REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: B4-2024

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 8 February 2024 E van der Schyff

In the matter between:

BONGUMUSO MPILO MBLEBUKA APPLICANT

and

CHANGING TIDES 17 (PTY) LTD RESPONDENT

JUDGMENT / REASONS

Van der Schyff J

[1] The urgent application heard on 7 February 2024 was struck from the roll with attorney and client costs. I undertook to provide reasons for my order.

[2] This application was issued at the eleventh hour. The papers were served by email to the respondent after 17h00, and the matter was set down to be heard at 20h20. I was truly surprised when the respondent filed a notice of intention to oppose. However, the respondent was unable to file an answering affidavit due to the limited time before the matter was being heard. The respondent set out the legal points on which it opposed the application in the notice.

[3] The application was heard on a virtual platform. Due to load shedding, the virtual platform changed, and it was challenging to commence the hearing. Due to a time limitation inherent to the virtual platform used I indicated to counsel that they would be afforded limited time to address me, and that the application would be adjudicated on the papers filed.

[4] The application was, essentially, a Rule 45A application and an application to vary the terms of the existing court order. The applicant wanted the court to amend the conditions of sale incorporated in the Rule 46A application when the property was declared executable.

[5] The applicant contended that the application was urgent because the sale in execution was scheduled for 8 February 2024. He stated that he became aware of the sale on 25 February 2024, but I assume that is a mistake since it is a future date. He claims that he did not apply for the relief at an earlier stage because litigation issues are onerous and burdensome on the individual consumer. His previous attorney apparently instituted a similar application on the motion court roll. Without basing the claim on facts, he claims that the action proceedings that resulted in the order and the declaration that the property is executable were flawed and that his rights were flagrantly disregarded.

[6] The order authorizing the sake in execution was granted already on 27 February 2023. It is unclear whether default or summary judgment was granted, as the applicant uses the terms interchangeably in the founding affidavit. A reserve price was set. As part of the alternative relief sought, the applicant claimed that the reserve price be increased. The applicant also claimed he could sell the property privately

within six months. However, He failed to explain why he did not sell the property in the eleven-plus months following the granting of the order in February 2023.

[7] The applicant did not appeal the Rule 46A order nor applied for its rescission. This court cannot sit as a court of appeal. The court that considered the default or summary judgment application is the forum that determined the reserve price. That is also the court referred to in Rule 46A of the Uniform Rules of Court. The procedure provided for in Rule 46A and the applicable provisions of the National Credit Act aims to protect consumer's constitutional rights. The issues raised in the founding affidavit are issues that are relevant to the Rule 46A application. If the Rule 46A prescripts were not considered or applied, the applicant's remedy was to challenge the order using the appropriate mechanisms provided. This did not happen.

[8] The applicant did not appreciate the case it had to make out for an order in terms of Rule 45A for the suspension of the execution of the Rule 46A order or the variation of an existing order.

[9] The applicant brought this application based on extreme urgency. With regard to the fact that the order in question was granted almost a year ago, that the order was not appealed, or that no rescission application was filed, any urgency that might exist is self-created. In addition, it is trite that the principle of *audi et alteram partem* is sacrosanct. By filing the application by email after office hours, the applicant essentially deprived the respondent, a corporate entity, of filing answering papers.

[10] The sale of the property, *per se*, would not deprive the applicant of substantial redress in due course. If the facts allow, a damages claim would exist. The sale of the property does not amount to an eviction, and the applicant will have ample opportunity to seek alternative accommodation if he stays there.

[11] As a result, I found that the applicant did not make a case for the court to condone non-compliance with the Uniform Rules of Court, and the application was struck off the Roll.

[12] I agree with the respondent's counsel that launching the application at the time it was launched was an abuse of the court process and justifies granting a punitive costs order.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. C. Mkhabela
Instructed by:	Musingwini Mukondeleli Inc.
For the respondent:	Adv. J. Minnaar
Instructed by:	HP Ndlovu Inc.
Date of the hearing:	7 February 2024
Date of reasons:	8 February 2024