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

Case Number: A314/2021

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 2023-10-05

SIGNATURE

In the matter between:

CLASSIC CROWN PROPERTIES 55 CC

First Appellant

(Registration Number: 2022/030894/23)

CALVIN NYIKO MAPHOPHE

Second Appellant

(Identity number: 5[...])

THANDIWE LYDIA MAPHOPHE

Third Appellant

(Identity number: 6[...])

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

This judgment 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 handing down is deemed to be 5 October 2023.

JUDGMENT

POTTERILL J

Introduction

[1] The appellant, Classic Crown Properties 55 CC [Classic Crown] concluded three loan agreements with the respondent, The Standard Bank of South Africa Limited [Standard Bank]. Three mortgage bonds were registered over the immovable property registered in the name of Classic Crown as security for these loans. The second appellant, Calvin Nyiko Maphophe [Mr Maphophe] and the third appellant, Thandiwe Lydia Maphophe [Ms Maphophe] signed two suretyships confirming and reconfirming that they are bound as sureties and co-principal debtors towards Standard Bank for all three loans.

[2] Classic Crown defaulted on the payments and Standard Bank by means of application sought enforcement of the debt and execution against the property. As of 5 May 2017 the arrear instalments amounted to R115 978.89 with the last instalment received on 18 August 2014.

[3] The application was enrolled on the unopposed roll but Standard Bank received a notice to oppose and the matter had to be removed from the unopposed roll. The matter was again enrolled on the unopposed roll because no answering affidavit was filed, but the day before the hearing Classic Crown filed an opposing affidavit again resulting in a postponement of the matter.

[4] The matter was heard by Acting Judge Gwala on 20 November 2018. Classic Crown did not deny its indebtedness but raised four points *in limine*. The Court rejected the points *in limine* and granted judgment against Classic Crown and Mr and Mrs Maphophe on 20 November 2019. As for the executable the Court found as follows:

“The fact that the first respondent has not made any attempt to make payments towards the monthly instalments for over a period of four years is worrying. The respondents seem to deny that the first

respondent has not made payments over that period. They did not assist, however, by providing any kind of proof that payments have been made in the meantime. I have no way of assessing whether they will be able to satisfy the judgment order once granted in any way other than declaring the property specially executable. They have not provided any information to demonstrate that the order declaring the property specially executable is not justified. The debt has been outstanding for far too long. "

[5] An application for leave to appeal was filed by Crown Classic. The application for leave to appeal was heard on 29 January 2020. There was no appearance for Crown Classic and the matter proceeded in their absence. The Court *mero motu* raised the issue of whether it should not have set a reserve price for the sale in execution and granted leave to appeal to the Full Court. Although it is clear from the record that the intention was to only grant leave on whether a reserve price should have been set, Gwala AJ did not specifically limit the grounds of appeal. It is apposite to enlighten that Standard Bank had enrolled the appeal and Crown Classic had not filed heads of argument for this appeal but, pursuant to enquiry by this Court, filed their heads of argument late.

The issues

[6] There are only two issues to decide in this matter; can this new ground of appeal be raised before the court of appeal? Can this Court entertain argument on the reserve price notwithstanding that Rule 46A(9) was not extant when the application was issued, but before judgment was granted?

[7] Rule 46A(9) reads as follows:

“(9)(a) In an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set.

(b) In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court should take into account

—

- (i) the market value of the immovable property;*
- (ii) the amounts owing as rate or levies;*
- (ii) the amounts owing on registered mortgage bonds;*
- (iii) any equity which may be realised between the reserve price and the market value of the property;*
- (iv) reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);*
- (v) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;*
- (vi) the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;*
- (vii) any prejudice which any party may suffer if the reserve price is not achieved; and*
- (viii) any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.*

(c) If the reserve price is not achieved at a sale in execution, the court must, on a reconsideration of the factors in paragraph (b)

and its powers under this rule, order how execution is to proceed.

- (d) Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within 5 days of the date of the auction, which report shall contain –*
 - (i) the date, time and place at which the auction sale was conducted;*
 - (ii) the names, identity numbers and contact details of the persons who participated in the auction;*
 - (iii) the highest bid or offer made; and*
 - (iv) Any (sic) other relevant factor which may assist the court in performing its function in paragraph (c).*
- (e) The court may, after considering the factors in paragraph (d) and any other relevant factor, order that the property be sold to the person who made the highest offer or bid.”*

[8] On behalf of Crown Classic it abandoned the other grounds of appeal and persisted on appeal only with whether the Court should have considered setting a reserve price. It was conceded on behalf of Mr and Ms Maphophe that whether a reserve price was to be set, is not a defence to their liability in terms of the suretyships and the appeal on behalf of Mr and Ms Maphophe thus has to fail.

Submissions on behalf of Crown Classic

Can this Court decide this new ground of appeal?

[9] It was argued that this new ground of appeal could be raised because this question of whether a reserve price should be set was procedural in nature and thus

a new point of law that could be argued.¹ It was conceded that this point was not engaged in the evidence in the affidavits and thus the record, but there was no unfairness to Standard Bank to argue the point.² This was so because the matter could be referred back to the High Court where Standard Bank could address this issue.

Does the insertion of Rule 46A have retrospective operation?

[10] It is common cause that this application was issued and served before Rule 46A was inserted and the application also preceded the Full Court judgment of *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) where the following was found in par [66]:

“... In order to comply with the constitutional requirement of just and equitability, it would be an exception rather than a rule when a reserve price is not set by a court ...

‘Save in exceptional circumstances a reserve price should be set by a court, in all matters where execution is granted against immovable property which is the primary residence of a debtor, where the facts disclosed justify such an order.’”

[11] For this *ratio* to apply to the matter at hand reliance was placed on *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another, and Similar Matters* 2020 (1) SA 623 (GJ) where the general rule about retrospectivity was captured as follows:

“...’a statute is as far as possible to be construed as operating only on facts which came into existence after its passing.’”

But then proceeded to find:

¹ *JMN v The Commissioner for the South African Revenue Service* (A3096/2019; 14001) [2021] ZAGPJHC 167 (30 April 2021).

² *Quartermark Investments (Pty) Ltd v Mkhwanazi & another* (768/2012) [2013] ZASCA 150 (1 November 2013); 2014 (3) SA 96 (SCA).

“Despite this general rule, it has been held that a distinction must be drawn between those amendments that are merely procedural in nature and those that affect substantive rights. New procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases. However, this rule is not always easy to apply in practice. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately.”

[12] The argument went that the substantive rights and obligations of Standard Bank remained unimpaired and therefore the new procedure could be applied. Standard Bank could still execute, it just had to follow the rule 46A procedure.

Submissions on behalf of Standard Bank

Can this new ground of appeal be entertained?

[13] The stance was that Standard Bank needed to finalise this matter due to the extreme time period that this debt has been outstanding. It was submitted that, in fact, the appeal had lapsed due to Crown Classic not prosecuting it, but Standard Bank is not raising it so as to obtain legal certainty and finality.

Does Rule 46A operate retrospectively?

[14] It was submitted it does not apply retrospectively and relied on the matter of *Williams and Another v Standard Bank of South Africa Ltd and Another* [2019] ZAGPPHC 364 (3 May 2019) where the following was found:

“... applied retroactively to the bank's case it would have the effect of impairing the bank's untrammelled right to sell in execution by imposing new duties and burdens on the bank. It would also have the effect of undoing all the procedural steps already taken by the bank in regard to an execution process initiated under the old rule. The injustice and impracticality of applying Rule 46A to such a case is obvious. Given that there is no indication that the provision was intended to apply to

pending execution proceedings. I consider that the presumption against retrospectivity and interference with existing rights have not been rebutted.”

[15] On behalf of Standard Bank this Court’s attention was drawn to the fact that Crown Classic, despite an invitation to do so in the summons, did not set out a single fact as to why a reserve price should be set. This is contrary to the requirements set out by the Supreme Court of Appeal in the matter of *NPGS Protection and Security Services CC and Another v FirstRand Bank Ltd* (314/2018) [2019] ZASCA 2019 (6 June 2019); 2020 (1) SA 494 (SCA):

“On the facts of this case, the complete failure by the second appellant to avail himself of rights which were expressly drawn to his attention in the summons issued by the respondent dictates to the contrary. It bears repeating that there was a specific prayer in the summons requesting an order of execution. In imposing an obligation upon a court in this case when one vague and unspecified mention of a personal residence without more suffices as a defence or even a justification for remitting a case back to the court a quo, would in my view, cause significant uncertainty, and arguably serious damage to the efficient provision of credit in the economy.”

[16] The submission was further that there is no indication in the rule itself that it had to have retrospective application.

[17] It was further argued that remitting this matter back to the High Court to consider a reserve price setting would be futile. This debt has not been paid since 2017 and now, five years later, the property will have no equity to satisfy this debt, with or without, a reserve price. Crown Classic had not set out any reasons why a reserve price must be set.

Reasons for decision

Must this Court determine this new ground of appeal?

[18] This ground of appeal was referred to the Full Court by the High Court and I think on that basis alone the matter must be heard. I do not propose that leave granted by a High Court will always entitle a litigant to argue the new ground of appeal whereon leave was granted, but in this matter, due to the delay and dilatory conduct of Crown Classic justice will be served to obtain certainty on the issue raised. It is in the interests of justice that this matter be finalised.

[19] I am aware that it is debatable whether the issue of setting a reserve price by the Court is indeed only procedural and may clothe this Court with jurisdiction to entertain the new ground of appeal. Also, the reserve price issue was not addressed in the papers or the judgment of the court below perhaps rendering the new ground of appeal not to be entertained. But, in view of my finding above and Standard Bank's stance that the matter can be argued, I do not find it necessary to determine those issues.

Is Rule 46A to be applied retrospectively?

[20] The common law presumption against retrospectivity has found application under our constitutional dispensation. This rule has evolved into a vital and important mechanism by which a court can protect fundamental rights from being interfered with by the legislature. There is however a rider to this presumption; where it is clear from the unambiguous language of the statute that the legislature intended to interfere with the fundamental rights the presumption against retrospectivity cannot be invoked.

[21] This relationship was set out by the Constitutional Court in *Du Toit v Minister of Safety and Security* 2010 (1) SACR 1 (CC)³ as follows: *"The principle against interference with vested rights is a component of the presumption against retrospectivity. No statute is to be construed as having retrospective operation, which would have the effect of altering rights acquired and transactions completed under existing laws, unless the legislature clearly intended the statute to have that effect"*.

³ Footnote 23.

[22] In *S v Acting Regional Magistrate, Boksburg* 2011 (2) SACR 274 (CC) at par [16] the following was held:

“However, in our common law there is a presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication. This presumption is consistent with the fair-trial provisions of the Constitution, and was approved by this court in *Veldman*.”

[23] In *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* (CCT19/05) [2005] ZACC 22 (5 December 2005); 2007 (3) SA 210 (CC) the court held that:

“Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”⁴

[24] There is no indication, expressly or otherwise that the rule was intended to be applied retrospectively. I agree with the finding in *Williams v Standard Bank of South Africa Limited* where the court held that:-

“The answers to the questions posed above indicate that Rule 46A does not apply to execution proceedings which are pending in terms of prior execution orders at the time when Rule 46A came into effect.

⁴ Paragraph [26]

Moreover, there is no indication whatsoever in the notice that Rule 46A is intended to have retroactive effect. One can assume the Rule Board for Courts of Law is familiar with the presumptions against interference with existing rights and the rule that old procedural rules continue to apply in respect of matters which are the subject of pending legal proceedings. Had it been intended that Rule 46A would apply retroactively to pending cases, this would have been clearly stated in the notice.

To sum up: I consider that Rule 46A is not purely procedural in nature and that, if applied retroactively to the bank's case, it would have the effect of impairing the bank's untrammelled right to sell in execution by imposing new duties and burdens on the bank. It would also have the effect of undoing all the procedural steps already taken by the bank in regard to an execution process initiated under the old rule. The injustice and impracticality of applying Rule 46A to such a case is obvious. Given that there is no indication that the provision was intended to apply to pending execution proceedings, I consider that the presumptions against retrospectivity and interference with existing rights have not been rebutted.”⁵

I am satisfied that the rule is not to be applied retrospectively.

[25] It was not submitted that the rule was to be applied retroactive; operating as of a time prior to its enactment. As this was not argued I need not address retroactive application of the rule, suffice to say that the rule does not express a date prior to its enactment from which it should operate, nor is there any other reason as to why the rule should have retroactive application.

Costs

[26] I can see no reason why the normal rule, that costs follow the successful litigant should not be applied in this matter. As the loan agreements provide for attorney and client costs the costs will be awarded on such scale.

⁵ Paragraphs 35-37

I propose the following order:

The appeal is dismissed with costs to be paid on an attorney client scale.

S. POTTERILL
JUDGE OF THE HIGH COURT

I agree

L.A. RETIEF
JUDGE OF THE HIGH COURT

I agree

M.R. PHOOKO
ACTING JUDGE OF THE HIGH COURT

CASE NO: A314/2021

HEARD ON: 2 August 2023

FOR THE APPELLANTS: ADV. S.S. COHEN
ADV. S. MSIMANGA

INSTRUCTED BY: Larry Marks Attorneys

FOR THE RESPONDENT: ADV. L.A. PRETORIUS

INSTRUCTED BY: Findlay & Niemeyer Inc.

DATE OF JUDGMENT: 5 October 2023

