

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 1911/2019

(1)	REPORTABLE: YES / <del>NO</del>
(2)	OF INTEREST TO OTHER JUDGES: YES/ <del>NO</del>
(3)	REVISED.
	<u>30/05/2019</u>
	DATE
	<u>[Signature]</u>
	SIGNATURE

In the matter between -

**CHANGING TIDES 17 (PTY) LIMITED N.O.**

Applicant/Plaintiff

and

**GERT PETRUS J. S. RADEMEYER**

First Respondent/Defendant

**SALOME RADEMEYER**

Second Respondent/Defendant

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**JUDGMENT**

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STRYDOM, AJ:

- [1] This is an application for summary judgment in which the plaintiff claims against the first and second defendants, jointly and severally, one paying the other to be absolved, for –

[1.1] Payment of the sum of R1 839 535,03;

- [1.2] Interest thereon at the rate of 9.10% per annum, compounded monthly in arrear from 22 November 2018 to date of payment;
  - [1.3] Declaring an immovable property (as described in the application) especially executable and authorising the Registrar of this Court to issue a warrant of execution against the immovable property;
  - [1.4] Costs of suit on an attorney and own client scale.
- [2] After service of the summons the defendants, a husband and wife, filed a notice of their intention to defend the matter. Pursuant to this, the plaintiff, a registered credit provider, brought the summary judgment application supported by an affidavit.
- [3] The matter was initially set down to be heard on 8 May 2019, however, this date was declared a public holiday and the matter was subsequently heard on 10 May 2019.
- [4] The defendants elected not to file an affidavit resisting summary judgment but opposed the application. Advocate Coetzee, appearing on behalf of the defendants, indicated that he will argue the matter on the papers as they stood.
- [5] Part of the relief the plaintiff is seeking in its summary judgment application is to declare immovable residential property executable.
- [6] In the plaintiff's summons the cause of action was fully pleaded, including averments that the immovable property, over which a bond was registered, is a residential property and that the plaintiff will make application to the Court on notice in terms of the provisions of Rule 46A of the Uniform Rules of this Court ("the Rules") for an order declaring the immovable property specially executable. In compliance with the Rule, its impact and consequences were pleaded.
- [7] Simultaneous with the application for summary judgment, an affidavit in terms of Rule 32(2) of the Rules were filed. On behalf of the respondents it was argued that certain allegations contained in this affidavit fell short of the

requirements of Rule 32(2). I will deal with this aspect later in this judgment.

- [8] On about 23 April 2019, the plaintiff caused a further notice of motion to be filed to declare immovable property executable in terms of Rule 46A. This was accompanied by an affidavit as is required in Chapter 10(17) of the Practice Manual. This affidavit contained all the required information and allegations and is aligned with the pro-forma precedent with reference to the relevant factors to be taken into account before a court granting default judgment declaring residential immovable property specially executable.
  
- [9] The defendants also filed a notice to oppose this further application. The defendants elected not to file an opposing affidavit and Advocate Coetzee, as with the case of the summary judgment application, informed the court that he will argue the matter on the papers as they stood. He also indicated that he will argue that the deponent to the affidavit lacked personal knowledge to swear to some of the allegations in the affidavit.
  
- [10] The Rule 46A application was set down for hearing simultaneously with the summary judgment application. This Court was then asked to adjudicate the summary judgment application together with the application to declare the immovable property executable.

### **Issue of *lis pendens***

- [11] The defendants argued that considering the fact that the relief set out in the Rule 46A application mirrors the relief sought in the summary judgment application, one is confronted with *lis alibi pendens*. It was argued that an affidavit accompanying a summary judgment application must comply with the requirements of the Rules. No provision is made for the filing of any affidavit by the plaintiff other than the affidavit described in sub-rule 2. The plaintiff is expressly confined thereto and any application of or in addition to this affidavit must be disregarded. It was submitted that the only way in which it would be possible for a separate application to be considered when applying for summary judgment would be if in the summary judgment application, were executability if immovable property be sought, could be granted without



reference to the affidavit accompanying the Rule 46A application.

- [12] If this argument is correct, summary judgment will never be obtainable in matters where residential immovable property is to be declared executable. This will be the case as Rule 46A requires a further affidavit in line with the pro-forma precedent containing all the relevant factors to be taken into account by the court before granting judgment in foreclosure cases where execution is sought against the immovable property.
- [13] The court was referred to the judgment of *Absa Bank Ltd v Mokebe and related cases*<sup>1</sup> in which the full court dealt with default judgment specifically. The court found that both the money judgment and the issue of executability should be dealt with simultaneously.
- [14] It was pointed out by both counsel appearing before me that considering that the *Mokebe* judgment only dealt with default judgment, it would not be authority for what the situation should be in a summary judgment application where executability is sought of residential immovable property.
- [15] I was informed by counsel for the plaintiff that, the plaintiff filed the two applications (the summary judgment application and the Rule 46A application) in an effort to adhere to the findings of the full court. This would prevent the situation that only the money judgment is dealt with on a piecemeal basis.
- [16] It was argued on behalf of the plaintiff that the summary judgment application and the Rule 46A application is on a different footing and that the latter does not offend the provisions of Rule 32 as the court does not have to have regard to the context thereof in order to make a ruling on the money part of the judgment. Moreover, Rule 46A requires an application and this Rule is as applicable as Rule 32(a).

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<sup>1</sup> 2018 (6) SA 492 (GJ)

[17] In the matter of *ABSA Bank Ltd v Sawyer*<sup>2</sup> the court was faced with a similar situation where summary judgment was sought together with an order declaring residential immovable property executable. The only factual difference between that matter and the matter in *casu* is that the plaintiff in that matter did not file a separate application in terms of Rule 46A but merely a further affidavit. What the plaintiff did was to file a separate affidavit pursuant to the rule containing the required allegations. The court as per Van Eeden AJ granting the summary judgment and declaring an immovable property executable, found that the procedure followed by the plaintiff was in order. The court stated as follows:<sup>3</sup>

*“Mr Scott’s submission correctly identified an uneasiness between action procedure and a subsequent opposed application for summary judgment on the one hand, and the provisions of rule 46A of the other. The plaintiff is fully within its rights to pursue an application for the money judgment and the order of executability in terms of rule 32, but rule 46A requires an application on notice of motion for the order of executability substantially in accordance with Form 2A of schedule 1 (rule 46A(3)(a)). In addition, the Practice Manual requires the chapter 10.17 affidavit.*

*In my view the uneasiness is more apparent than real. The plaintiff pleading cause of action in the combined summons is compelled to plead both circumstances entitling it to the money judgment and circumstances entitling it to an order of executability. Although the order of executability is ancillary to the money judgment, the latter relief forms an integral part of the cause of action.<sup>4</sup> It follows that when summary judgment is applied for and the cause of action is verified, the deponent verifies both the money judgment and the order of executability. The chapter 10.17 affidavit is a separate affidavit not falling foul of rule 32, which supports the relief sought*

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<sup>2</sup> (2018/17056) [2018] ZAGPJHC 662 (14 December 2018) (Sawyer)

<sup>3</sup> Sawyer at para 13, 14 and 15

<sup>4</sup> The court then referred to the full court judgment para [12]



*in respect of executability. A court is eventually faced with a hybrid procedure requiring adherence to rule 32, rule 46A and the Practice Manual.*

*I do not read rule 46A as excluding a plaintiff's right to apply for summary judgment, nor that the plaintiff must institute a further application under rule 46A in order to follow Form 2A. In my view the summary judgment application and affidavit filed in compliance with chapter 10.17 constitute substantial compliance by the plaintiff of its obligations contained in rule 46A. Together they allow the court to discharge its duties imposed by rule 46A and to strike a balance between the competing interests of the plaintiff and the defendant in a matter where the executability of a primary residence is at stake..."*

[18] The court in *Sawyer* found that the plaintiff in that matter was fully entitled to apply for both orders in summary judgment proceedings in terms of Rule 32.<sup>5</sup> I am in agreement with this judgment. The summary judgment application, read with the affidavit filed in terms of chapter 10.17 constitute substantial compliance with the provisions of Rule 46A. The rules exist for the court, not the court for the rules.<sup>6</sup> The further affidavit only deals with execution and not with the money judgment.

[19] Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this.<sup>7</sup> The rules are not intended to be inflexible; where it is necessary to relax them in order to do justice, it is competent for the court to do so; otherwise the court would become the slave of rules designed and intended to facilitate its task.<sup>8</sup> The rules should not be interpreted and

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<sup>5</sup> [1] It can be noted that in the work *Summary Judgment A Practical Guide* SJ Van Niekerk, HF Geyer and ARG Mundell, it was submitted that the position was satisfactorily addressed by Van Eeden J in the matter of *Absa Bank Ltd v Sawyer*, *supra*.

<sup>6</sup> *Republikeinses Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783.

<sup>7</sup> *Simmons v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 906.

<sup>8</sup> *Riddle v Riddle* 1956 (2) SA 739 (C) at 748.

applied in a formalistic manner that fails to take these objects into account.<sup>9</sup>

- [20] In short, in a summary judgment application a court is not only entitled but also obliged to consider the Rule 46A application and accompanying affidavit to determine whether the order in the summary judgment application should include an order to declare the immovable property executable.

### **Other points raised**

- [21] On behalf of the defendants, it was pointed out that the affidavit in support of the summary judgment application must be made by a person who can swear positively to the facts verifying the cause of action, the amount claimed, stating that there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purposes of delay. It was argued that this summary judgment application cannot succeed in that the deponent to the supporting affidavit stated that his personal knowledge is derived also from certain unidentified "*enquiries*" he made regarding the matter.
- [22] The attack went further and the affidavit in support of the Rule 46A application was also stated to be lacking. It was argued that the deponent in that affidavit did not indicate that he has the requisite personal knowledge as the deponent merely declared that he has knowledge of the facts contained in the affidavit.
- [23] According to the defendants' argument "*enquires made*" is indicative of the fact that the deponent relied on hearsay evidence in support of the applications as the "*enquiries made*" can only relate to enquiries made to humans and not to documents or other sources of information. Furthermore, the deponent acknowledges the fact that he does not have the necessary personal knowledge of all allegations contained in the affidavit.
- [24] On behalf of the plaintiff, it was submitted that the defendants' argument that "*enquiries made*" relate to information obtained from humans is totally

<sup>9</sup> *Protea Assurance Company Ltd v Vinger* 1974 (SA) 663 (O) at 668; *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A).



misplaced and incorrect. It can also relate to a formal investigation of something or someone.

[25] I am of the view that first-hand knowledge of every fact contained in the affidavit in support of summary judgment could be qualified by the official who deposes to the affidavit on behalf of such financial institution and large corporation. No one person will be in a position to have personal knowledge of all the facts relating to one of thousands of matters being dealt with at the financial institutions and large corporations. This was succinctly put in the matter of *Rees and Ano v Investec Bank Ltd*<sup>10</sup> where it was held by Saldulker JA that:

*“As stated in Maharaj, ‘undue formalism in procedural matters is always to be eschewed’ and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj.”*

[26] The stance taken on behalf of the defendants in this matter is without merit and lost sight of the fact that the deponent to the summary judgment affidavit confirmed that he has access to and has under his control all files, documents, records, information (having perused the contents thereof), the facts of this action, the cause of action and the underlying transactions giving rise thereto to determine the status of the loan and nature and extent of the defendants’ indebtedness.

[27] I am satisfied that the affidavit in support of the summary judgment application met the requirements of Rule 32(2).

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<sup>10</sup> 2014 (4) SA 220 (SCA).



[28] Counsel on behalf of the defendants argued that the deponent to the Rule 46A application does not have the necessary personal knowledge as the allegation that *"I have knowledge of the facts herein stated either personally or as a result of my access to all relevant computer data and documentation pertaining to the respondents/defendants mortgage loan account No: 1740088"* does not warrant the conclusion that the defendant has the necessary personal knowledge.

[29] I am in agreement with the submission on behalf of the plaintiff but this argument does not hold true if regard is had to the fact that the deponent clearly stated that as supervisor of the litigation department he has personal knowledge of the facts stated in his affidavit which facts are both true and correct. In order to make a finding that the deponent does not have the necessary personal knowledge surely it must be measured against objective facts indicating the opposite. No facts are placed before court to show that the deponent does not have the requisite knowledge to depose to the affidavit.

### **The Rule 46A application**

[30] Returning to this application, the defendants placed no facts before this court to counter the allegations contained in the plaintiff's affidavit. The arrears on the account are nearing R1 million. This equates to 55.58 missed instalments of R23 375.91 per month. The last payment received was on 9 September 2015 in an amount of R1 589. The breach is common cause and the outstanding amount is forever increasing.

[31] The plaintiff went to great lengths to provide the court with valuations of the property. The estimated market value was R1 500 000 and the estimated force sale value of the property was R1 200 000. The plaintiff listed all other expenses and costs which will be incurred in the process of preparing the property for sale and costs related thereto. Considering all these aspects, the court is of the view that the reserve price should be set when the property is auctioned in the amount of R900 000.

[32] I make the following order against the defendants, jointly and severally, the one paying the other to be absolved:

- (1) **Payment in the sum of R1 839 535,03 (one million, eight hundred and thirty-nine thousand, five hundred and thirty-five rand, three cents);**
- (2) **Interest thereon calculated at the rate of 9.10% per annum, compounded monthly in arrears from 22 November 2018 to the date of payment;**
- (3) **An order declaring**  
**PORTION 3 OF ERF 637 MOUNTAINVIEW (PTA) TOWNSHIP**  
**REGISTRATION DIVISION JR. PROVINCE OF GAUTENG,**  
**MEASURING: 1044 (ONE THOUSAND AND FORTY-FOUR)**  
**SQUARE METRES**  
**HELD BY DEED OF TRANSFER T344076/1990**  
**subject to the conditions therein contained to be specially**  
**executable.**
- (4) **That the Registrar of the above Honourable Court be authorised to issue a warrant of attachment in respect of the immovable property.**
- (5) **That the reserve price to sell the property is set at R900 000 (nine hundred thousand rand).**
- (6) **Costs of suit as between attorney and client.**



R. STRYDOM

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 10 May 2019

Date of judgment: 31 May 2019 at 10h00

Counsel for Plaintiff: Adv P. I. Oosthuizen

Counsel for Defendant: Adv M. Coetsee