IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***11th NOVEMBER 2015*** Signature: _____

CASE NO: 2013/1814

In the matter between:

JORDAAN & WOLBERG ATTORNEYS Applicant

and

MORGAN, NORMAN VIVIAN Respondent

JUDGMENT

ADAMS AJ:

[1]. The applicant applies for the issue of a writ of execution against the primary residence of the respondent and I am required to declare such immovable property specially executable in terms of the provisions of Rule 46(1)(a)(ii) of the Uniform Rules. This entails me considering all the relevant circumstances with a view to deciding whether or not to declare the said property specially executable.

[2]. This issue is before me in somewhat of a peculiar manner in that the application to have the immovable property declared executable is opposed on the basis that the order should not be granted if regard is had to the circumstances of this matter. Moreover, respondent argues that the application should not be granted because he intends to launch an application for a rescission of judgment obtained against him on which this application is premised.

THE FACTS

[3]. On the 11th November 2013 this court (Manaka AJ) granted default judgment against the respondent in favour of the plaintiff for payment of the sum of R114,765.55, together with interest thereon and cost of suit.

[4]. Judgment was granted after the respondent had failed to deliver notice of appearance to defend the action instituted against him and after the expiry of the *dies induciae* on the 21st February 2013. Ironically, the respondent had served notice of intention to oppose applicant's application for default judgment on the 4th October 2013, which resulted in a removal from the roll of the said application on the 14th October 2013.

[5]. Subsequently there were numerous attempts on the part of the applicant to recover from the respondent the judgment debt, all of which attempts were unsuccessful. Notably, the applicant caused a warrant of execution against the property of the respondent to be issued and subsequently movable property was attached on no less than two occasions. On both occasions the property was released from attachment. On the first occasion an agreement was reached between the parties, including the claimants in an interpleader proceeding (the wife and son of the respondent), in terms whereof a payment arrangement of sorts was reached with applicant. A motor vehicle which was subsequently attached was released to the bank, being the title holder of the vehicle.

[6]. Thereafter, there were numerous attempts to amicably resolve the dispute, all seemingly to no avail.

INTENDED APPLICATION FOR RESCISSION

[7]. Respondent has indicated in his answering affidavit that he intends launching an application for a rescission of the default judgment obtained against him. I hasten to add that respondent has been threatening to bring this application from at least the date on which he deposed to the Answering Affidavit, that being the 26th May 2015, but to date the application has not materialised. He alleges that he has *bona fide* defences, which would entitle him to a rescission of the judgment.

[8]. The requirements for obtaining rescission of a default judgment are well-established: Firstly, the existence of a reasonable and acceptable explanation for the default in appearance and secondly that a *bona fide* defence, carrying some prospect of success, exists (see *Chetty v Law Society Transvaal,* 1985 (2) SA 756 (A); *Silber v Ozen Wholesalers (Pty) Ltd,* 1954 (2) SA 345 (A)).

[9]. I turn now to consider whether the applicant would satisfy these requirements.

[10]. The difficulty I have with the respondent's intended rescission application is that there is neither an explanation by the respondent for the default nor an explanation by him as to why the application has to date, that is some 2 (two) years after judgment has been granted, not been launched. I am

therefore of the view that it will be difficult, if possible at all for the respondent to demonstrate to a court that his application for rescission is *bona fide*.

[11]. No reason has been proffered for the respondent's failure to launch the application for rescission as a counter – application to the present application before me. Respondent has expended a considerable amount of effort and time to oppose the present application on the basis that he intends applying for a rescission of the default judgment against him. That time and energy could have been better spent in preparing, filing and moving the application for rescission. I infer from this failure by the respondent that he is not *bona fide* when he claims that he will be delivering an application for rescission.

[12]. I am therefore of the view that any application for rescission is bound to fail in view of the fact that the respondent has not been able to demonstrate to me that he has an acceptable explanation for his default in entering an appearance to defend. For this reason alone the application is doomed.

[13]. Furthermore, the *bona fide* defences which respondent intends raising in support of the rescission application appear to be on the flimsy side at best for the respondent.

[14]. On the merits, respondent denies liability on the basis that the applicant obtained a judgment for an amount being in respect of professional services rendered and disbursements incurred by the applicant, a firm of attorneys, for and on behalf of the defendant, without an attorney and own client bill of costs having been presented to him and / or taxed by the Taxing Master. As submitted by Ms Gordon, Counsel for the applicant, this is a defence which would have been available to the respondent, as a dilatory defence prior to the granting of judgment. However, now that judgment has been granted, it is incumbent on respondent to demonstrate to the court that the prospects are good that he will not be liable to applicant for the amount claimed or for any other sum if the applicant goes through the whole process of preparing and taxing an attorney and own client bill of costs. That has not been done, and accordingly I am of the view that this 'defence' would not be of any assistance to the respondent in obtaining a rescission.

[15]. Respondent also alleges that a portion of the applicant's claim has become prescribed. Again, the respondent is a tad thin on the detail relating to which portion would ostensibly have become prescribed. Applicant, on the other hand, alleges that respondent had made payment from time to time in settlement of fees and disbursements debited and in any event alleges that prescription is not an issue because there were undertakings by the respondent to liquidate the debt, which he had accepted liability for.

[16]. The Respondent also claims that he has a defence of non – joinder of the bond holders, being Absa Bank Limited, in the application to have the immovable property declared executable.

[17]. This defence does not avail the respondent as it is settled law that the joinder of a party to proceedings is required only as a matter of necessity, as opposed to a matter of convenience. If a party has a direct and substantial interest which may be affected prejudicially by the order of the court, he should be joined of necessity in the proceedings. Absa Bank has the right to be paid, first and foremost, from the proceeds of the sale of the immovable property in question. That right would in no way be prejudicially affected by an order declaring the property executable. Therefore, I am not convinced that a plea of non – joinder would avail itself successfully to the respondent.

[18]. All the same, as things stand, the applicant has a judgment against the respondent and he is entitled to insist that this judgment be satisfied.

[19]. Accordingly, I am of the view that the *'threat'* by the respondent that he will in due course be applying for a rescission of the judgment is a consideration which should have very little, if any, effect on whether I grant the order declaring the immovable property executable.

THE RULE 46(1)(A) CONSIDERATIONS

[20]. Uniform Rule 46(1)(a) provides that 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'.*

[21]. The effect of the proviso is that only a court is competent to declare any or all of a judgment debtor's residential immovable property specially executable under the provisions of rule 46(1)(a)(ii).

[22]. If such residential property consists of the judgment debtor's primary residence, the court has, in terms of the proviso to rule 46(1)(a)(ii), to

consider all relevant circumstances before ordering execution against such property.

[23]. In deciding whether or not to declare the primary residence of a judgment debtor who is a natural person specially executable, the court must consider all relevant circumstances as contemplated in the sub-rule. This means *'legally relevant circumstances'*.

[24]. In *Jaftha v Schoeman; Van Rooyen v Stoltz*, 2005 (2) SA 140 (CC), the Constitutional Court gave the following examples of such circumstances:

24.1 Whether the rules of court have been complied with;

24.2 Whether there are other reasonable ways in which the judgment debt can be paid;

24.3 Whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt;

24.4 The circumstances in which the judgment debt was incurred;

24.5 Attempts made by the judgment debtor to pay off the debt;

24.6 The financial position of the parties;

24.7 The amount of the judgment debt;

24.8 Whether the judgment debtor is employed or has a source of income to pay off the debt;

24.9 Any other factors relevant to the particular case.

[25]. In *Gundwana v Steko Development CC & Others,* 2011 (3) SA 363 (CC), the Constitutional Court added the following to the circumstances referred to above: It is only when there is a 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.

[26]. In *Nedbank Ltd v Mortinson*, 2005 (6) SA 462 (W), the full court of this division laid down the following rules of practice applicable in all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable. It was held that the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:

'33.1.1. The amount of the arrears outstanding as at the date of the application for default judgment.

33.1.2. Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.

33.1.3. Whether, to the knowledge of the creditor, the immovable property is occupied or not.

33.1.4. Whether the immovable property is utilised for residential purposes or commercial purposes.

33.1.5. Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.

[27]. In *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*, 2011 (4) SA 314 (GNP), the full court of the North Gauteng High Court, Pretoria, observed the following:

'40. It is obviously impossible to provide a list of circumstances that might be regarded as extraordinary which would persuade a court to decline a writ of execution. They would usually consist of factors that would render enforcement of the judgment debt an abuse of the process, which a court is obliged to prevent, see Hudson v Hudson 1927 AD 259, Beinash v Wixley 1997 (3) SA 721 (SCA) at 734F: "an abuse of the process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for

a purpose extraneous to that objective …" Instances of this nature would fall into the category enumerated by Mokgoro J in Jaftha, supra and encountered in Absa Bank Ltd v Ntsane & another 2007 (3) SA 554 (T). As is apparent from these examples, the creditor's conduct need not be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although bona fide, may be iniquitous because the debtor will lose his home while alternative modes of satisfying the creditor' s demands might exist that would not cause any significant prejudice to the creditor.

41. Mindful of the impossibility to anticipate every potential circumstance, some of the following factors that may need to be taken into consideration by the court when deciding whether a writ should issue or not, are:

- *Whether the mortgaged property is the debtor's primary residence;*
- *The circumstances under which the debt was incurred;*
- *The arrears outstanding under the bond when the latter was called up;*
- *The arrears on the date default judgment is sought;*

- *The total amount owing in respect of which execution is sought;*

- *The debtor's payment history;*

- *The relative financial strength of the creditor and the debtor;*

- *Whether any possibilities exist that the debtor' s liabilities to the creditor may be liquidated within a reasonable period without having to execute against the debtor's residence;*

- *The proportionality of prejudice the creditor might suffer if execution were to be refused compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;*

- *Whether any notice in terms of section 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;*

- *The debtor's reaction to such notice, if any;*

- *The period of time that elapsed between delivery of such notice and the institution of action;*

- *Whether the property sought to have declared executable was acquired by means of, or with the aid of, a State subsidy;*

- *Whether the property is occupied or not;*

- *Whether the property is in fact occupied by the debtor;*

- *Whether the immovable property was acquired with monies advanced by the creditor or not;*

- *Whether the debtor will lose access to housing as a result of execution being levied against his home;*

- *Whether there is any indication that the creditor has instituted action with an ulterior motive or not;*

- *The position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.'*

[28]. It is obvious that not each and every one of the above considerations will of necessity have to be taken into account in every matter. The enquiry must always be fact bound to identify the criteria that are relevant for the particular case.

[29]. Applying the aforegoing principles *in casu*, I am of the view that before ordering execution against the immovable property of the respondent, I should have regard to the following circumstances:

29.1 By all accounts, the applicant has complied in all respects with the court rules applicable to the type of relief sought in this application. Additionally, the applicant has complied with the provisions of the Practice Manual of this division as well as the guidelines contained in the relevant case authorities.

29.2 There have been a number of attempts by the applicant to execute against the movable property of the respondent, all of which endeavours have been to no avail. On the occasions when the applicant was successful in attaching property, the attached property was subsequently successfully claimed by and released to third parties.

29.3 It was submitted by Mr Du Plessis, who appeared on behalf of the respondent, that applicant does not allege that he has instituted section 65 proceedings in the Magistrates Court. In that regard, I accept the applicant's explanation that the respondent has on various occasions made settlement proposals, and had subsequently failed to make regular monthly payment in accordance with proposals emanating from the applicant. In any event, nowhere in his answering affidavit does the respondent place before me information

relating to monthly payments which he can afford to pay as he would be required to do at a section 65 inquiry. Accordingly, I am satisfied that, all things considered, the applicant does not have available to him any other alternative courses of action which would enable him to recover from the respondent the amount of the judgment debt.

29.4 I am also of the view that, having regard to the long and tedious history of the litigation in this matter, the possibility is slim in the extreme that the respondent will liquidate his indebtedness within a reasonable period without the applicant having to resort to executing against the residence of the respondent.

29.5 The judgment debt due by the respondent to the plaintiff is for the sum of R114,765.55, plus interest thereon and costs of suit. As and at the date of the filing of the rule 46(1) application during March 2015, the total sum outstanding amounted to R164,599.68. It can therefore not be said that the amount due is of a trifling nature, and if one has regard to the fact that the applicant is a practising attorney (a sole practitioner), the issue of the proportionality of prejudice of the creditor if execution was to be refused compared to the prejudice the debtor would suffer if execution went ahead and he lost his home, at best does not favour the respondent.

29.6 As was said by Mokgoro J in the *Jaftha* matter (supra) at par [42]:

'The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process'.

29.7 Also at par [43]:

'However, it is clear that there will be circumstances in which it will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors has already been described. There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. Besides, the facts of this case also demonstrate the potential of the section 66(1)(a) process to be abused by unscrupulous people who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable'.

29.8 The property in question has, by all accounts, not been purchased with the assistance of a Government Housing subsidy. The respondent also is clearly not of the same ilk from a means point of view as the debtors in the *Jaftha* matter. I do not have before me any

indication that the execution would infringe on the constitutional right of the respondent to have access to adequate housing. The execution for example would not prevent him from obtaining finance in the future for purposes of acquiring immovable property.

29.9 The property in question is occupied by the respondent, his wife and their adult son. There are no occupants who can be said to fall within the category of the vulnerable in our society. There is most certainly no information and evidence before me of such circumstances. I can therefore safely infer that this is a consideration which would not favour the respondent. This is so despite the fact that by all accounts the property in question is utilized for residential purposes, and the debt to the applicant was not incurred in order to acquire the property which is sought to be declared executable.

29.10 The debt was incurred when the respondent utilised the legal services of the applicant in a number of matters. The respondent has made very little, if any, attempt to liquidate his indebtedness to the applicant. If anything, the respondent has been somewhat dilatory in his approach to paying his debt, and he has made the applicant jump through every possible proverbial hoop in order to recover his money.

29.11 The relative financial strengths of the applicant and the respondent is a consideration which, at best for the respondent, is a neutral one.

The plaintiff, a sole legal practitioner, is owed a fairly substantial sum of money by the respondent, whose sole source of income, on his own version, is sporadic monies received for odd jobs, and who is seeking employment.

29.12 On the available evidence, it cannot possibly be suggested that the applicant has instituted action with an ulterior motive. If anything, I am of the view that the applicant has treated the respondent fairly and reasonably, with due regard to his constitutional rights. A good example is the fact that on more than one occasion the applicant was prepared to postpone proceedings to afford respondent an opportunity to consider his position.

[30]. These factors, in my view, mitigates against the respondent and in favour of the applicant. I must just mention that in his Answering Affidavit, the respondent does very little by way of bringing to my attention any circumstances as envisaged in Rule 46(1)(a)(ii). Instead the respondent opted to focus his attention on persuading the court that he has *bona fide* defences in respect of the merits. I have already indicated that I am of the view that these defences are not sustainable.

[31]. In that regard, I am guided by what was said in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters,* 2011 (4) SA 314 (GNP), under the heading: *'The manner in which the relevant information should be placed before the court',* at par [42]:

'If a creditor's claim is opposed, the debtor will ordinarily be in the best position to advance any contentions he may wish to make, and will be able fully to inform the court of any aspect that should be taken into account'.

[32]. Respondent did not apprise me of any further circumstances which may be relevant to my assessment relative to whether it would be just and equitable to issue a writ.

[33]. Mr Du Plessis did however make submissions on certain issues during arguments. I have dealt with all these submissions above. These relate to section 65 Proceedings in the Magistrates Court, which ties in with the other submission made, being in relation to a possible alternative course of action to recoup the judgment debt.

[34]. In the circumstances of this matter, I am of the view that there are no circumstances that might be regarded as extraordinary which would persuade a court to decline a writ of execution. Accordingly, there is no reason why I should not declare the immovable property of the respondent specially executable.

ORDER:

Accordingly, I make the following order:-

1. The immovable property owned by the respondent, described as Portion 5 of Erf 17, Buccleuch Township, registration division I.R., the province of Gauteng, situated at 2C Beatty Street, Buccleuch, Gauteng *('the property')* is hereby declared to be specially executable;

2. The registrar of this Court is authorised to issue a writ of execution for the attachment of the property;

3. The respondent shall pay the costs of this application.

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L ADAMS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	2nd November 2015
JUDGMENT DATE:	11th November 2015
FOR THE PLAINTIFF:	Adv C. Gordon
INSTRUCTED BY:	Jordaan & Wolberg Attorneys
FOR THE DEFENDANT:	Mr C. R. Du Plessis
INSTRUCTED BY:	Klinkenberg Incorporated