

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

CASE NO: 17022/2018

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED.
25/1/2022

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

CLINT JOHN LAMONT

Respondent

Civil procedure – application of Uniform Rule 46A in summary judgment proceedings – application is deficient if it fails to comply with Rule 46A(4)(ii) – consequence of non-compliance is that Court unable properly to comply with its obligations under Rule 46A(2) – practitioners cautioned to ensure compliance in drafting applications seeking order declaring property specially executable in summary judgment proceedings

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION AND PROCEDURAL ISSUES

1. This is an application for summary judgment against the respondent for payment of a capital amount of R601 152. 71, and interest. The applicant's cause of action is an alleged breach of a home loan agreement. In addition, the applicant seeks an order declaring certain immovable property executable. It is common cause that the property is the primary residence of the respondent and his family, which includes three children. Accordingly, Rule 46A applies.

2. As the summary judgment was applied for prior to the effective date of the amendment effected to Uniform Rule 32, the pre-amendment rule applies. Although the respondent has not yet filed a plea to the summons issued against him, he filed an affidavit opposing the grant of summary judgment indicating his defence. The matter was enrolled subsequently as an opposed motion.

3. There were some procedural complications in the matter arising from the fact that the applicant was bound to comply with the procedure prescribed by Rule 46A of the Uniform Rules of Court, and at the same time was required to comply with the procedure to be followed in summary judgment applications. As a result, I had to refer the matter back to the parties many times to ensure that everything that needed to be before the court was placed in the court file.

4. One of the difficulties was that because the applicant was guided primarily by the fact that it was seeking relief by summary judgment, it did not comply with Rules 46A(3) and (4). These Rules provide that:

“(3) Every notice of application to declare residential immovable property executable shall be —

(a) substantially in accordance with Form 2A of Schedule 1;

(b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to

in rule 46(5)(a): Provided that the court may order service on any other party it considers necessary;

(c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and

(d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.

(4) (a) The applicant shall in the notice of application —

(i) state the date on which the application is to be heard;

(ii) inform every respondent cited therein that if the respondent intends to oppose the application or make submissions to the court, the respondent must do so on affidavit within 10 days of service of the application and appear in court on the date on which the application is to be heard;

(iii) appoint a physical address within 15 kilometres of the office of the registrar at which the applicant will accept service of all documents in these proceedings; and

(iv) state the applicant's postal, facsimile or electronic mail address where available.

(b) The application shall not be set down for hearing on a date less than five days after expiry of the period referred to in paragraph (a)(ii)."

5. Compliance with these Rules is obviously important because in terms of Rule 46A(6)(a):

"A respondent, upon service of an application referred to in sub (3), may-

(i) oppose the application; or

(ii) oppose the application and make submissions which are relevant to the making of an appropriate order by the court; or

(iii) without opposing the application, make submissions which are relevant to the making of an appropriate order by the court."

6. It is only if a respondent has been given the opportunity to “*make submissions which are relevant to the making of an appropriate order by the court*” that the court can properly exercise the discretion it is required to under Rule 46A(2), which reads:

(2) (a) A court considering an application under this rule must —

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence.

(b) A court shall not authorise 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.

(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.

7. In this case, while the respondent had been notified in the summons that his s 26 rights might be imperiled, and while he had filed an affidavit opposing the application for summary judgment, he had never been informed, as is required under sub-rule 46A(4)(ii) that he had a period of 10 days within which to make submissions to the court on an appropriate order. In other words, it had never been drawn to his attention that, quite apart from setting out a defence to the summary judgment application, he was also entitled to draw the court’s attention to any information regarding his personal circumstances and how an order of executability might affect him.

8. This was not a deliberate ploy on the part of the applicant. It was simply a result of a failure by the lawyers drafting the pleadings in the matter effectively to marry the summary judgment procedure with that of Rule 46, which requires that this specific notice be given to the respondent. Of course, some respondents, particularly those who are legally represented, may, as a matter of course in their affidavit

opposing summary judgment, also make submissions to the court regarding their personal circumstances and the consequences to them of an order of executability being made. However, in this case, the respondent had not done so, merely stating generally in his opposing affidavit that he would be rendered homeless if an order was granted.

9. For this reason, I was not satisfied that there had been substantial compliance with the notice requirement embedded in Rules 46A(3), (4) and (6), or that the respondent had been given a proper opportunity to make the specific representations identified in those sub-rules. Without those representations, I did not feel that I could comply with my obligations under Rule 46A to ensure that the order I made was appropriate. In order to avoid unnecessary legal costs (which in these matters usually increase the debt burden on the respondent home-loan debtor) and further time delays, I gave the respondent an opportunity to file an affidavit providing the information that he was entitled to provide to the court under subrule 46A(6)(a). Having received this affidavit, which sets out in detail what the respondent's family circumstances are, I am now in a position to make a determination on the issue.

10. However, I think it is important to caution practitioners when drafting papers in similar matters to ensure that the requirements of Rule 46A do not fall by the wayside when seeking orders of executability by way of summary judgment against home-loan debtors. This may require a hybrid application in which notice is given to the respondent both of her rights under Rule 32, and her rights under Rule 46A. The most important objective is to ensure that the respondent is notified that in addition to opposing the summary judgment application, or even in the event that she elects not to do so, she is nonetheless entitled under subrule 46A(6) to make representations to the court regarding what effect an order of executability may have on her and her family's right to housing under s 26 of the Constitution.

SUMMARY JUDGMENT

11. The respondent's defence to the applicant's application for summary judgment is that the loan was extended to him in contravention of the provisions prohibiting reckless credit agreements under the National Credit Act 34 of 2005 (the

Act), and the loan agreement is thus null and void. Section 80(1) of the Act provides that:

“(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)-

(a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.”

12. Section 81 is also relevant. It provides that:

(1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

(a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer.

(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if-

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment."

13. The respondent says that in June 2000 he had been placed under administration by an order of the Magistrate's Court in Boksburg in terms of s 74 of the Magistrates Court Act 32 of 1944. He does not have documentation from the court to substantiate this averment, but he annexed a letter from his alleged attorney at the time confirming that he was placed under administration. The respondent says that he was still under administration when he applied for the loan from the applicant.

14. At that stage he was employed, but was having financial difficulties. In about August 2007, he needed additional finance. He already had a smaller bond over the immovable property of R80 000. He was turned down by other financial institutions when he sought financial assistance. He says that this was because they picked up that there was an active administration order against his name.

15. A friend then advised him to approach "*a certain company*" whose details he can no longer remember. This company was assisting people to get loans from the

applicant. The company asked him to bring a copy of his ID book, proof of residence, a municipal account and three months' salary advices. He did this and he says he told the person he was dealing with at this company that he had a negative credit rating. However, they told him this would not be a problem. He says that he even told the person at this unnamed company that he was under administration, as she noticed a garnishee order on his salary advice. He sought a loan of R500 000.

16. Three weeks later he was telephoned by this consultant at the unnamed company who advised him that his application had been successful, although the applicant was only prepared to approve an amount of R320 000, after doing an "affordability test". The respondent says that: *"I have every reason to believe the person or consultant who assisted me to apply for the loan or bond was an agent or intermediary of the Plaintiff. I say so because following the representations I have explained elsewhere, the Plaintiff and I signed a Mortgage Agreement (on) 27th September 2007... ."*

17. The nub of his defence then follows. He says that: *"I submit that the granting of the loan and the subsequent registration of a mortgage bond was so done by the Plaintiff with the full knowledge that I was a person under administration. It is on the basis set out above that I submit that the conduct of the Plaintiff/Applicant constitute (sic) reckless credit."* He says that loan agreement should be declared to be of no force and effect.

18. The rationale and requirements for the grant or refusal of summary judgment are trite. They are neatly summarised in the Supreme Court of Appeal judgment in *Joob Joob Investments*¹ as follows:

"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first

¹ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11G–12D

instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E.”

19. The defendant must place sufficient facts before the court to satisfy it that on the facts disclosed by the defendant, she has a defence that is *bona fide* and good in law. The defence must not be bald, vague or sketchy.

20. One of the problems with the respondent’s defence is that it is very vague about the identity of the company that apparently assisted him to secure the loan. This is a material problem because on his own version, he says that the applicant had full knowledge that he was under administration, and yet recklessly proceeded to grant him the loan. In order to succeed with this aspect of his defence, the respondent would have to show, as he says, that the unnamed company, and unidentified person from the company who acted as a go-between for him was an “*agent or intermediary*” of the applicant. The only reason he gives for this conclusion is that the loan agreement was entered into thereafter. It does not seem to me that on his own version the respondent provides sufficient facts to establish that the so-called intermediary, whom he avers knew of his financial difficulties and the

administration order, was an agent of the applicant. On the bald and sketchy facts pleaded, this is not evident.

21. There is a further difficulty for the respondent. He confirms that he signed the loan agreement. This agreement is attached to the applicant's particulars of claim, including the terms and conditions of the loan, which were signed by him too. On the last page of the terms and conditions, under the heading: "Acceptance", the respondent was asked to confirm that:

21.1. the quotation/cost of credit and the terms and conditions had been fully explained to him and that he understood his rights and obligations and the risks and costs of the loan;

21.2. he had been informed that he could refer any further questions he may have to the applicant at any time;

21.3. he accepted the offer of the loan contained in Part A and the related terms and conditions and confirmed that:

21.3.1. he could afford the capital and interest payments and the fees referred to in the agreement;

21.3.2. he was not under debt review, nor applied for debt review.

21.3.3. he was aware that he should not accept the agreement unless he understood his rights and obligations, and the risks and costs of the loan.

22. Clause 18.10 of the document appears on the previous page. In it, as one of the general terms and conditions of the loan, the respondent was directed as follows: "You must tell us immediately if you are placed under an administration order, become insolvent, or have any other form of legal disability." (My emphasis). Furthermore, under clause 14 of the agreement, it was expressly noted that default under the agreement would occur if:

22.1. he was placed under administration order, or

22.2. any representation made or given in connection with the application of any information supplied by him was materially incorrect.

23. By signing the agreement, the respondent confirmed that he understood the terms and conditions, and that he understood his obligations under the agreement. Therefore, he understood that he had an obligation to tell the applicant if he was placed under administration. He also understood that if he gave the applicant false information or made a false representation, this would constitute an act of default by him. Despite this, on the respondent's own version, he signed the agreement knowing that he was under an administration order, knowing that he would have difficulty repaying the loan, and yet keeping this information from the applicant, in breach of the very conditions he signed as having understood.

24. Section 81(1) of the Act provides that a prospective consumer must fully and truthfully answer any request for information made by the credit provider as part of the assessment required. Section 81(4), which is cited in full earlier is important. It provides that it will constitute a complete defence to a claim of reckless credit if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information, and a court finds that this failure materially affected the credit provider's ability to make a proper assessment.

25. From the facts averred by the respondent, and his signature of the loan agreement, it is plain that he did not fully and truthfully answer the requests for information as part of the assessment. He did not advise the applicant that he was under an administration order. There can be no question that this would have materially affected the applicant's ability to make a proper assessment. This provides the applicant with a complete defence to the respondent's reckless credit averment on which he relies. It follows that the respondent has failed to show that he has a *bona fide* defence to the applicant's claim that is good in law.

26. Summary judgment must be entered in favour of the applicant.

AN APPROPRIATE ORDER UNDER RULE 46A

27. Rule 46A was enacted to formalise a procedure for the protection of the right to housing in circumstances where an execution creditor seeks to execute against a debtor's primary residence. It followed in the footsteps of many judgments which had sought, incrementally, to ensure that the execution process did not undermine this fundamental right.

28. On the other hand, these judgments, and indeed the Rule itself, recognise that a balance needs to be struck between the protection of a debtor's right to housing, which is threatened by execution, and the rights of the execution creditor to enforce its contractual and real rights against the debtor. So, for example, in *Gundwana*,² the Constitutional Court directed that it is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attend the same purpose, that alarm bells should start ringing. In *Foscher*,³ a full court of this Division laid down a list of factors that ought to be considered by a court in determining whether an order of executability was warranted. It included a consideration of the proportionality of prejudice the creditor may suffer if execution were to be refused compared to the prejudice the debtor would suffer if execution went ahead and she lost her home.

29. Rule 46A(2)(B) directs that a court: *"may not authorise 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."* Inherent in the process of making this determination is the need for the court to consider factors relevant to weighing the balance of prejudice between the right of the judgment debtor to her home, on the one hand, with the rights of the judgment creditor to extract payment of the debt, on the other.

30. One of the factors the Rule requires the court to consider is whether there are alternative means by which the judgment debtor might satisfy the debt, other than via execution of the property.⁴ Rule 46A(8)(d) authorises the court to *"order execution*

² *Gundwana v Steko Development* 2011 (3) SA 608 (CC) at 626F-G

³ *First Rand Bank v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP)

⁴ Rule 46A(2)(a)(ii)

against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt.” The court must also be provided with documents indicating the market value of the property, the local authority valuation, amounts owing to the local authority as rates and other dues, and any other factor which may be necessary to the exercise of the court’s discretion as to an appropriate order.

31. *Folscher* lists a number of specific factors that may be relevant to the exercise of a court’s discretion to authorise execution. They include the arrears outstanding under the bond when it was called up; the arrears on the date judgment is sought; the debtor’s payment history; the total amount owing; whether there is any possibility that the judgment debtor’s liability may be liquidated within a reasonable period without having to execute against the property; whether the debtor will lose access to housing as a result of execution being levied against her home; and the position of the debtor’s dependents and other occupants of the house.

32. In this case, the respondent has provided the court with details of his and his family’s personal circumstances and how they will be affected if execution is ordered. The immovable property is the family home. The respondent is 42 and the head of a household of five (including himself). He lives in the home with his customary law wife and their three children. The eldest is 17 and the youngest is 11 years of age. The children all attend school in the area. Although the respondent is only 42 years of age, he provides proof of serious health problems which mean that he is unemployable. He is the recipient of a SASSA temporary disability grant of R1 800 per month. In addition, the family receives R450 per month as a child grant in respect of two of the children. The respondent’s wife does not work and she is his carer. The respondent and his family survive on the financial grants. They have no other income.

33. There can be no question that if execution against the property is ordered, the family stand to lose their present home. This will not automatically mean that the family will be rendered homeless, as they could only be lawfully evicted from their home by a subsequent order of court. However, execution would undoubtedly be the first step in a process that might lead to homelessness. Given the family’s precarious

situation, the state would have an obligation to provide them with alternative emergency accommodation should they ultimately face the threat of eviction.

34. The respondent and his family's situation is plainly tragic. However, I need to balance his interests, and those of his minor children, with the interests of the judgment creditor. Compliance with contractual obligations is an important element of the rule of law, as are the enforcement of real rights held by third parties in another's property. The applicant's constitutional protection of its property rights is also relevant and must be balanced against those of the respondent.

35. The facts show that there is simply no other way in which the respondent's indebtedness can be satisfied save through a sale of the immovable property. When summons was issued the respondent's arrears on his bond payments were R94 000. Since then, they have escalated to R334 000, which is the equivalent of 44 months of arrears. His last substantial payment into the bond account was on 3 March 2018. At that stage, he had already accumulated 17 months' worth of arrears. In short, for a number of years, now, the respondent has been in arrears on his bond repayments. He is unemployable and dependent on state assistance. There seems to be no other income stream that may be tapped to pay the monthly instalments, let alone the arrears.

36. Unfortunately, the respondent is in a hopeless situation. While the consequences of losing his current home will be serious for him and his family, the applicant cannot be expected to continue to provide housing for them when there is no prospect at all that the respondent is likely to be able to rectify the situation and comply with his obligations to the applicant. It seems to me that this is one of those cases where the sale of the primary residence is unavoidable.

37. Does this mean that an immediate order of execution is warranted? Given the dire circumstances in which the respondent and his family find themselves, a factor to consider is whether the possibility of a private sale of the property should not first be explored before resorting to execution and sale by auction. Although a reserve price would be appropriate, this is no guarantee that a sale in execution will provide

the family with an effective opportunity to realise the best value they can for the property.

38. This seems to me to be one of those cases where the interests of the parties will be balanced most appropriately by authorising the execution of the property, with an appropriate reserve price, but suspending the operation of the order of execution for a period of a few months to allow the respondent, possibly with the assistance of the applicant, the opportunity to market the property for private sale. These types of orders are not uncommon in this Division, and in my view such an order would be appropriate in this case.

39. As to the reserve price, the applicant has provided a valuation which gives the market value of the property as R650 000, and a forced sale value of R450 000. The respondent disputes that this is an accurate valuation and contends that the value of the property is higher. He says that he attempted to sell the property privately in early 2018 and that an estate agent at the time told him that it could be sold for R750 000. However, he did not secure a buyer. The respondent provided a summary of property sales by Property 24 in the area between March 2018 and June 2021. The prices range from R550 000 to R955 000. Of course, these are not valuations, and I have no details of the types of properties involved and how they might compare to the respondent's property. I cannot simply accept on this basis the respondent's assertion that an appropriate reserve price would be between R700 000 and R900 000.

40. It is also important to bear in mind that a reserve price must be realistic: it cannot be so high that the auction is likely to fail to attract a buyer. That would serve the interests of neither party. In particular, the respondent, as judgment debtor, ultimately would be burdened with the increased costs associated with a failed execution process.

41. The respondent's capital debt as reflected in the latest certificate of balance at the time the Rule 46A affidavit by the applicant was deposed to was over R770 000. It is unlikely, in my view, that a reserve price close to this amount would be realistic. What I intend to do is to set a reserve price of R600 000 in my order. However, I will

permit either of the parties to approach the court, on the same papers, supplemented as needs be, to seek an amendment to the reserve price. My reason for making provision for this is that the marketing of the property in the interim may give a better sense of what may be a realistic reserve price.

42. I accordingly make the following order:

1. Judgment is entered against the Respondent for payment of the amount of R601 152. 71, together with interest on this amount at the rate of 14.65% per annum calculated from 26 March 2018 to date of payment, both dates inclusive.

2. Subject to paragraph 5 below, the property mortgaged to the Applicant described as follows is declared specially executable:

Erf [...] ELANDFONTEIN TOWNSHIP REGISTRATION DIVISION: I.R,
PROVINCE OF GAUTENG

IN EXTENT 831 (EIGHT HUNDRED AND THIRTY-ONE SQUARE
METRES, HELD BY DEED OF TRANSFER NO. T[...]

SUBJECT TO ALL THE TERMS AND CONDITIONS CONTAINED
THEREIN ("the Property").

3. Subject to paragraph 5 below, the registrar is authorised to issue a writ of execution in respect of the property.

4. The auction of the property under the writ of execution is subject to a reserve price of R600 000, save that either party may approach the court on the same papers, supplemented as needs be, to apply for an amendment to the reserve price so set.

5. The effect of paragraphs 2, 3 and 4 above is suspended for a period of four months from the date of this judgment in order to permit the property to be marketed for purposes of a private sale. If no agreement of sale has been secured by the end of this period the orders under paragraphs 3, 4 and 5 will automatically take effect.

6. The Respondent's attention is drawn to section 129(3) of the National Credit Act No. 34 of 2005 in that the respondent may pay to the Applicant all amounts that are overdue together with the Applicant's permitted default charges and all reasonable taxed or agreed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement.

7. The Respondent is directed to pay the costs of the Applicant on an attorney and client scale.

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 January 2022.

**KEIGHTLEY J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

Date Heard (Via Ms-Teams):	At various sittings between 7 June 2021 and 12 October 2021, when final submissions received
Date of Judgment:	25 January 2022
On behalf of the Applicant:	ZE Mohamed
Instructed by:	JOUBERT SCHOLTZ INC.
On behalf of the Respondent:	Mr Lamont, in person