REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 10267/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

12 AUGUST 2022

In the matter between:

EYE OF AFRICA HOMEOWNERS ASSOCIATION NPC **Applicant**
REG NO. 2007/030516/08

and

SHADRACK MUDANALWO **1st Respondent**
(ID NO: [....])

MIDVAAL LOCAL MUNICIPALITY **2nd Respondent**

JUDGMENT

Mdalana-Mayisela J

1. This is an application to declare the first respondent's immovable property specially executable. The applicant also seeks an order that a writ of execution be issued in respect of the immovable property, as envisaged in terms of Rule 46(1)(a).

2. The applicant is Eye of Africa Homeowners Association NPC (Registration No: 2007/030516/08), an association not for gain and separate legal persona, duly constituted as such, with principal place of business situated at c/o Golf Estate Management Services ("GEMS"), 55 Thembi Office Place, Calderwood Road, Lonehill, Johannesburg, Gauteng.

3. The first respondent is the registered owner of the immovable property known as Erf [....], Eye of Africa Extention 1, Gauteng, situated in the Eye of Africa Golf & Residential Estate, Alewynspoort, Eikenhof, Johannesburg, Gauteng, held by virtue of Title Deed number, T [....] ("The immovable property").

4. The immovable property is a vacant piece of land with the registered size of 580 square metres. The first respondent purchased the immovable property from the previous owner on 2 March 2016. It was registered into his name on 21 June 2016. The purchase price was R775,000.00. The current municipal property value is R695,000.00. There is a bond registered over the immovable property in the name of Firstrand Bank Ltd in the amount of R465,000.00.

5. The second respondent is a municipality as contemplated in section 2 of Local Government: Municipal Systems Act 32 of 2000, and is cited in these proceedings as an interested party, and the immovable property falls within its geographical jurisdiction.

6. In terms of Article 6 of the Memorandum of Incorporation of the applicant, every registered owner of an erf shall *ipso facto* be and become a member of the Association upon registration of transfer of the erf into his name and shall remain a member until he ceases to own such erf.

7. The first respondent (as successor in title) took transfer of the immovable property on 21 June 2016, and accordingly became a member of the applicant, and a subscriber of the Memorandum of Incorporation of the applicant on this date. The Memorandum of Incorporation is binding upon the applicant and first respondent.

8. In terms of Articles 6.10.4.1 and 6.10.4.6, every member of Association shall comply with the provisions of the Memorandum of Incorporation, the Estate Rules, Landscaping and Gardening Guidelines, Architectural Guidelines and all other rules and regulations made or promulgated by the Association, as well as comply with and timeously pay the levy as it falls due for payment. In terms of Article 12.8, any amount due by a member by way of levy or otherwise and interest shall be a debt due by such member to the applicant / Association.

9. In terms of clauses 4.1 and 4.2 of Estate Rules of the applicant, levies are due and payable monthly in advance on the 1st day of each month, which levies will be determined by the directors of the Association in accordance with the Memorandum of Incorporation. The directors may from time to time impose special levies upon members or call upon members to make special contributions in respect of all expenses necessarily or reasonably incurred (Article 12.7). In terms of clause 4.3, it will be compulsory to sign a debit order in favour of the Association for the collection of levies unless the directors of the Association decide otherwise.

10. Article 38 of the Memorandum of Incorporation, provides as follows:

> "*38.2 Each Member shall within a period of 24 (twenty four) months after the date of the first transfer of the Erf from the Developer commence building the dwelling on the Erf and shall complete such dwelling within a period of 36 (thirty six) months after the date of the first transfer of the Erf from the Developer. This will be the date from which such periods will be calculated irrespective of whether the Erf has been transferred subsequently. If the Member fails to comply with these provisions the Developer is entitled, without prejudice to any other rights which it may have and/or at law and at its election to*:
>
> > *38.2.1 repurchase the Erf from the Member for an amount equal to the original purchase price paid by the Member in terms of the Deed of Sale (inclusive of VAT); or*

38.2.2 sell the Erf to any third party for an amount of not less than the original purchase price paid by the Member in terms of the Deed of sale.

The Member hereby irrevocably and in rem suam appoints the Developer as his duly authorised agent for purposes of such sale, provided that all costs of transfer shall be for the account of the Member in either case.

38.3 Notwithstanding the provisions of clause 38.2 the Member shall pay to the Company an amount equal to double the normal levy per month for every month which elapses between the date 3 (three) years from the date of the first transfer of the Erf to the date of compliance with clause 38.2 by the Member. This will increase to three times the normal Levy after one year of non-compliance and thereafter the multiplying factor will increase with one for every completed year of non-compliance (i.e after two years of non-compliance, the Member or his successor in title shall pay 4 (four) times the Levy, after three years 5 (five) times etc.)

38.5 Each Member shall pay the fees as set out in the Architectural Guidelines, before the commencement of any building operations on his Erf. These fees can be amended by the Company from time to time."

11. On 19 March 2019, the applicant issued combined summons out of this court against the first respondent for arrear Levies and Special Levies in the sum of R62,871.13 plus interests, and costs on an attorney and client scale (claim A); for penalty for failure to commence with building work and/or complete building work / construction, in the sum of 346,616.00 plus interest, and costs on attorney and client scale (claim B); and for payment of a speeding fine imposed in terms of the Estate Rules, in the sum of R400 plus interest, and costs on attorney and client scale (claim C).

12. The combined summons was served personally on first respondent by a Sherriff on 29 March 2019. The *dies induciae* (10 days) expired on 15 April 2019. The first respondent did not enter the appearance to defend. The applicant applied for a default judgment to the registrar of this court. On 10 May 2019, the registrar referred the default judgment application to open court.

13. The applicant set down a default judgment on numerous occasions. On 20 August 2019 the default judgment application was removed from the roll by Twala J to allow the applicant to supplement its papers in order to provide clarity on the penalty charges payable by first respondent (claim B). The reason for this was due to the applicant's claim suggested that first respondent inherited a substantial arrears in penalties when he bought the immovable property from his predecessor.

14. The applicant filed a supplementary affidavit dated 23 October 2019, in which it explained that the first respondent became liable to make payment as from 21 June 2016 when the immovable property was registered in his name. The first transfer of the immovable property was effected on 19 July 2007. The first respondent did not inherit any arrear Levies from the previous owner. The imposition of the Late Building Levies was delayed and only implemented from 1 September 2011. When the immovable property was registered into the first respondent's name, a period of 5 (five) years already elapsed since imposition of the Late Building Levies. The first penalty was raised on 30 September 2016 which comprises of 2 (two) times the normal Levy. The applicant continued to raise 2 (two) times the normal Levy until March 2017, and as from April 2017 imposed the maximum amount of penalties, i.e 8 (eight) times the normal levy.

15. The default judgment application was again set down for 13 November 2019. On that day Dippenaar J removed the application from the roll, and directed that the supplementary affidavit be served on first respondent, and furthermore, that it would be advantageous to provide different calculations in quantifying the Late Building Penalty claimed by applicant, for purposes of considering whether the court should exercise its discretion in terms of the Conventional Penalties Act 15 of 1962. The applicant filed a second supplementary affidavit dated 27 November 2019, providing different calculations in quantifying the Late Building Penalty claim. The

supplementary affidavits were served on first respondent personally on 17 December 2019.

16. The applicant set down the default judgment application for 31 August 2020. A notice of set down was served on first respondent personally on 6 August 2020. The default judgment application remained unopposed. Senyatsi J granted a default judgment in respect of claims A, B and C.

17. Pursuant to Senyatsi J's order, the applicant caused a Warrant of Execution against movable property to be issued against first respondent, at his residential address situated at [....] T [....] 1 Street, P [....] Zone [....] , Soweto, Gauteng, in order to satisfy the judgment debt. On 3 November 2020, the Sheriff Soweto East executed the Warrant on first respondent personally and rendered a *nulla bona* return, indicating that no movable property or disposable assets of the first respondent could be located at the said address to satisfy the judgment debt. The first respondent signed the Warrant as confirmation of the *nulla bona* so rendered.

18. On 21 July 2021 the applicant filed this application, so as to enable it to sell the immovable property for the best attainable price at a public auction in order to recover unpaid contributions and charges due to the applicant by the first respondent. The applicant alleges that there is a growing prejudice suffered by it. The first respondent has, despite the court order, continued to fail / or refuse and/or neglect to pay the amounts due and owing to the applicant in respect of the immovable property. As at 17 June 2021, the arrear contributions have increased to the amount of R597,491.20. A detailed Customer Ledger, spanning the period 1 November 2020 to 17 June 2021 is attached to the founding affidavit. An original Certificate of Indebtedness, dated 17 June 2021, certifying the indebtedness as set out above, as at the date reflected thereon is also attached to the founding affidavit. The first respondent has not sought to make arrangements for payment of the arrears and/or judgment and/or continuing and escalating arrears.

19. The first respondent opposed this application on the following grounds. First, that the applicant has failed to make a debit order ever since he became a registered owner of the immovable property. Second, the applicant is using illegal and unlawful

membership and late building penalty fee to extort money from him against his property. Third, in respect of claim C, matters of this nature are reported and resolved at Community Scheme Ombudsman, the applicant brought a premature application to court. Fourth, the default judgment court did not take into account his constitutional rights of owning a property in the Republic and it also did not hear his side of story.

20. On the day of hearing I granted the order sought by the applicant in terms of the prayers 1 and 2 of the Notice of Motion, and costs. I gave the order without giving reasons, because I agreed with the applicant that the interests of justice required the immovable property to be sold as expeditiously as possible as the increasing monthly costs would inevitably prevent the sale of the immovable property, as the additional expenses payable by the purchaser in accordance with the conditions of sale may exceed the property municipal value and market value. The first respondent has requested the reasons for my order. I give my reasons hereunder.

21. Senyatsi J determined the money claims against the first respondent and granted a default judgment. The first respondent was personally served with all the documents and notices of set down pertaining to the money claims. The first to third defences raised by first respondent in this application, should have been raised in the action or default judgment application. The first respondent did not oppose the action and default judgment application. Senyatsi J's order is binding on the first respondent until set aside. The first respondent has legal remedies to set aside a default judgment, but he has not invoked them.

22. With regard to the fourth defence, that the default judgment court did not take into account his constitutional rights of owning a property in the Republic and it also did not hear his side of story, he was aware of the application and the hearing date. He did not file the notice of intention to oppose the application, the answering affidavit stating his side of story, and did not appear at the hearing to address the court. Unfortunately, the blame lies at his door rather than that of the court.

23. The applicant brought this application in terms of Rule 46(1) of the Uniform Rules of Court. Rule 46(1)(a)(i) provides that no writ of execution against the immovable property of any judgment debtor shall be issued unless a return has been made of any process issued against any movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ.

24. It is common cause that pursuant to a default judgment, the applicant caused a Warrant of Execution against movable property to be issued against first respondent. The Sheriff executed the warrant on the first respondent personally, and rendered a *nulla bona* return.

25. It is also common cause that the immovable property is a vacant piece of land and not the first respondent's primary residence. The first respondent's primary residence is in P [....], Soweto. Therefore, Rule 46A and Rule 46(1)(a)(ii) and Rule 46(1)(c)(ii) do not apply.

26. It is also common cause that the first respondent is indebted to the applicant. He is not paying the levies or is refusing to pay levies. He is refusing to pay levies even after Senyatsi J has found that as a member of the applicant he is liable to pay levies. In the annexures "D5.1", "D6.2" and "D6.5" (his emails addressed to applicant post default judgment) attached to his answering affidavit, he says:

> "*Please note that I will not be paying levies due to the problem that Eye of Africa management caused by allowing the owner of Erf [....] to build his boundary wall on my stand."*
>
> *"As long as that boundary wall remains there the owner of ERF [....] must be the one that pays the levies because he increased his stand by stealing a portion of my stand by about 8 square metres*."
>
> *"The question why should I pay levies to EAO while they allow Feroze Dadoo and his land surveyor to steal a peace of my stand? I will start to pay the levies to EOA ones that boundary wall is demolished from my stand*."

"*I will not pay levies until EOA and Mr. Feroze Dadoo demolishes their boundry wall that they have erected on my property*."

27. The first respondent is a member of the applicant's Homeowner Association. He is bound by the Memorandum of Incorporation to pay levies. The fact that he has an issue with the owner of Erf [....] does not absolve him from paying levies.

28. He has not provided the applicant with a security to satisfy the judgment debt. He has not made any form of arrangement to satisfy the judgment debt. He is working and can afford to pay the levies. He is refusing to pay levies. He has no valid defence to this application.

29. It is clear from the correspondence between the parties, and *nulla bona* return that the applicant has exhausted all other avenues and remedies to satisfy the judgment debt. I find that the applicant has made out a case for the immovable property to be declared specially executable and a writ to be issued to satisfy the judgment debt.

30. There is a bond registered over the immovable property in favour of Firstrand Bank Limited. Firstrand was given a notice to bring this application by the applicant on 17 June 2021. The application was served on Firstrand on 3 August 2021. Firstrand has not opposed the application.

31. The first respondent in his answering affidavit seeks an order that the applicant pay him an encroachment penalty fee of an amount of R5 413 760.00. Further, he seeks an order that the applicant demolish its '*illegal wall that was constructed into his property for a violation of Right of Exclusion as stated in the Constitution of South Africa*'. During the hearing of this matter, he did not address me on this claim, which was somehow an indication that he was no longer pursuing it. However, for completeness' sake, I deal with it.

32. The first respondent alleges that the applicant and Feroze Dadoo have stolen and encroached 8 square metres piece of his stand worth R10 689.60 on 6

September 2019. It is not clear from his affidavit how he arrived at the claim in the sum of R5 413 760.00, when he actually bought his immovable property for R775 000.00.

33. Feroze Dadoo is not joined as a respondent in these proceedings by the first respondent. The applicant in its replying affidavit, states that the representative of the owner of Stand [....], duly obtained a surveyor's report and provided the applicant with a copy. In an attempt to resolve this issue, the applicant itself appointed a surveyor and obtained the surveyor's drawing and report. The applicant invited the first respondent to appoint his own surveyor to prove his allegations. Despite this, the first respondent has failed to appoint his own surveyor and makes allegations of encroachment without any basis or foundation.

34. Further, the applicant contends that the first respondent had an agreement with the owner of Erf [....] that a joint boundary wall would be built. Having regard to this, the boundary wall is on the centre line and the pegs in respect thereof are in the centre of the wall. The applicant has attached the surveyors' reports, drawing and photographs.

35. The first respondent refuses to appoint his own surveyor for the purposes of his claim because he does not want to pay the surveyor's fees. He demands that the applicant pays the surveyor's fees. I find that the first respondent has not made out a case for the relief he seeks. I accept the version of the applicant as being creditworthy and plausible in relation to the first respondent's claim. The first respondent's claim is refused.

36. Regarding the issue of costs, I find no reason why costs should not follow the event.

37. Accordingly, I made the following order:

> 1. The first respondent's immovable property known as **Erf [....], Eye of Africa Exention 1, Gauteng, situated in the Eye of Africa Golf and Residential Estate, Alewynspoort, Eikenhof, Johannesburg, Gauteng**,

registered under Title Deed T [....] (“the immovable property”) is declared specially executable.

2. A Writ of Execution to be issued in respect of the immovable property, as envisaged in terms of Rule 46(1)(a) of the Uniform Rules of Court, is authorised.

3. The first respondent is ordered to pay the costs of the application.

MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(**Digitally submitted by uploading on Caselines and emailing to the parties)**

Date of delivery:	12 August 2022
Appearances:	
On behalf of the Applicant:	Adv JG Dobie
Instructed by:	Rooseboom Attorneys
On behalf of the first respondent:	In person