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

CASE NO: 39747/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

25 November 2022

In the matter between:

RODEL FINANCIAL SERVICES (PTY) LTD Applicant

Applicant

and

LUSOLINK INTERNATIONAL EXPORT (PTY) LTD

First Respondent

GABRIEL GARY MOONSAMY

Second Respondent

J U D G M E N T

MUDAU, J:

[1] The applicant seeks an order that, Portion [...] of ERF [...] Bedfordview Ext [...]; in the city of Ekurhuleni Metropolitan Municipality, Registration Division I.R., the Province of Gauteng (“the property”), commonly referred to as unit [...] L [...] P [...] 1, [...] P [...] Road, Bedfordview, be declared specially executable. The applicant further seeks an order for costs on the attorney and client scale. The application is opposed by the respondents.

Background facts

[2] The property is owned by Lusolink International Export (Pty) Ltd (first respondent), a juristic person or company registered in terms of the company laws of South Africa. On 7 March 2018, the applicant and the first respondent entered into a written facility agreement in terms of which the applicant lent and advanced monies to the first respondent. On 8 March 2018, the second respondent, signed a written guarantee and undertaking to accept liability as principal debtor, for the due and punctual discharge of the first respondent's obligations and indebtedness to the applicant. The facility agreement was conditional upon the first covering mortgage bond being registered over the immovable property, which was registered on 9 May 2018. The second respondent chose as his *domicilium citandi et executandi* [...] W [...] W [...], Bedfordview, Gauteng, 2007.

[3] On 7 September 2018, the first respondent cancelled the transfer of the property without notice to the applicant, which consequently, triggered the breach clause. As a result, on 25 October 2018, the applicant instituted action proceedings against the respondents for payment of the amount loaned to the first respondent in terms of the Facility Agreement entered into between the parties.

[4] On 24 September 2019, the applicant obtained a judgment against the first and second respondents in the amount of R3 369 723.60 ("the judgment debt") for the capital amount owed. The respondents were granted leave to defend in respect of the applicant's claim for interest. The respondents applied for leave to appeal the summary judgment, which was dismissed on 14 June 2020.

[5] On 14 July 2020, a warrant of execution was issued and subsequently delivered to the Sheriff Germiston North for execution against the movable property of the respondents found at the property. On 14 August 2020, the Sheriff found the property to be vacant and furnished Le Roux Vivier Attorneys, the applicant's attorneys, with a Return of non-service.

[6] By 14 August 2020, the respondents have not made any payments to settle

the judgment debt. The amount of arrears outstanding at the date of the application for summary judgment on 12 April 2021, was R5 162 014.41. On 14 August 2020, the sheriff found the property to be vacant when serving a warrant of execution on the first respondent. On 15 September 2020, the applicant's Warrant of Execution was served on the second respondent personally at his residential address in Blue Valley Centurion. On 15 September 2020, a warrant of execution was served on the second respondent but the sheriff furnished a *nulla bona* return. The applicant highlights that, on 15 January 2021, when the sheriff attended the property in respect of service of a notice of set down, but found the property vacant.

[7] The second respondent also failed to comply with a court order in terms of which he was to file an answering affidavit within the time periods prescribed in that Order, despite the founding affidavit having been served on the second respondent on 13 April 2021. It took the second respondent nearly seven months in which to file the requisite answering affidavit. The second respondent contends in opposing this application that the first respondent purchased the property in 2002. He has used the said residential property as his primary residence since 2016. He currently resides with his adult son in the property.

[8] For a significant period until the end of 2020, he was renting the property situated at [....] F [....] C [....], Blue Valley Golf Estate, Centurion. He would however, on weekends return to the property at Unit [....] L [....] P [....] 1. The second respondent further contends that, because the applicant launched these proceedings under Rule 46 as opposed to Rule 46A of the Uniform Rules of Court, the application was fatally defective, as this was his primary residence. He contends that, the applicant has failed to comply with the requirements of Rule 46A, nor has it filed an affidavit in terms of Chapter 10.17.1 of the Practice Directives of this court.

[9] According to the applicant in its reply, at the time that the application was prepared, the immovable property was vacant. The applicant contends that; the property is not utilised for residential purposes but rather for commercial purposes. There was therefore no need for the applicant to have complied with the provisions of Rule 46A, but the applicant did so *ex abundanti cautela*. The applicant denies the second respondent and his son have resided on the property since 2016 and

submits that the second respondent has perjured himself under oath in light of the following reasons.

[10] In the Magistrate's Court proceedings instituted against the first respondent by the Homeowner's Association under case number 39747/18 for outstanding 2018 levies due, the first respondent averred under oath in the answering affidavit dated 9 November 2020 at paragraph 5 thereof as follows:

"I will be relocating to the immovable property owned by the respondent herein, within the next week, which will then become my principal residence. I am not able to continue living with my adult son any longer where I am at present, who has told me as much." My emphasis.

[11] Notably, on 15 January 2021, the Sheriff attended the property to serve a Notice of set down in the Magistrates' court and found the property to be vacant. It is common cause that the magistrate also found that there existed no alternative means to satisfy the judgment debt. Accordingly, an order was granted declaring the property specially executable with costs on the attorney and client scale.

[12] Section 26(1) of the Constitution of the Republic of South Africa accords to everyone the right to have access to adequate housing. From the facts, it is clear that, the immovable property was not utilised for residential purposes even on the respondents' version since it was purchased in 2002 until 2016. The mortgaged property is not the second respondent's primary residence as he used the property during weekends until 2020 well after the applicant obtained judgment. The debt sought to be enforced was not incurred in order to acquire the property sought to be declared executable. The second respondent does not suggest that he cannot afford alternative housing as evidenced by the second respondent choosing as his *domicilium citandi et executandi* [...] W [...] W [...], Bedfordview, Gauteng, 2007 and rental of the Centurion property.

[13] It is trite that, Rule 46 deals with execution against immovable property other than the residential immovable property of a judgment debtor, the underlying principle being that, save where immovable property has been specially declared

executable, execution shall not issue against immovable property until movable property has been executed and it appears that the movable property is insufficient to satisfy the writ. Rule 46A on the other hand, provides for judicial oversight, the aim of which is to protect the constitutional right to adequate housing provided for in section 26 of the Constitution.

[14] The applicant urges this court to have regard to annexure "0" at page 74 of the valuation report attached to the founding affidavit in the Magistrate's Court application, it can be gleaned that: the municipal value of the property is R4 091 000.00; and that the estimated market value of the property is R4 400 000.00. That was a few years ago. The applicant regards as reasonable and recommends that a reserve price be set at R5 000 000.00, which amount represents the difference between the estimated value, the municipal value plus the amounts owing to L [...] P [...] 1 Home Owners Association and the municipality. I am inclined to agree. The judgment debt remains unsatisfied nor any payment made whatsoever in respect thereof.

[15] I find that in this matter, the respondents' opposition is not *bona fide*. There is no valid defence in law. The property belonged to the first respondent which is a juristic person. The rule 46A defence is accordingly, without merit. The respondents have failed to indicate alternative means to be considered by this court in determining whether execution against the property is warranted.

[16] I have no doubt to conclude that the respondents have opposed the application with the sole intention of delaying the order of execution. The version contended for on behalf of the respondents is so far-fetched and untenable that it falls to be rejected. I am inclined to agree with counsel for the applicant in submitting that, the respondents' conduct in opposing the application without any merit, and furthermore in delaying in delivering their answering affidavit has severely prejudiced the applicant insofar as it has not been able to obtain relief against the execution of the property despite the judgment being granted against the respondents more than two years ago on 24 September 2019.

[17] Also, the respondents were furthermore in contempt of a court order in that

they were ordered to file their answering affidavit by no later than 27 September 2021. It is trite that, a punitive costs order is justified where the conduct concerned is “extraordinary” and worthy of a court’s rebuke’. Accordingly, costs on an attorney and client scale is justified.

Order

1. The first respondent’s immovable property, namely PORTION [....] of ERF [....] BEDFORDVIEW EXTENSION [....], IN THE CITY OF EKURHULENI__METROPOLITAN MUNICIPALITY, REGISTRATION DIVISION I.R., THE PROVINCE OF GAUTENG, more commonly referred to as Unit [....] L [....] P [....] 1, [....] P [....] Road, Bedfordview ("the immovable property"), be declared executable.
2. That the Registrar of this Court is authorised to issue a Warrant of Execution in respect of the immovable property.
3. The reserve price of the property is set at R5 000 000,00.
4. The first and second respondents are to pay the costs of this application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

MUDAU J
[Judge of the High Court]

APPEARANCES

For the Applicant: Adv. V Vergano

Instructed by: LE ROUX VIVIER ATTORNEYS

For the Respondents: In person

Instructed by:

Date of Hearing: 3 October 2022

Date of Judgment: 25 November 2022