**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG HIGH COURT**
**JOHANNESBURG**

**CASE NO. 2009/1065**

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

17/05/2013
DATE

SIGNATURE

In the matter between:

SHACKLETON CREDIT MANAGEMENT (PTY) LTD **Applicant**

and

RICHMOND, STELLA SHAMELA **First Respondent**

STANDARD BANK OF SA LTD **Second Respondent**

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**JUDGMENT**

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**DTvR DU PLESSIS : AJ**

1. The applicant sued the first respondent for payment of the sum of

R286 113,15, interest on the aforesaid sum and costs on the attorney and client scale. The cause of action was a written lease agreement that the first respondent had entered into with Wesbank in respect of a motor vehicle. The applicant obtained a cession from Wesbank and sued as cessionary.

2. On 23 March 2009 the applicant obtained a default judgment against the first respondent for payment of the said sum, interest thereon and costs. The default judgment is not in dispute, nor is there an application for the rescission thereof.

3. After obtaining the judgment, the applicant caused a writ of execution against movable property to be issued, which writ was served by the Sheriff on a tenant at the first respondent's immovable property situated at Erf 1530 Dunnottar, Ekurhuleni Municipality, Gauteng ("the immovable property"). The value of the goods attached by the Sheriff amounted to about R1 000,00.

4. On 8 September 2009 one Joe Mankanda delivered an interpleader affidavit on the applicant's attorneys in terms whereof he claimed that he was renting the immovable property from the first respondent and that he was the owner of the goods that were attached. The first respondent admits that she does not live at the immovable property, as she resides with her mother.

5. Because the applicant's attempts to execute against movable property have proved fruitless, it launched the present application in terms whereof it applied for leave to execute against the first respondent's immovable property. The

second respondent is the bondholder over the immovable property and was joined in the application as an interested party.

6. The first respondent was represented by Mr Omar. He argued, both *in limine* and as the only defence on the merits, that the tenants who reside in the property ought to be joined as parties to the application as they have a material interest herein. Over and above this argument, the only additional reason why an order should not be granted was set out as follows in the first respondent's answering affidavit:

*"I am a single parent and have no source of income, other than the rental I secured from the immovable property in question. If the immovable property is sold, I will lose the only substantial asset that I own. ...., I am willing to pay Applicant the sum of R500.00 per month."*

*"Having regard to my right to housing as well as the right to housing of my minor children, it will not be just and equitable that my immovable property be sold. The Applicant is a financial institution and there is no prejudice to the Applicant if I am afforded an opportunity of paying of (sic) the judgment debt in reasonable instalments that I can afford. At present I can afford to pay R500.00 per month."*

7. The issue to be determined is the relevant circumstances to be considered by a court in deciding whether or not to grant an order declaring immovable property specially executable. In this regard the amended rule 46(1)(a) of the uniform rules of this court is relevant. It reads as follows:

*"(1) (a) No writ of execution against the immovable property of any*

*judgment debtor shall issue until-*

*(i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or*

*(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar: Provided that where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."*

8. The requirement in rule 46(1)(a)(i) has clearly been met in this matter. The movable property attached was not only insufficient to satisfy the writ, but there is also a claim of ownership by another person in respect thereof. The first respondent has not alleged or shown that she has other movable assets to satisfy the writ: in fact, she states that she does not own anything other than the immovable property. On her own version the first respondent is unable to satisfy the judgment debt.[1]

9. The proviso in rule 46(1)(a)(ii) is also not applicable in this case, as the first respondent does not reside in the immovable property. It therefore seems as if it is not necessary to consider "all the relevant circumstances" of the first

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[1] Silva v Transcape Transport Consultants 1999 (4) SA 556 (W)

respondent. The cases dealing with these circumstances and what should be taken into account by a court, are not relevant in this matter.[2]

10. In any event, even if the first respondent's personal circumstances were taken into account, there is nothing to suggest that she will be left destitute if the immovable property is sold in execution. She does not live there and the income derived from letting the property to tenants would be used to repay her debts. She does not provide any further details regarding her potential to earn an income than that set out above. Her right to housing will not be affected by an order as sought by the applicant.

11. For reliance on the argument that the tenants should have been joined herein as parties, Mr Omar referred to the following passages from Jaftha v Schoeman and others[3] (at paragraph 47 and 56):

*"Even where there is awareness, it would generally be difficult for indigent people in the position of the appellants to approach a court to claim protection. They are a vulnerable group whose indigence and lack of knowledge prevents them from taking steps to stop the sales in execution, as is demonstrated by the facts of this case."*

*"... the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless."*

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2 Mkhize v Umvoti Municipality and others 2012 (1) SA 1 (SCA); Nedbank Ltd v Mortinson 2005 (6) SA 462 (W); First Rand Bank Ltd v Folscher 2011 (4) SA 314 (GNP)

3 2005 (2) SA 140 (CC)

12. The reference in these passages is, however, to the judgment debtor and not to tenants living in the property at the time. The passages are also quoted out of context. In paragraph 56 of the judgment, for example, and just before the portion quoted by Mr Omar, the following is said:

*"If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate."*

13. That is exactly the situation here: the applicant has complied with the rules, there is no other reasonable way in which the debt may be satisfied and the ordering of a sale would not be grossly disproportionate.

14. The tenants are not parties to the relationship between the applicant and the first respondent. Their rights do not and cannot form part of the circumstances that a court should take into account when an order authorising a sale in execution is sought. Over and above this, their rights will also not be affected by the order sought. If the applicant wants to transfer the property to a purchaser without such tenants, an appropriate application for their eviction should be brought. At that stage they will have the opportunity to place whatever facts they wish, before the court. It is not appropriate at this stage.

15. For these reasons I am satisfied that the applicant has made out a case for the order sought and that the first respondent has failed to place any facts before me on which I should exercise a discretion in her favour.

16. I therefore make an order in the following terms:

1. The applicant is granted leave to execute against the first respondent's immovable property more fully described as Erf 1530 Dunnottar, Registration Division IR, situate in the area of the Ekurhuleni Metropolitan Municipality, Gauteng and held in terms of Title Deed T54034/1998 ("the immovable property");

2. The Registrar of this Court is authorised to issue a writ of execution against the immovable property;

3. The first respondent is ordered to pay the costs of the application.

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**DTvR DU PLESSIS : AJ**
**ACTING JUDGE OF THE HIGH COURT**

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| On behalf of the Applicant: | Adv. R J Stevenson<br>083 563 9042 |
| Instructed by: | Lynn & Main Inc. |
| On behalf of the Respondents: | Adv. Z Omar<br>082 492 5207 |
| Instructed by: | Zehir Omar Attorneys<br>C/c Nelson Bowman<br>011 333 1083 |
| Dates of Hearing: | 2 May 2013 |
| Date of Judgment: | 21 May 2013 |