of this matter.

[16] Having heard argument from the parties, I am of the view that the crisp issues to be determined is whether the property in question is the first respondent's primary residence, and whether this is an application for foreclosure.

[17] The first respondent opposes the relief sought, in circumstances where he concedes that the property is not his primary residence[1]. It is common cause between the parties that the first respondent does not reside at the property. This fact has been confirmed to the sheriff by the second respondent, who is the first respondent's mother, as well as by the first respondent in his answering affidavit.

[18] The first respondent asserts that the second respondent resides on the property, together with her other adult children and grandchildren. In this regard, it is clear that no order is sought regarding the second respondent's half share of the property, who is cited as an interested party to this application.

[19] Accordingly, in my view having regard to the purpose of the application, the right of the second respondent, as well as any of the occupants that reside on the property remains unaffected by the relief sought.

[20] I have duly applied my mind to the additional cause of complaint, in that the application is defective insofar as it fails to set out statements referenced in applicable case authorities, and a reserve price is not provided for.

[21] In this regard, it is an undisputed fact that the first respondent does not reside on the property and hence it cannot be regarded as his primary residence. I have duly taken note that despite this fact, the applicant has duly referenced the requisite statements in both the notice of motion and founding affidavit to this application.

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[1] Bundle C, Answering Affidavit, paginated page 237, paragraph 8.4.3 and paginated page 238, paragraphs 8.4.4.6 – 8.4.4.7

[22] Further, I am in agreement with the applicant's submission that a reserve price need not be set, insofar as the application pertains to the half share of the property owned by the first respondent, and the fact that the first respondent is not primarily resident on the property.

FINDINGS:

[23] I have carefully applied my mind to the nature of the relief sought, as well as the common cause fact that the first respondent does not reside at the property. To this end, I find that the property is not the first respondent's primary residence.

[24] It is clear that the applicant does not hold a bond over the property and therefore this simply cannot be deemed to be a foreclosure application. I accordingly conclude that this is an application for execution against the first respondent's undivided half share in the property.

[25] Further, having found that the property is not the first respondent's primary residence, it is clear that the considerations regarding foreclosure applications do not apply in this instance.

[26] Accordingly, I find no merit in the points *in limine* raised by the respondents, and accordingly these are dismissed.

[27] Based on the nature of the relief sought it is clear that no order is sought regarding the second respondent's half share of the property and accordingly such relief would not affect the rights enjoyed by the second respondent in the property.

[28] Accordingly, on the totality of the evidence before me, and having carefully considered this matter, I find that the applicant has made out a proper case for the relief sought.

COSTS

[29] The general principle applicable to the issue of costs is that costs follow the

event, and subject to the general rule that costs unless expressly otherwise enacted, is a matter of discretion for the court to grant or deny any party its costs.

This is succinctly captured in the dictum of Lord Lloyd in **Bolton DC V Secretary of State for the Environment [1996] 1 ALLER 184 (HL) at 186g**: *"What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and in practice, however widespread and longstanding, must never be allowed to harden into a rule"*.

[30] In **Kruger Bros & Wasserman v Ruskin 1918 AD 63 at 69**, Innes J expressed the same principle in the following way: *"...the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised".*

[31] I am accordingly guided in these circumstances by what was stated in the case of **Jenkins v S.A Boiler Makers, Iron & Steel Workers & Ship Builders Society 1946 WLD 15 at 18**: "*the court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation*"·

[32] I am full well aware that the general practice is that costs follow the results, and accordingly the party that is substantially successful gets the costs awarded in its favour.

[33] **In the result, I make the following order:**

[1] The first respondent's undivided share in the immovable property described as Unit [....] Tygerberg, Berea, Gauteng, Scheme Number 122/1992, City of Johannesburg held under Deed of Transfer Number ST22373/2002 ("the property") is declared specifically executable.

[2] A writ of execution is issued in respect of the property, as envisaged in terms of Uniform Rule 46(1)(a) of the Uniform Rules of Court.

[3] The first respondent is to pay the costs of this application on an attorney and client scale.

C I MOOSA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG
12 JANUARY 2021

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Dates of hearing:	**21 October 2020**
Date of judgment:	**12 January 2021**