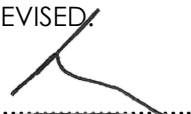





**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 2018/47106

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: 
Signature:  Date: 10 October 2022	

In the matter between:

**DAYALAN MUNSAMI**

Applicant

and

**THE STANDARD BANK OF SOUTH AFRICA LTD**

First Respondent

**SHERIFF RANDBURG SOUTH WEST**

Second Respondent

**REGISTRAR OF DEEDS JOHANNESBURG**

Third Respondent

**HAZEL IRENE KNOWLER**

Fourth Respondent

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**JUDGMENT**

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**This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed and stamped copy hereof to Caselines. The date and time for hand-down is deemed to be 10h00 on 10 October 2022.**

## MOULTRIE AJ

### Introduction

- [1] The applicant seeks an order setting aside the sale in execution and transfer to the fourth respondent of his primary residence (“the property”) pursuant to a judgment obtained by the first respondent (“the Bank”). The basis for this relief is alleged non-compliance by the Bank with the provisions of Rule 46A prior to the sale and transfer.

### Relevant Facts

- [2] It is common cause that the judgment debt arises from an order of summary judgment granted by his Lordship Mr Acting Justice Mtati on 9 May 2019. Apart from various orders requiring the payment of moneys due and owing to the Bank, the summary judgment declared the property specially executable and authorised the Registrar to issue a writ of execution without setting a reserve price (“the Rule 46A orders”).
- [3] The Rule 46A orders formed part of the relief claimed by the Bank in the combined summons that it had issued on 20 December 2018.
- [4] The Bank’s particulars of claim included *inter alia* the following allegations:
- (a) Under the heading “Executability Order”, the Bank alleged that the property was the applicant’s primary residence, and he was directed to take notice of the provisions of section 26(1) and (3) of the Constitution, as well as the requirements of Rule 46A. He was “called upon to place facts and submissions before the court” to enable the court to apply Rule 46A, failing which an order declaring his home specially executable may be granted and “consequent upon which [his] home may be sold in execution”.
- (b) Under the heading “Relevant Factors”, the Bank set out the amount of the monthly instalments, the amount of the instalments in arrears, the number of months that the applicant was in arrears, the date of the last

payment of the received from the applicant, and the full amount owing to the Bank and secured by the property as at the date of summons. These allegations were supported by a statement of account.

- (c) The Bank made the allegation that it was unlikely that the applicant would be in a position to pay his indebtedness within a reasonable time and that there was no alternative or less invasive means available to satisfy the anticipated judgment debt.
  - (d) Under the heading “Reserve Price and general”, the Bank stated that an automated valuation report was attached in order to assist the court in setting a reserve price should it decide to do so. The valuation report calculated the “high value” of the property as being R4.94 million, whereas the “low value” was calculated as being R3.38 million. The Bank further alleged that it had been unable to obtain a sworn valuation, as the applicant was not co-operating with it to obtain such a valuation or any other information relevant to the property and that the Bank “has no knowledge of any other factors for the purposes relevant” to the setting of a reserve price.
- [5] Following delivery of a notice of intention to defend by an attorney acting on behalf the applicant, the Bank applied for summary judgment in March 2019. It should be noted that this was prior to the amendments to Rule 32 which require a plaintiff to wait until the delivery of a plea before making such an application. The Rule 46A relief was included among the prayers in the notice of application for summary judgment. In the affidavit filed in support of the summary judgment application, the relevant official of the Bank swore positively “to the facts verifying the cause of action”.
- [6] Despite the applicant being legally represented at the time of the summary judgment application and order (he specifically alleges in the founding affidavit that “at the time I had legal representation”), he did not deliver any answering affidavit setting out a defence or placing facts and submissions before the court in relation to the factors to be considered for the purposes

of Rule 46A.

- [7] The applicant did not apply for a rescission of the summary judgment (including the Rule 46A orders) or seek to suggest that the consequent sale in execution without a reserve price would be impeachable for any non-compliance with Rule 46A. To the contrary, the applicant launched urgent proceedings in December 2020 seeking to stay the sale in execution (not but not prevent it altogether) on the basis that the notice of sale did not contain a short description of the property. Further concerns about the adequacy of the short description were raised in correspondence on 14 April 2021 but, once again, no allegation was made that the anticipated sale in execution would be impeachable on the basis of any non-compliance with Rule 46A.
  
- [8] The property was sold in execution to the fourth respondent for the sum of R360,000.00 at a public auction on 24 June 2021, which the applicant notes was far below the “low value” calculated in the automated valuation report. The transfer was registered on 25 November 2021.
  
- [9] On about 16 February 2022, the fourth respondent launched an application seeking the eviction of the applicant from the property. The current application was launched about a week later, on 24 February 2022.

### Discussion

- [10] In his affidavits, the applicant was at pains to emphasise that this is not a rescission application, and this contention was repeated at the hearing before me by Mr Panday, who represented him. It was argued that although the summary judgment issued by Mtati AJ (including the Rule 46A orders which did not set a reserve price) is not impugned, the applicant is entitled to the relief that he seeks purely on the basis of the alleged non-compliance with Rule 46A together with the prejudice that he has allegedly suffered as a result of the fact that the property was sold without any reserve price.

- [11] According to applicant, the alleged non-compliance with Rule 46A was not a failing of the court, but of the Bank, which he contends was obliged to bring a separate Rule 46A application after the summary judgment (including the Rule 46A orders) was granted.
- [12] I disagree, for two reasons.
- [13] In the first place, as a general principle of our law, a sale in execution and consequent registration of transfer of immovable property may only be impugned in exceptional circumstances<sup>1</sup> and, in particular, in circumstances where the purchaser took transfer of the property in bad faith with knowledge of the alleged defect in the sale.<sup>2</sup>
- [14] The applicant makes no allegation, let alone adduces any evidence that would lead me to conclude that the fourth respondent took transfer of the property in bad faith, or with any knowledge of the non-compliance with Rule 46A alleged by the applicant in the current instance. Indeed, nothing in the affidavits serving before me indicates that any non-compliance with the rule was alleged by the applicant until after the date of transfer.
- [15] Secondly, and even assuming that a failure to comply with Rule 46A could, without more, constitute exceptional circumstances justifying the impeachment of the sale and transfer, I do not consider that there was any non-compliance with Rule 46A. In particular, it was not necessary for the Bank to have launched a separate application in which the provisions of Rule 46A would, in the words of Mr Panday, be the “sole focus”.
- [16] There is precedent in this division to the effect that, as long as appropriate steps are taken “*by the lawyers drafting the pleadings in the matter effectively to marry the summary judgment procedure with that of rule 46*”,<sup>3</sup>

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<sup>1</sup> *Sookdeyi and Others v Sahadeo and Others* 1952 (4) SA 568 (A) at 571H – 572A.

<sup>2</sup> *Polizzi and Another v Standard Bank of South Africa Limited and Others* (12598/2009) [2017] ZAWCHC 73 (30 May 2017) at para 36.

<sup>3</sup> *Standard Bank of South Africa Ltd v Lamont* 2022 (3) SA 537 (GJ) paras 3 to 10.

nothing in principle prevents a party seeking and obtaining orders in terms of Rule 46A in the course of a summary judgment application. As long as the relevant allegations are made in the particulars of claim and verified on oath in the summary judgment affidavit<sup>4</sup> or in another affidavit,<sup>5</sup> there is no need for a separate Rule 46A application.<sup>6</sup>

[17] In my view, the two procedures were indeed effectively “married” in the current instance, and the provisions of Rule 46A were substantially complied with when the summary judgment (including the Rule 46A orders) was sought and granted. When I invited Mr Panday to identify any specific provision of Rule 46A that had not been complied with in the course of the summary judgment application, he conceded that he was unable to do so. I consider this concession was well-made for the following reasons:

- (a) The summary judgment was an instance in which an execution creditor sought to execute the residential immovable property of a judgment debtor (Rule 46A(1)).
- (b) The allegations in support of the Rule 46A orders contained in the particulars of claim constituted part of the “cause of action” that was verified on oath by the Bank’s official in the affidavit in support of the application for summary judgment.
- (c) The court was specifically advised that the immovable property which

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<sup>4</sup> This was also the approach taken in *ABSA Bank Limited v Sawyer* [2018] ZAGPJHC 662 (14 December 2018). Although there is no reference in the current matter to an affidavit akin to one filed in compliance with paragraph 10.17 of the erstwhile practice manual, I can find nothing in either the Sawyer judgment indicating that Rule 46A would have been found not to have been complied with in the absence of such an affidavit.

<sup>5</sup> In *Nedbank Limited v Pettitt and Another* (24418/2019) [2021] ZAGPJHC 74 (4 June 2021), summary judgment was refused in circumstances where the plaintiff neither included relevant allegations in the particulars of claim nor filed an additional affidavit.

<sup>6</sup> This is not to say that it would always be inappropriate to deliver a separate Rule 46A application: In *Changing Tides 17 (Pty) Limited NO v Rademeyer and others* [2019] ZAGPPHC 165 (13 May 2019), the court granted summary judgment in circumstances where the plaintiff had delivered a separate Rule 46A application, which was considered simultaneously with the summary judgment application.

the Bank intended to execute against was the primary residence of the Applicant (Rule 46A(2)(a)(i)) and it was alleged that there were no alternative means to satisfy the judgment debt, other than execution against the property (Rule 46A(2)(a)(ii)).

- (d) There is no evidence to suggest that when Mtati AJ made the Rule 46A orders, he did not consider that the Rule 46A orders were warranted, or that he failed to consider the information placed before him in relation to the special executability of the property set out in the particulars of claim and verified on oath in the summary judgment affidavit (Rule 46A(2)(b)).
- (e) It is conceded that the court granted the Rule 36A orders and given that they are not impugned, there is no basis to contend that Rule 46A(2)(c) was not complied with.
- (f) The notice of application for summary judgment contained prayers for the Rule 46A orders, and as such constituted “a notice of application to declare residential immovable property executable” as contemplated in Rule 46(3) and was substantially in accordance with Form 2A of Schedule 1 (Rule 46(3)(a)).
- (g) The application for summary judgment was on notice to the applicant, and was supported by the affidavit in support of summary judgment which set out the reasons for the application and the grounds on which it was based by reference to the contents of the Particulars of Claim (Rule 46(3)(b) and (c)).
- (h) Although the application was not served by the sheriff on the applicant personally, I consider that the service on the applicant’s attorney of record in circumstances where he expressly alleges that he was legally represented in relation to the matter at the time constituted acceptable alternative service as contemplated in the proviso to Rule 46A(3)(d).
- (i) While the notice of application for summary judgment did not state the

specific date on which the application was to be heard; expressly inform the applicant that if he intended to oppose the application or make submissions to the court, he 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 (Rules 46(4)(a)(i) and (ii)), these requirements (as well as the requirement in Rule 46A(4)(b)) were substantially complied with in view of the provisions of Rule 32(2) and (3)(b) as they existed at the time, or are of no moment in view of the fact that the applicant was legally represented in the matter at the time. I note in this regard that although the court in *Lamont* considered that these requirements had not been complied with, that did not result in the dismissal of the application, but only Keightley J affording 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).<sup>7</sup>

- (j) The notice of application for summary judgment appointed a physical address within 15 kilometres of the office of the registrar at which the Bank would accept service of all documents in the proceedings and gave the Bank's attorneys' postal and electronic mail addresses (Rule 46A(4)(a)(iii) and (iv)).
- (k) The application for summary judgment was supported (by reference to the contents and annexures to the particulars of claim in the affidavit in support of summary judgment) by documents evidencing the information required by Rule 46A(5).
- (l) There is no evidence to suggest that when Mtati AJ made the Rule 46A orders, he did not as required by Rule 46A(9) consider whether a reserve price was to be set.

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<sup>7</sup> *Standard Bank v Lamont* (above) at para 9.




Conclusion, costs and order

[18] In the circumstances, the application falls to be dismissed.

[19] The usual principle is that the successful party should be awarded its costs. I see no reason to depart from that approach in this matter.

[20] The application is dismissed with costs.



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RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 5 October 2022

JUDGMENT DELIVERED: 10 October 2022

APPEARANCES

For the Applicant: Attorney S Panday, instructed by Kesi Moodley attorneys

For the 1<sup>st</sup> Respondent: Attorney S Jacobs, instructed by Stupel Berman Inc.

For the 4<sup>th</sup> Respondent: Adv L Mhlanga, instructed by: Precious Muleya Inc.