

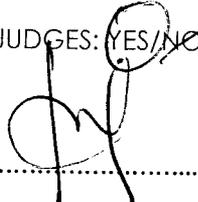


IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

13/5/16

CASE NO: 14730/2011

(1)	REPORTABLE <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO
(2)	OF INTEREST TO OTHER JUDGES: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO
(3)	REVISED.
	13-MAY-2016
	
DATE	SIGNATURE

In the matter between:

ABSA BANK LIMITED

Applicant

and

WH CONSTRUCTION (PTY) LTD

First Respondent

HENDRIK WHITEMAN

Second Respondent

HENDRIK STEPHANUS MARTHINUS JOSEPHUS MARX

Third Respondent

DATE OF HEARING : 17 FEBRUARY 2016

DATE OF JUDGMENT : 13 MAY 2016

JUDGMENT

MANAMELA AJ

Introduction

[1] This is an application based on rule 46(1)(a)(ii) of the Uniform Rules of this Court.¹ The Bank seeks, in terms hereof, an order declaring immovable property, belonging to the third respondent and his wife specially executable in order to satisfy judgment obtained against the three respondents cited above. I hasten to point out that the third respondent's wife is not a party to the proceedings.²

Background

[2] The second and third respondents were or are directors of the first respondent (the Company). The Company had an overdraft facility in terms of which an amount of R1 900 000.00 was lent and advanced by the applicant (the Bank) to the Company. As security, the Bank caused to be registered a mortgage bond over immovable property of the Company (Erf 2434).³ The second and third respondents stood surety for (and also bound themselves as principal debtors with) the Company in respect of its indebtedness to the Bank.

[3] When the Company defaulted on agreement pertaining to the overdraft facility, the Bank took legal action against the Company, second and third respondents. It sought and was granted summary judgment against the respondents on 05 May 2011 for payment of an amount of R1 964 265.66.⁴ Thereafter, the Bank sold in execution Erf 2434, the only property of the Company. The sale of this property yielded an amount of R385 000.00.⁵ The Bank then

¹ See par 14 below.

² See par 22 below.

³ The applicant had registered a covering mortgage bond over Portion 4 of Erf 2434 Three Rivers belonging to the first respondent (the Company) to secure an overdraft loan in an amount of R1 900 000.00 on 03 April 2007.

⁴ Judgment was granted jointly and severally against all three respondents, the one paying the other to be absolved. See par 9.2 of the founding affidavit on indexed p 6; a copy of the summary judgment order attached to the founding affidavit as annexure "A" on indexed pp 11-12.

⁵ See pars 9.4-9.5 of the founding affidavit on indexed pp 6-7.

turned to the second and third respondents for the balance of the judgment debt. The second respondent made arrangements with the Bank to pay off the debt in monthly instalments of R1 500.00. The third respondent did not make any arrangements. Attempts to execute on the third respondent's movable property resulted in a *nulla bona* return by the sheriff. This, in the main, triggered this application, which is opposed by the third respondent (Mr Marx).⁶

[4] The matter came before me on 17 February 2016 and after hearing oral arguments from Ms M Riley, for the Bank, and Mr Prinsloo, for the third respondent, I reserved this judgment. However, I still encouraged the parties to make attempts towards an amicable resolution of the matter and let me know by not later than 19 February 2016. Evidently, no amicable resolution was reached, but I am grateful for the parties' efforts in this regard.

The Bank's case

[5] According to the Bank, Mr Marx, unlike the second respondent, has made no attempts to settle or reach some arrangement with the Bank regarding the outstanding judgment debt. As indicated above, attempts to execute on Mr Marx's movables yielded a *nulla bona* return.⁷ This, together with Mr Marx's submissions in his opposing papers that his financial situation does not permit him settling his indebtedness to the Bank, bolstered the Bank's case for an order sought in terms of this application. The Bank says its only hope of recovery of its debt is in the sale in execution of Erf 63 Three Rivers (the Property), hence this application for same to be declared specially executable. Mr Marx holds 50% share in the Property and his

⁶ See par 9 below.

⁷ See annexure "C" to the founding affidavit on indexed p 15.

wife (Mrs Marx)⁸ holds the other 50%. They are married to each other out of community of property.

[6] The Bank has a mortgage bond over the Property in an amount of R2 600 000.00.⁹ I think it is necessary to belabour some points here. This mortgage bond has nothing to do with the judgment or indebtedness of Mr Marx to the Bank, or at least not directly so. Erf 2434, already sold at the instance of the Bank, was the direct object of the Bank's security. The Property is in the picture, so to speak, by virtue of the suretyship signed by Mr Marx to secure the overdraft facility granted to the Company. The corollary of this is that the suretyship will only apply to the half share in the Property held by Mr Marx. Therefore, this application is about the half share belonging to Mr Marx, which the Bank wants declared specially executable.

[7] It is also common cause between the Bank and Mr Marx that there is no breach of the mortgage bond loan agreement between the Bank and Mr and Mrs Marx relating to the Property. It appears Mr and Mrs Marx, have kept payments to the Bank up-to-date in respect of the mortgage bond loan account for the Property.¹⁰ Mr Marx pays the monthly instalment on the house in an amount of around R19 000.00. This is said to be slightly more than the actual monthly instalment stipulated by the agreement with the Bank.¹¹ The outstanding amount or balance on the mortgage bond account was R2 405 305.98 as at 08 March 2015.¹² The Bank says the closing balance was R2 395 585.95, excluding interest, on 27 May 2015.¹³

⁸ I have assumed for purposes of the order to be made herein that Mare Adre Visser reflected on a copy of the "Windeed" extracts (i.e. annexure "D" to the founding affidavit) is Mrs Marx and the holder of 50% share in the Property. See indexed pp 16-17.

⁹ See par 4.6 of the opposing affidavit on indexed p 26.

¹⁰ See statement of account included as annexure "HM" to the opposing affidavit on indexed pp 40-41.

¹¹ See par 20 below.

¹² See annexure "HM" on indexed p 41.

¹³ See par 5.4 of the replying affidavit on indexed p 52.

It is submitted that all relevant circumstances envisaged in terms of rule 46(1)(a)(ii) and prescribed in applicable case law supports the Bank's case for execution.¹⁴

Mr Marx's case

[8] As indicated above, Mr Marx opposed this application. The other two respondents are not taking part and Mrs Marx is not cited as a party. I will revert to the latter issue later below.

[9] Mr Marx's opposition is based on more than one ground. Although, not necessarily a ground of opposition, he bemoans the fact that Erf 2434 was sold for only R385 000.00, despite a higher valuation in excess of R2 600 000.00 placed on the property by the Bank.¹⁵ He says that him or the second respondent ought not to be blamed for the yield of an amount lower than the market price from the sale. The Bank allowed this to happen, he submits. He does not really say what he would have done differently to sell Erf 2434 for more. Therefore, nothing turns on this latter issue for current purposes.

[10] As indicated above, Mr Marx also says he does not earn sufficient income and does not possess sufficient means to pay off the judgment debt or part thereof. However, he disputes the veracity of the sheriff's *nulla bona* return, without saying much.¹⁶ He also submits, rather curiously so in my view, that the Bank has not exhausted all avenues, including the financial investigation in terms of section 65D of the Magistrates' Courts Act

¹⁴ See par 25 onwards.

¹⁵ See par 4.4 of the opposing affidavit on indexed p 26.

¹⁶ See par 11.1 of the opposing affidavit on indexed p 32.

32 of 1944 (the Magistrates Court Act)¹⁷. This submission is curious, but perhaps, with respect, even absurd. The question that immediately comes to mind, which was also understandably so reiterated by Ms Riley appearing for the Bank, is what such process would yield if in Mr Marx's own words he does not earn sufficient income and has no means to satisfy the judgment.

[11] Mr Marx's main ground of opposition is located in the argument that the Property is his primary residence and that of his family. His family comprises three minor children, his wife and himself. His wife is currently unemployed and he is the sole breadwinner. He submits that execution of the Property will severely prejudice him and his family. They will lose access to housing, which will be more prejudicial to them than the Bank. The Bank is one of the largest financial institution in the country; financially strong and is litigating from a position of power, he adds.

[12] He also submits that the execution of his 50% share in the Property will not be practical or financially feasible. A purchaser of his share would end up with a cohabiting the Property with his family. Considering this and the current valuation of the Property, sale in execution of the Property would not fetch much.¹⁸ He estimates that the Property may fetch a high price of R2 600 000.00 and low price of R1 530 000.00 on sale.¹⁹ The significance of these values or postulations would become clearer below.²⁰

¹⁷ The financial investigation or enquiry is initiated in terms of section 65M of the Magistrates Courts Act by referral to that court of a judgment of the High Court.

¹⁸ See par 4.13 of the opposing affidavit on indexed p 28; a valuation report attached to the opposing affidavit as annexure "M" on indexed pp 36-39.

¹⁹ *Ibid.*

²⁰ See par 35 below.

[13] What is noteworthy from Mr Marx's submissions is that he does not give any suggestions as to how his indebtedness to the Bank could be settled. I will deal below with the implications of this disposition, together with other issues to be identified next.

The issues

[14] As indicated above the application is premised on rule 46(1)(a)(ii) of the Uniform Rules of this Court.²¹ This rule has enjoyed greater attention of our Courts in the recent past, including at the highest level of our Courts.²² The implications of the rule (as it was before amendments) to section 26(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) were dealt with in these cases.²³ From the case law generated by the rule and the rule itself, an applicant for an order currently sought by the Bank herein, ought to adduce evidence on some factors or circumstances for consideration by the Court, for purposes of an order for execution against immovable property, which is a primary residence. Although the rule doesn't specify what the "relevant circumstances" are, our Courts came to the rescue, so to speak, in this regard.²⁴ However, the peculiar issues in this matter present an opportunity of consideration of a broader range of issues, which may be unconventional to rule 46(1)(a)(ii). I expand on this below.

[15] From what appears above, particularly regarding the contending parties' respective cases, the following are the issues to be determined for disposal of this application:

²¹ See par 17 below.

²² See par 26 onwards.

²³ *Ibid.*

²⁴ See par 29 below.

- the circumstances and implications of the *nulla bona* return by the sheriff on Mr Marx;
- the fact that the Bank is said not to have exhausted all avenues, including the financial investigation or enquiry in terms of section 65D of the Magistrates' Courts Act;
- declaration of execution of immovable property wherein the execution debtor only holds a share;
- practicality or financial feasibility of execution of Mr Marx's 50% share in the Property, including the price the sale is likely to fetch considering current valuation and co-habitation;
- other relevant circumstances in terms of rule 46(1)(a)(ii).

[16] I proceed to utilise the above issues, some combined, as subheadings for further discussion under the next main heading.

Analysis of the facts/issues against applicable legal principles

[17] As indicated above, the main legal principle here is rule 46(1)(a)(ii) of the Uniform Rules of this Court. Rule 46(1)(a), incorporating the aforesaid sub-rule, reads:

“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.²⁵

[underlining added for emphasis]

[18] Our Courts have already clarified that the underlined portion in the rule is the *proviso* which is applicable to both (i) and (ii) of the rule.²⁶ Therefore, even where a *nulla bona* return was made against a judgment debtor, no execution against immovable property which is primary residence of the judgment debtor is possible, unless ordered by the Court. This is the case in this application. There was a *nulla bona* return, but because the immovable property sought to be attached is a primary residence, no writ shall issue without an order by this Court upon consideration of all relevant circumstances for execution.

The nulla bona return and financial investigation or enquiry in terms of section 65D of the Magistrates Courts Act

[19] Mr Marx denies making statements attributed to him in the sheriff's return.²⁷ But, I hasten to mention that, I consider it highly improbable that the sheriff of this Court would attribute statements to Mr Marx without him saying so.²⁸ But, even if one was to accept for a

²⁵ Rule 46(1) of the High Court Rules was amended with effect from 24 December 2010.

²⁶ See *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) at 116B-117A.

²⁷ See par 11.1 of the opposing affidavit on indexed p 32.

²⁸ In terms of the sheriff's return of service the sheriff says that "after I demanded payment of the amount due, I was informed by the PARTY SERVED – 3RD DEFENDANT that it was impossible to pay the amount claimed or any sum. Except property exempted by law ... no property or assets could, after enquiry, be pointed out to

moment that Mr Marx did not make the impugned statements to the sheriff, Mr Marx doesn't state how his responses would have been different to the same questions. This clearly doesn't matter, as in Mr Marx's own words under oath he says that he does not possess the means with which to meet the judgment.²⁹ Therefore, I do not see how there could be any dispute about the sheriff's *nulla bona* return, save for purposes of an academic debate. I accept the sheriff's return herein as sufficient for purposes of rule 46(1)(a)(ii).³⁰

[20] As stated above, Mr Marx, unlike the second respondent, made no attempts to settle or make arrangements to settle the outstanding amount. However, in both written and oral submissions by Mr Prinsloo appearing on behalf of Mr Marx, it is contended that the Bank should have initiated a financial enquiry in the Magistrates' Court through transfer of the judgment in terms of section 65M of the Magistrates' Court Act.³¹ But, as indicated above, Mr Marx doesn't say what the enquiry would reveal in terms of disposable property. It appears that no tangible benefit would be obtained by transfer of the matter to the Magistrates' Court debtors' enquiry, save perhaps for a general financial enquiry. It ought to be mentioned in this regard that Mr Max pays more than the required monthly instalment in

satisfy this writ. Despite a diligent search and enquiry I could not find sufficient disposable property to satisfy this writ. I therefore make a return of NULLA BONA." See annexure "C" to the founding affidavit on indexed p 15.

²⁹ See par 4.9 of the opposing affidavit on indexed p 27.

³⁰ See *Barclays Nasionale Bank Bpk v Badenhorst* 1973(1) SA 333 (N) at p 337 onwards.

³¹ Section 65M of the Magistrates' Courts Act reads: "If a judgment for the payment of any amount of money has been given by a division of the Supreme Court of South Africa, the judgment creditor may file with the clerk of the court from which the judgment creditor is required to issue a notice in terms of section 65A (1), a certified copy of such judgment and an affidavit or affirmation by the judgment creditor or a certificate by his attorney specifying the amount still owing under the judgment and how such amount is arrived at, and thereupon such judgment, whether or not the amount of such judgment would otherwise have exceeded the jurisdiction of the court, shall have all the effects of a judgment of such court and any proceedings may be taken thereon as if it were a judgment lawfully given in such court in favour of the judgment creditor for the amount mentioned in the affidavit or affirmation or the certificate as still owing under such judgment, subject however to the right of the judgment debtor to dispute the correctness of the amount specified in the said affidavit or affirmation or certificate."

respect of the Property. Perhaps this issue and more may benefit from the suggested debtors court enquiry in terms of section 65D of the Magistrates' Courts Act.³²

Declaration of executability of 50% share in immovable property

[21] The intriguing issue of this matter is the fact that the declaration of executability is only with regard to a portion of the Property. As stated above, Mr Marx holds only 50% share in the Property. The question that immediately comes to mind is how will the declaration be carried out when the holder of the other 50% share, being Mrs Marx doesn't patently harbour the same interests as the execution creditor? Even if a sale eventuates, how will the purchaser enjoy his/her/its half share? The same applies to Mrs Marx and all those who will be occupying the Property through her authority after the sale? Will they still be held to have access to adequate housing? I revert to these issues below.

Non-joinder of Mrs Marx as the holder of the other 50% share in the Property

[22] The other aspect of this matter which does not appear to be of concern to the parties, but is of concern to the Court, is that Mrs Marx is not cited as a party in this application. In my view she has a direct and substantial interest and ought to have been joined to the

³² Section 65D of the Magistrates' Courts Act reads in the material part: "On the appearance before the court of the judgment debtor ... on the return day of the notice referred to in section 65A (1) or (8) (b), in pursuance of his or her arrest under a warrant referred to in section 65A (6), or on any date to which the proceedings have been postponed, the court in chambers shall, subject to the provisions of subsection (2) of this section, call upon him or her to give evidence under oath or affirmation on his or her financial position ..., and the court shall permit the examination or cross-examination of the judgment debtor ... on all matters relevant to the judgment debtor's financial position and his or her ability to pay the judgment debt, and the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem just, by or on behalf of either the judgment debtor or the judgment creditor, as is material to the determination of the judgment debtor's financial position and his or her ability to pay the judgment debt, and for the purposes of such evidence witnesses may be summoned in the manner prescribed in the rules."

application.³³ The order sought clearly affects her rights. I will also indicate below the import of this to this application.

No breach in respect of the mortgage bond for the Property

[23] This is additional or complementary to what is immediately stated above. It is common cause that at all material times there was no breach of the agreement underlying the mortgage bond in respect of the Property. The breach by Mr Marx occurred in respect of other relationships or agreements. The mortgage bond loan account for the Property appears to be up to date. Ordinarily, issues of execution would not feature, for the Property. But this is no ordinary matter. This issue, as well, is significant for a determination to be made herein.

Financially feasibility of the envisaged sale in execution

[24] In his opposition to the relief sought herein, Mr Marx pointed out that the Property may fetch an amount of R2 600 000.00 on the high and R1 530 000.00 on the low. On the high side and with an outstanding balance of around R2 400 000.00³⁴ there would be a profit of R200 000.00 for division between the shareholders in the Property, after settling the balance owing to the Bank. Therefore, Mr Marx would be able to pay from his 50% share of the profits an amount of R100 000.00.³⁵ The Bank heavily relies on this for its case for execution of the Property.³⁶ However, there is no submission as to what would happen if the Property fetches lower than the postulated amount in an open market. Will the Bank, as the

³³ See generally Cilliers AC, Loots C and Nel HC *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, vol 1, 5th edition (Juta Cape Town 2009) on p 217 onwards.

³⁴ According to the applicant the closing balance on the mortgage loan account amounted to R2 395 585.95, excluding interest, on 27 May 2015. See par 5.4 of the replying affidavit on indexed p 52.

³⁵ See pars 4.13-4.14 of the opposing affidavit on indexed pp 28-29.

³⁶ See par 5.4 of the replying affidavit on indexed p 52; par 3.4 of the applicant's heads of argument.

bond holder over the Property, accept a purchase price lower than reasonable value for the Property? If so, will this constitute reasonable exercise of the Bank's rights and no abuse of process? What if Mrs Marx insists on sale for profit? These are questions or factors worthy of consideration for purposes of the order sought herein.

Other relevant circumstances in terms of rule 46(1)(a)(ii)

[25] As indicated above, the rule 46(1)(a) has been a subject of a vast amount of case law in the last few years. Primarily the cases have been a quest to ensure the realisation of the constitutional rights contained in sections 26 of the Constitution.³⁷ Section 26 provides “the right to have access to adequate housing” and proscribes evictions without a court order and legislation allowing arbitrary evictions. It has to be understood in the light of our history of forced removals and unlawful evictions in South Africa.³⁸ These, in the main, affected the poor and black South Africans.

[26] However, from the decision in *Jaftha v Schoeman and Others; van Rooyen v Stoltz and Others*,³⁹ it is clear that section 26 of the Constitution is not only meant for the poor segment of communities.⁴⁰ It applies to all South Africans. Although the circumstances in *Jaftha* were punctuated by elements of dire poverty,⁴¹ the following passage from *Jaftha* is significant in this regard:

³⁷ Section 26 of the Constitution reads as follows in the material part: “(1) Everyone has the right to have access to adequate housing. (2) ... (3) No one may be evicted from their home..., without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

³⁸ See *Jaftha* at pars 25-29.

³⁹ 2005 (2) SA 140 (CC) (*Jaftha*).

⁴⁰ See *Jaftha* at par 29.

⁴¹ See *Jaftha* at par 30.

“Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the State must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified.”⁴²

[underlining added for emphasis]

[27] Obviously, it is beyond reasonable argument that execution of housing property has far more severe impact on indigent debtors than the rest of us,⁴³ especially in cases of state-aided housing⁴⁴ and execution of houses due to trifling debts.⁴⁵ However, there is nothing in section 26 itself to warrant a view that only access to adequate housing by poor people is protected. This would obviously have had implications relating to the equality clause in the Constitution⁴⁶ and its limitation clause.⁴⁷ Therefore, despite the Property being in the upper echelons of society, it enjoins the legislative protection available. I will also return to this aspect.

[28] The case law on this rule has been about the declaration of immovable property which is primary residence, as specially executable. Invariably the execution is at the instance of financial institutions or banks which would have provided the finance to purchase the house or immovable property, which is the subject matter of execution. This matter is of a different

⁴² See *Jaftha* at par 29.

⁴³ See *Jaftha* at par 43.

⁴⁴ See *Jaftha* at par 35.

⁴⁵ See *Jaftha* at par 40.

⁴⁶ Section 9 of the Constitution.

⁴⁷ Section 36 of the Constitution.

spin, so to speak. The property sought to be declared specially executable was financed by the Bank, but the execution debt or judgment arose from a different liability and agreement. Therefore, the voluntary assumption of risk argument which generally is to the effect that a debtor places his/her property at risk by bonding it to the creditor, becomes more complicated here. More so, due to the existence of the suretyship agreement.⁴⁸ Is the suretyship agreement such assumption of risk by the debtor like Mr Marx? I do not consider an answer to this question significant for current purposes.

[29] Further, rule 46(1)(a)(ii) applies to any property which is the primary residence of the judgment debtor. This is so for this matter. The Court has to consider all relevant circumstances before ordering execution. It has already been found in this division and elsewhere that relevant circumstances means “legally relevant circumstances”.⁴⁹ The Constitutional Court gave examples of such circumstances in *Jaftha*,⁵⁰ and added to the list in *Gundwana v Steko Development and Others*.⁵¹ Although, the decision in *Standard Bank of South Africa Ltd v Saunderson*⁵² was overturned, the Constitutional Court did not discard the practical rules prescribed in this matter.⁵³ They remain helpful. In *Firststrand Bank of South Africa Ltd v Folscher and Another*⁵⁴ the full court of this division provided a full list of factors⁵⁵ to be taken in consideration as relevant circumstances for purposes of rule 46(1)(a)(ii). In this matter, the parties have provided what they consider relevant circumstances for consideration by the Court. Most of these are indicated above under the

⁴⁸ See *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) at pars 44-49; *Jaftha* at par 58; *Firststrand Bank of South Africa Ltd v Folscher and Another* 2011 (4) SA 314 (GNP) at pars 24; 38-39.

⁴⁹ See *Firststrand Bank of South Africa Ltd v Folscher and Another* 2011 (4) SA 314 (GNP) at 330C-D; *Standard Bank of South Africa Ltd v Bekker and Another* 2011 (6) SA 111 (WCC) at 129C.

⁵⁰ See *Jaftha* at 1611-163B.

⁵¹ 2011 (3) SA 608 (CC) at 626F-G.

⁵² 2006 (2) SA 264 (SCA) (*Saunderson*).

⁵³ See *Saunderson* at 227C-F.

⁵⁴ 2011 (4) SA 314 (GNP) (*Folscher*).

⁵⁵ See *Folscher* at 336A-G.

headings regarding the parties' respective submissions. Therefore, some of the relevant factors or circumstances are not repeated.

[30] I begin this with the common cause factors. The Property is the primary residence of Mr Marx and his family. Monies due in terms of the judgment debt did not originate from monies advanced by the Bank in respect of the Property.⁵⁶ No breach of the terms of the mortgage bond agreement relating to the Property has occurred. Mr Marx holds half share of the Property.

[31] The Bank submits that it is not driven by any ulterior motive in bringing this application; it complied with all relevant legal provisions and has no option, but to sell the Property in execution as Mr Marx had declared his indigence.

[32] As circumstances advanced against the granting of an order sought herein Mr Marx made the following submissions. He submits that he would suffer prejudice, together with members of his family and lose access to housing, if the Property is sold. He does not earn sufficient income and does not possess of sufficient means to pay the judgment debt or part thereof. The Property would not yield much through sale in execution and the result of the sale will be co-habitation by the purchaser with his family after sale in execution. The Bank has not exhausted all avenues, including the financial investigation in terms of section 65 of the Magistrates' Courts Act.

⁵⁶ See par 28 above, and in particular footnote 48, also above.

[33] It is true that execution of the Property would affect Mr Marx's and his family's housing or residential requirements. They will be without residence upon sale of the Property and face possible eviction in the event of delayed departure. However, on the basis of available facts, Mr Marx is clearly not indigent. He pays around R19 000.00 in monthly instalments for the Property. He will be able to acquire a new house or have access to adequate housing, even if it is on a rental basis. His right of access to housing does not "encompass an entitlement to the ownership of housing; entitlement to a particular form of housing ..."⁵⁷ Therefore, sale of the Property would not take away Mr Marx's right of access to adequate housing or that of his family.

[34] However, there are other features of this matter that are of concern to me. One of them is that, despite Mr Marx only holding a half share in the Property whose execution is sought, the holder of the other half share, being Mrs Marx has not been joined to these proceedings. She is clearly an interested party whose rights and interests would be affected by an order of execution. This would not be limited to the right of access to adequate housing, but her rights of an economic or commercial nature. She is married out of community of property to Mr Marx and therefore there is no convergence of patrimonial rights. She has a say about the real and material issues in this matter.

[35] The other feature that is of concern to me, is that execution is sought in relation to a relationship between the Bank and Mr Marx in which Mr Marx appears to be complying with his obligations. I am not suggesting here that this is not permissible in terms of law. I am also not implying that it is so permissible. I do not consider the issue to require a finding for

⁵⁷ See *Jaftha* at par 13.

purposes of this matter. The Bank appears unconcerned by this. This may not be unreasonable conduct on the part of the Bank, but, the Bank ought to have acted more proactively under the circumstances. For without such proactivity, the Bank's case in this regard lies on not so strong grounds. I say this because the Bank assumed on the basis of projections made available by Mr Marx that sale of the property would yield some return. Even this assumption only considers the higher projections stated in Mr Marx's papers. There is no submission as to what would happen if the market place produces purchasers at the lower end of the projections. Is the Bank prepared to upset –by selling the Property for less - the seemingly uneventful relationship with Mr and Mrs Marx in terms of the mortgage bond loan account, due to breaches emanating from elsewhere? In my view, these issues need to be thoroughly investigated and the Bank may need to acquire its own valuations in respect of the Property and also declare whether it would only sell for a profit or not. The Property can never be sold for a price unreasonable to Mrs Marx. And this Court cannot *mero motu* determine and impose reserve price for the Property. It is also not without complications to order executability on an assumption that the Property will be sold for an amount within a specified threshold. Such an order may be difficult to implement and may even be overly assumptive of the dictates of the housing market. These, in my view, are reasonable concerns. I consider them relevant circumstances which affect the granting of the order sought herein. We are dealing here with a family's primary residence in which a third party not cited in the litigation has an equal share.

Conclusion

[36] For the abovementioned reasons, I will postpone this application *sine die*. This will be to allow the Bank to consider what is stated above and if so minded or advised re-enrol the

matter for adjudication. It will also be open to the Bank to consider referring the matter to the Magistrates Court for a debtors' enquiry in terms of section 65M, read with section 65D of that court, should the Bank bear some hope that same would yield some kind of benefit. I will include this aspect in the order, due to the fact that Mr Marx actually appears to favour it. The postponement is also to allow Mrs Marx to be given an opportunity to join in the proceedings or for the parties to join her as a party. I reiterate my view that, she has an interest qualifying her to be a party in this application or at least to say something, if she is so minded or advised.

[37] Despite the finding reached above and the concerns I raised, in my view, the Bank is entitled to the costs of this application to the date hereof. This notwithstanding that the Bank's notice of motion did not include a prayer for costs and notice was in the Bank's heads of argument.⁵⁸ Mr Marx, as a respondent, had prayed for a punitive costs order on attorney and client basis against the Bank.⁵⁹ There is no basis for this. The Bank in bringing this application was not influenced by an ulterior motive or being in a quest to abuse the process of this Court. The Bank's options were, in a way, limited to this application. And Mr Marx's conduct in not unequivocally declaring his financial position or making attempts to arrange for payment of his debt, is one of the reasons why the possible options of the Bank are limited. The costs order to be made herein will not be limited to wasted costs due to the postponement of the application, but all party and party costs of the application as at the date of the order.

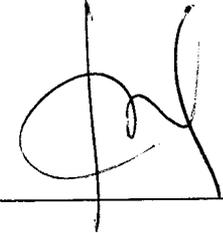
⁵⁸ See 10.4 on p 11 of the applicant's heads of argument.

⁵⁹ See par 14 of the opposing affidavit on indexed p 34.

Order

[38] In the premises, I make the following order:

1. The application is postponed *sine die*;
2. The applicant may refer the matter to an enquiry in terms of section 65M, read with section 65D, of the Magistrates' Courts Act 32 of 1944;
3. The third respondent is liable to the applicant for all party and party costs of this application to date hereof.
4. Copies of all documents in the application and relevant documents from the action, including this order be served on Mare Adre Visser in the event of re-enrolment of this application. together with a notice of set down.



K. La M. Manamela
Acting Judge of the High Court
13 MAY 2016

Appearances:		
For the Applicant	:	Adv M Riley
Instructed by	:	Rorich Wolmarans & Luderitz Inc. Pretoria
For the 3 rd Respondent	:	Adv Prinsloo (Heads of Argument prepared by Adv N Erasmus)
Instructed by	:	Rothmann Phahlamohlaka Inc. Pretoria