REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 18088/2015

In the matter between:

CHARLES WILLIAMS	First Applicant
ROSETTA ADELE WILLIAMS	Second Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LTD	First Respondent
SHERIFF OF THE HIGH COURT, KUILSRIVER NORTH	Second Respondent

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JUDGMENT DELIVERED ON 3 MAY 2018

DAVIS, AJ

1. The question to be decided in this case is whether an execution creditor who obtained a court order entitling it to execute against a judgment debtor's residential immovable property before 22 December 2017 is obliged to comply with the provisions of Rule 46A of the Uniform Rules of Court ("the Rules"), which came into effect on that date. In other words, does Rule 46A have retrospective effect?

2. The applicants are the owners of the immovable property situated at 105 Drostdy Street, Kraaifontein ("the property"), which is their primary residence. The first respondent ("the bank") holds a mortgage bond over the property. On 22 May 2017 this Court granted summary judgment against the applicants in favour of the bank for:

2.1. payment of the amount of R 1 951 190.89 and costs of suit;

2.2. an order declaring the property specially executable;

2.3. an order directing that no sale in execution of the property could take place on a date earlier than 6 months from the date of the court order, but authorising the bank to issue a writ of execution and the sheriff to attach the property in the interim.[1]

3. I shall refer to as the order granted by Burger AJ on 22 May 2017 in the context of summary judgment proceedings as "the order".

4. By virtue of the terms of the order, the bank could not sell the property in execution before 22 November 2017. On 6 November 2017 the Registrar issued a writ of execution in respect of the property. On 5 February 2018 the bank's attorneys prepared a notice of sale in execution in respect of the property in which the sale was arranged for 28 March 2018 and it was stated that the property would be sold without reserve to the highest bidder.

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[1] An order granting leave to execute against residential immovable property but suspending the sale in execution for a period of six months is commonly referred to in this division as a "Rogers Order", in honour of Rogers J who introduced the salutary practice.

5. On 28 February 2018 the second respondent ("the sheriff") served on the applicants the conditions of sale in execution in respect of the property ("the conditions of sale"). It is common cause that the conditions of sale did not contain a reserve price.

6. On 23 March 2018 the applicants launched an urgent application for an interdict preventing the respondents from proceeding with the sale in execution which was scheduled to take place at 10h00 on 28 March 2018. The application was set down for hearing on 27 March 2018 and, due to the number of urgent applications on the roll for that day, argument commenced late in the day at approximately 17h00.

7. Mr Zimmermann, who appeared for the applicants, contended that the conditions of sale, which were prepared and served after Rule 46A came into operation, did not comply with the new rule because they stipulated that the property shall be sold without reserve to the highest bidder, and the Court had not been approached to exercise its discretion in terms of Rule 46A regarding the setting of a reserve price.

8. Mr Jonker, who appeared on behalf of the bank, argued a) that the bank had acquired a vested right to sell the property without a reserve price in terms of the order, which right was not affected by the introduction of Rule 46A, and b) that the applicants had failed to approach the court in terms of Rules 46(8)(d), 46A(8) or 46A(9)(a) to request the Court to set a reserve price or impose other appropriate conditions of sale.

9. As regards Mr Jonker's first contention, namely that the bank had acquired a vested right to sell the property in execution without a reserve price, Mr Zimmerman countered with the submission that the bank only had a vested right to sell the property in execution, but not in the procedure regulating the sale in execution. He argued that Rule 46A is purely procedural, and that its provisions apply prospectively from 22 December 2017, even where the order authorising execution was granted before that date.

10. Having heard these competing arguments the answer was not readily apparent and I felt that the matter warranted further consideration. I found myself constrained to grant an urgent interdict as prayed, not because I had decided the matter in favour of the applicants, but merely to prevent the injustice which would result if the sale in execution went ahead and I subsequently found that the conditions of sale were indeed non-compliant with the Rules.

11. I therefore indicated to the parties that I would grant an interdict to preserve the *status quo*, and would prepare a written judgment dealing with the issue at hand, which would form the basis for declaratory relief and the determination of costs. Mr Jonker assured me that such a judgment would by no means be moot, inasmuch as the interdictory relief sought was confined to the sale in execution scheduled for 28 March 2018, and the bank still needed to know whether it was entitled to sell the property in execution in terms of the order without taking any further steps in terms of Rule 46A.

THE AMENDMENT TO RULE 46 AND THE INTRODUCTION OF RULE 46A

12. The Rules Board for Courts of Law amended the existing Rule 46 and introduced Rule 46A in terms of Government Notice No. R. 1272 dated 17 November 2017 ("the notice").[2] The notice is silent as to whether Rule 46A is to operate retrospectively in the sense of applying to pending matters.

13. Rule 46A introduces new requirements regulating execution against residential immovable property. In terms of the new rule an execution creditor seeking to execute against the residential immovable property of a judgment debtor is obliged to apply to Court, on notice to the judgment debtor and any other affected parties, for an order declaring the property executable.[3]

14. It is incumbent upon the execution creditor to persuade the Court, on a consideration of all relevant factors, that execution against the property is warranted.[4]

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[2] Published on 17 November 2017 in Government Gazette Number 41257.

[3] Rule 46A(3)(b) states that:

"Every notice of application to declare residential immovable property executable shall be –

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(b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in Rule 46(5)(a) [preferent creditors, local authority, body corporate]: *Provided that the court may order service on any other party it considers necessary."*

[4] Rule 46A(2)(b) provides that:

"A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted."

15. When considering such an application, the Court must consider whether there are alternative means by which the judgment debtor may satisfy the judgment debt other than execution,[5] and may only grant an order authorising execution against the primary residence of a judgment debtor if there are no other satisfactory means of satisfying the judgment debt.[6]

16. When authorising execution against a primary residence in terms of Rule 46A, the Court is empowered *inter alia* to order the inclusion of appropriate conditions in the conditions of sale,[7] to set a reserve price for the sale having regard to the factors listed in Rule 46A(9)(b)[8], and generally to make any appropriate order.[9]

17. Rule 46A affords the judgment debtor, and any other affected party, the opportunity to oppose the application to declare the property executable, or to make submissions which are relevant to the making of an appropriate order, for instance in relation to the setting of a reserve price. [10]

18. Rule 46A confers a discretion on the Court to determine whether or not it would be appropriate to authorise execution against residential property, which discretion is to be exercised judicially having regard to the factors set out in the rule. It seems to me that the fundamental task of the Court seized

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[5] Rule 46A(2)(a)(ii).

[6] Rule 46A(8)(d).

[7] Rule 46A(8)(a).

[8] Rule 46A(8)(e).

[9] Rule 46A(8)(i).

[10] Rule 46A(6)(a).

with an application in terms of Rule 46A is to ensure that execution against the primary residence of the judgment debtor would not be disproportionate in all the circumstances of the case – hence the requirement that execution may only be authorised when there is no other satisfactory way to satisfy the judgment debt.[11]

19. It seems to me that the Court is required, in the exercise of its discretion under Rule 46A, to strike a just and equitable balance between the rights and interests of the execution creditor, the judgment debtor and any other affected parties, such as the local authority in the case of a rateable property or the body corporate in a sectional title scheme.

RELEVANT LEGAL PRINCIPLES

20. In *National Iranian Tanker Co v MV Pericles GC*[12] Corbett CJ penned the following pithy summary of the law relating to the retrospective effect of legislation:

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[11] See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at para [59] where Mokgoro J stated that:

"[I]f there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution would ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate."

See, too, *Gundwana v Steko Developments and Others* 2011 (3) SA 608 (CC) at para [54] where it was stated that:

"It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."

[12] 1995 (1) SA 475 (A).

> *"There is at common law a prima facie rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past. (This definition appears to merge two canons of interpretation: the presumption against retrospectivity and the presumption against interference with vested rights. This, however, is not of great moment, as both canons lead in the same direction: see Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C) at 350F – 351D.)
> *There is an exception to this rule in the case of a statute which is purely procedural and operates prospectively on all matters coming before the Court after the passing of the statute, though even here it is the intention of the Legislature which is paramount. Moreover, a provision which is procedural in form may in essence affect the substantive rights of persons."* [13]
> [Emphasis added]

21. Thus statutes which affect substantive rights are presumed not to have retrospective effect, but statutes which deal with matters of procedure are treated differently, since *"no person has a vested right in any particular course of procedure, but only a right to prosecute of defend a suit according to the rules for the conduct of an action for the time being prescribed."*[14] Where a new law effects procedural changes it is presumed that the law will apply to every case subsequently tried, regardless of when the case commenced or cause of action arose.[15]

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[13] At 483H – 484B.

[14] Per Lord Brightman in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1AC 553 (PC) ([1982] 3 All ER 833) at 836, as quoted with approval in *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 752.

[15] *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at para [66].

22. However, as Kentridge AJ pointed out in *S v Mhlungu and Others* ("*Mhlungu*"),[16] it is not always easy to decide whether a new law is purely procedural or whether it also affects substantive rights. As Lord Brightman observed in *Yew Bon Tew v Kenderaan Bas Mara,*[17] procedural statues may do far more than regulate the course of proceedings and may impact on substantive aspects of the case. He suggested that, rather than attempting to label a new provision as substantive or purely procedural, one should simply ask whether or not it would impair existing rights and obligations if applied retrospectively in a particular case.[18] Lord Brightman's remarks in this regard were referred to with approval by Kentridge AJ in *S v Mhlungu.* [19]

23. And even where it is clear that one is dealing with a statute which introduces procedural changes, one must bear in mind the distinction drawn by Olivier JA in *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others ("Unitrans")*[20] between the case where the statute amending existing procedures comes into effect before the procedure has been initiated, and the case where the amending statute comes into effect after the procedure has already been initiated and is pending.

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[16] 1995 (3) SA 867 (CC) at para [66].

[17] [1983] 1AC 553 (PC) ([1982] 3 All ER 833) at 836 All ER.

[18] At 838 All ER..

[19] *Supra* at para [66].

[20] 1999 (4) SA 1 SCA at para [16].

24. In the first situation, the new procedure usually applies to any action taken after the date on which the amending legislation takes effect, unless a contrary intention appears from the legislation. In the second situation, where the amending statute took effect after the procedure was initiated, the rule is that the existing (old) procedure remains intact, unless a contrary intention appears from the amending legislation.[21]

25. In *Unitrans* (*supra*) at para [23] Olivier JA, dealing with the question of whether fairness and equity should be considered in deciding whether legislation amending procedure is applicable to pending applications or actions, made the following observation which is particularly relevant in this case:

> *"Of course, there may be cases where an amending statute introduces new procedural provisions which may, on a proper interpretation, leave intact the steps that have already been taken and operate prospectively only. But that would not be the position where prospective operation would render abortive the steps taken in the past – unless such was the clear intention of the legislator. To apply the statute to the pending application in the present case would extinguish there and then the ability to proceed with the application. It would nullify the steps already taken by Interkaap."* [Emphasis added]

26. Finally, the principle that legislation will only affect future matters and will not take away existing rights, or impose new duties or obligations in respect of past facts, is founded on the rule of law. It therefore follows that if a court is

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[21] *Unitrans* (*supra*) at paras [17] – [19], referring to *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) in regard to the second type of case.

left in any doubt as to the retrospective effect of a provision, the presumption against retrospectivity would not be rebutted.[22]

EVALUATION

27. Applying these principles to the present case, it seems to me that the determination of the issue does not depend on the characterisation of Rule 46A as procedural but rather on the answers to the following questions:

27.1. Firstly, would Rule 46A, if applied to the bank's case, have the effect of:

27.1.1. impairing the bank's vested rights; and/or

27.1.2. imposing a new obligation or duty on the bank; and/or

27.1.3. nullifying the procedural steps already taken by the bank?

27.2. Secondly, did the bank initiate execution proceedings prior to the commencement of Rule 46A?

28. As a starting point, one must ask what the bank's vested rights were before Rule 46A came into effect on 22 December 2017. In terms of the mortgage bond the bank had a contractual right to seek an order declaring the property executable in the event of default by the applicants. This contractual right was

[22] *Kaknis v Absa Bank Ltd and Another* 2017 (4) SA 17 (SCA) at para [39].

enforced by means of the order, which authorised the bank to sell the property in execution after 6 months from the date of the order, and to immediately issue a writ of execution and attach the property in the interim. The 6 month period referred to in the order expired at midnight on 22 November 2017, and the bank therefore had a vested right on 23 November 2017 to sell the property in execution.

29. As at 23 November 2017 Rule 46(12) in its un-amended form stipulated that the sale in execution would be without reserve and that the property would be sold to the highest bidder. Thus the bank was entitled in terms of the procedure then applicable to sell the property without a reserve price. But this does not mean that the bank had a vested right to sell the property without a reserve price, for no person has any vested right in a particular course of procedure.[23]

30. One must also ask, however, whether Rule 46A, if applied to the bank's case, would have the effect of imposing additional obligations or duties on the bank, or rendering nugatory the procedural steps already taken by it. In these regards the clear answer, I think, is "yes".

31. If Rule 46A were held to apply in this case the bank, having already been authorised in terms of the order to sell the property in execution, would be forced to bring a further application for authorisation to sell the property in execution. Not only would this render nugatory the previous procedural steps

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[23] *Yew Bon Tew v Kenderaan Bas Mara* (*supra*) at 836 (All ER), referred to with approval in *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 752.

taken by the bank to obtain leave to execute against the property, but the bank would also be forced to meet the more onerous requirements of Rule 46A, including the production of additional documentation[24] and persuading the Court that there is no other satisfactory means of satisfying the judgment debt.[25]

32. The application of Rule 46A in this case would also mean that the bank is subject to the possible imposition of a reserve price, and to delays in execution in the event that any reserve price set is not achieved at the sale and the matter has to be reconsidered by the Court.[26] These are impairments or limitations on the bank's right (hitherto untrammelled) to sell the property in execution.

33. Turning to the question whether the bank initiated steps to execute against the property prior to 22 December 2017 so that execution proceedings could be said to be pending when Rule 46A commenced, the answer, in my view, is also clearly "yes".

34. Execution is the process for enforcing judgments. It commences with the issue of a writ of execution in the form prescribed by the Rules. The bank's writ of execution in respect of the property was duly issued by the Registrar on 6 November 2017. It therefore follows, in my view, that the bank initiated execution proceedings in terms of the order prior to the commencement of Rule 46A, and that the execution proceedings initiated by the bank were

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[24] Rule 46A(5).

[25] Rule 46A(8)(a).

[26] Rule 46A(9)(c) and (d).

already pending when Rule 46A came into operation. As I have already indicated, the application of Rule 46A to the bank's case in these circumstances would have the effect of undoing the procedural steps already taken by the Bank in connection with execution, including the issue of the writ of execution.

35. 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.

36. Moreover, there is no indication whatsoever in the notice that Rule 46A is intended to have retroactive effect. One can assume that 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 expressed in the notice.

37. 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.

38. I am therefore of the view that Rule 46A does not apply to execution proceedings which commenced and were pending in terms of prior execution orders before Rule 46A came into operation on 22 December 2017.

CONCLUSION

39. In the light of the conclusion which I have reached, it is not necessary for me to deal with the alternative submissions advanced by Mr Jonker regarding the applicants' failure to approach the Court for relief in terms of Rules 46(8)(d), 46A(8) or 46A(9)(a).

40. In the result the bank is entitled to an appropriate declaratory order, and the applicants must bear the costs of this application.

41. I therefore make the following order:

1. It is declared that:

1.1. The amended Rule 46 and the new Rule 46A introduced in terms of Government Notice No. R. 1272 dated 17 November 2017 ("the amendments") do not apply in respect of the execution proceedings initiated by the first respondent in terms of the Order of this Court granted under case number 18088/15

on 22 May 2017 and the writ of execution issued in terms thereof on 6 November 2017 ("the execution proceedings").

1.2. The first and second respondents are authorised to proceed with the sale in execution of Erf 10427 Kraaifontein, in the City of Cape Town, Division Paarl, Western Cape, situate at 105 Drostdy Street, Kraaifontein ("the property") in terms of the first respondent's notice of sale in execution dated 5 February 2018 ("the notice of sale") and the conditions of sale in execution of immovable property delivered to the applicants on 28 February 2018 ("the conditions of sale").

2. The applicants are ordered to bear the first respondent's costs of suit on the party and party scale.

D M DAVIS

Acting Judge of the High Court