IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

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DATE 16/4/18 SIGNATURE

16/4/18

CASE NO: 82972'2016

In the matter between:

ABSA BANK LTD Applicant

and

SUZETTE ROSS First Respondent

JASSAT MITCHELL INC ATTORNEYS Second Respondent

JUDGMENT

LOUW, J

[1] The applicant launched an urgent application on 21 October 2016 in which it sought an order for the provisional sequestration of the first respondent, alternatively an order that the proceeds of the sale of the first respondent's immovable property in Klerksdorp be paid into the trust account of the applicant's attorneys of record immediately after the funds become available upon transfer of the immovable property, further alternatively that the proceeds of the sale of the property be held in the trust account of the conveyancing attorneys, being the second respondent, pending the finalisation of execution steps by the applicant in respect of the property.

[2] On 11 June 2013, the applicant obtained judgment against the Alick Ross Trust, as well as the sureties, of whom the first respondent was one. The judgment against the trust and the sureties was joint and several and was for payment of the amount of R3 089 561.74 plus interest at the rate of 10.5% per annum, calculated and capitalised monthly from 14 November 2012 to date of payment. The applicant has to date only recovered an amount of approximately R700 000.00, being the proceeds of a sale by public auction of a small farm which belonged to the trust and which was declared specially executable in terms of the judgment which was granted.

[3] During September 2016, the applicant received information that the first respondent was in the process of selling her immovable property. The applicant's attorneys wrote letters to the second respondent on 19

September 2016 and 3 October 2016 in which they sought information about the first respondent's two properties and confirmation that the second respondent was attending to the transfer of the Klerksdorp property. They recorded their intention on behalf of the applicant to execute against the Klerksdorp property. The other property is a one week time share in a property in Margate, which was of no financial significance. On 4 October 2016, the second respondent confirmed in writing that it had received instructions to attend to the transfer of the Klerksdorp property and indicated that it would revert to the applicant once it had consulted with the first respondent. It was further indicated that it was not prepared to act on behalf of the trust or the trustees in litigation against the applicant due to a conflict of interest and that the first respondent would be requested to communicate directly with the applicant's attorneys. On 12 October 2016, the applicant's attorneys wrote a letter to the second respondent in which an undertaking was sought from the second respondent that the proceeds derived from the sale of the property would be paid to the applicant in satisfaction of the judgment granted in favour of the applicant.

[4] On 18 October 2016, the second respondent advised the applicant's attorneys telephonically that they were still attending to the transfer and were in the process of submitting the documentation to the Registrar of Deeds. Neither the first respondent nor the second respondent gave the undertaking which was sought. The applicant concluded that the first respondent did not want to pay any of the proceeds of the sale of the

property to the applicant and that she intended applying the proceeds to settle other debts or to spirit the funds away. This prompted the bringing of the urgent application.

[5] The urgent application was enrolled on the urgent court role of 25 October 2016. On 24 October 2016, Mr. Mitchell, a director of the second respondent, wrote an email to the applicant's attorneys in which he confirmed an oral agreement concluded between himself and Mr. Grove, the applicant's attorney, in terms whereof it was, inter alia, agreed that the second respondent would proceed to pass transfer of the property to the purchaser and that the proceeds of the sale would be held by the second respondent in an interest-bearing investment pending a joint written instruction by both parties on how the funds should be dealt with, alternatively that it would be dealt with in terms of a court order instructing the second respondent how to deal with the funds or in terms of an instruction given by a trustee. The undertaking resulted in the urgent application being removed from the roll and no order as to costs being made. The undertaking was recorded in paragraph 3 of the order.

[6] Subsequent to the matter being dealt with in the urgent court, the applicant instructed its attorneys of record to obtain a warrant of execution to enable the applicant to attach the proceeds of the sale. The warrant was issued on 23 November 2016 and the proceeds of the sale, which were then being held in trust by the second respondent, were attached by the Sheriff

pursuant to the warrant. This prompted an urgent application to be brought by the first respondent against the applicant, the sheriff and the second respondent in which she sought an order that they be interdicted from dealing with the proceeds of the sale pending the finalisation of the main application and that they be ordered to ensure that the proceeds of the sale, which had by then been paid over to the Sheriff by the second respondent in terms of the warrant, be paid over to and retained by the second respondent in an interest-bearing trust account pending finalisation of the main application.

[7] The applicant was given less than two hours' notice of the first respondent's urgent application. By agreement between the parties, an order was made by Mothle J directing the Sheriff to pay the monies held by him to the trust account of the applicant's attorneys and to be retained by them on an interest-bearing trust account pending the finalisation of the main application. Time periods were ordered for the filing of the first respondent's answering affidavit in the main application, the applicant's answering affidavit in the first respondent's urgent application and the filing of the first respondent's replying affidavit, if any, in her urgent application. Costs were reserved. Save for the question of costs, the first respondent's urgent application has therefore become moot.

[8] In the applicant's replying affidavit in the main application, which was filed after the making of the order in the first respondent's urgent

application, it is stated that, in light of the fact that it appeared from the first respondent's answering affidavit that her only other creditor was owed an amount of R30 000.00, it did not make sense to proceed with the application for the sequestration of the first respondent, although she was clearly insolvent, since the money has been preserved by having been paid into the trust account of the applicant's attorneys. The only relief which the applicant therefore still required, was an order that the applicant's attorneys be directed to pay the money held in trust over to the applicant in reduction of the first respondent's judgment debt towards the applicant. For that purpose, the applicant filed an amended notice of motion.

[9] I proceed to deal with the first respondent's defense to the main application. The basis of her defense is that the attachment of the proceeds of the sale of her property would infringe her right to adequate housing in terms of s 26(1) of the Constitution. Section 26 (1) provides that everyone has the right to have access to adequate housing.

[10] It is common cause that the property sold by the first respondent was her primary residence which consists of a luxurious home with six bedrooms, three bathrooms, a gymnasium, sauna, swimming pool and tennis court and that the first respondent was living on her own in the property. Her evidence is that she could not afford the upkeep of the property and could not find any tenants for it. She accordingly placed the property on the market for sale with the purpose of realising sufficient funds

from the sale to buy a much smaller and more adequate primary residence. The property was sold for R1,950 million which resulted in a net sum of approximately R1,7 million accruing to the first respondent. She says in her answering affidavit that she identified two properties in Bloemfontein and in Nelspruit which she regarded as adequate given her personal circumstances. The properties were marketed for a purchase consideration of between R1 020 000.00 and R1,2 million.

[11] The first respondent states that she would have expected the applicant to have served a warrant of execution and to have attached her immovable property pursuant to the judgment which the applicant obtained against her, and that it would have sought an order declaring the property executable. She says that the only explanation why this did not happen was because the applicant knew that it would not have succeeded in having her primary residence declared specially executable. In view of the luxurious nature of the property and of the substantial debt owing to the applicant, there is, in my view, little merit in this submission. The applicant has, in any event, explained the delay in taking steps against the first respondent. It first proceeded against the property of the trust, which is the principal debtor, before taking steps against the first respondent.

[12] It was submitted on behalf of the first respondent that, although she may not be entitled to all of the proceeds of the sale of her property, she was entitled to use the proceeds of the sale of her property to substitute

one primary residence with another, and that the proceeds should therefore be protected. The first respondent voluntarily sold her property. The argument presupposes that the proceeds of the sale, because it is the proceeds of the sale of a primary residence, somehow becomes the object of her right to adequate housing. It was submitted that the money should be seen as so closely related as to be the same as the attachment of the first respondent's primary residence. The argument is convoluted and, in my view, has no merit. Section 26(2) of the Constitution provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to adequate housing. The obligation does not apply to private institutions.

[13] Section 8(2) all of the Constitution of the Republic provides the following:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Section 26(2) clearly early binds the state, not natural or juristic persons. It was submitted in supplementary heads of argument filed on behalf of the first respondent that, having regard to s 8(2) and the judgment of the constitutional court in *Governing Body of Juma Musjid Primary School v*

Essay NO[1], the purpose of section 8(2) is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights, but is rather to require private parties not to interfere with or diminish the enjoyment of the right in question. That is what was held in that judgment.

[14] With regard to the right to adequate housing, it was submitted that this means that individuals cannot commit acts that render another person homeless. Assuming that the submission is correct, the attachment of the proceeds of the sale of the first respondent's property will not render her homeless. She presently resides in a house on the school grounds of Hoërskool Klerksdorp. The accommodation is provided to her by the school in exchange for her performing certain duties in the school hostel and for providing tennis coaching on a regular basis. She says that this is a sympathetic arrangement. Her income from private tennis coaching is R10 840.00 per month and she receives a pension of R5 590.00 per month. Her total monthly income is therefore R16 430.00. Her monthly expenses amount to R13 307.00. Her total liabilities, without taking into account the judgment debt owed to the applicant, are R122 000.00. The first respondent does not say that her present accommodation is not adequate. What she says, is that the arrangement is not permanent. She does not, however, give any indication of when she expects the arrangement to terminate.

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[1] 2011 (8) BCLR 761 (CC) para 58

[15] Furthermore, the first respondent has not brought a counterclaim for any particular relief, such as that the proceeds of the sale of the property which have been paid into the applicant's attorneys' trust account, or any part thereof, be paid to her. The defense which she raises, will have no outcome. There is no sense in keeping the money indefinitely in the trust account of the applicant's attorneys.

[16] For the aforegoing reasons, I conclude that the first respondent's defense to the main application is unsustainable and that an order should be granted in terms of the applicant's amended notice of motion.

[17] I turn to the issue of the costs of the first respondent's urgent application which were reserved. It was submitted on behalf of the first respondent that the attachment by the applicant, through the Sheriff, of the proceeds of the sale of the first respondent's property in the trust account of the second respondent was in contravention of the agreement concluded between the applicant's attorney and the second respondent that the money would be kept in the trust account of the second respondent pending the finalisation of the main application. The undertaking provided that the money would be kept in the second respondent's trust account until either of three events mentioned in the undertaking, to which I referred above, occurred. It was submitted on behalf of the first respondent that not one of these events occurred and that the applicant acted contrary

to the agreement that the money would be held in trust. The first respondent accordingly sought a costs order against the applicant on attorney and client scale.

[18] It was submitted on behalf of the applicant that the first respondent was incorrect in her submission that her *prima facie* right for purposes of the interdict which she sought, was the undertaking which was provided as she had relied on her right to adequate housing. I disagree with the submission. Although the undertaking was not given by the first respondent, she was, in my view, entitled to rely on the undertaking which had been given by the second respondent who was acting on her behalf for purposes of the transfer of the property.

[19] The applicant's answering affidavit to the first respondent's founding affidavit was deposed to by the applicant's attorney Mr. Grové. He submits therein that the attachment was made in terms of a court judgment and that the second respondent was therefore obliged to deal with it in accordance with the judgment of the court. He therefore submits that the payment made to the sheriff was not in contravention of the undertaking provided by the second respondent. This is a disingenuous argument. If the argument were correct, there would have been no reason for the undertaking to provide that one of the events which would oblige the second respondent to release the money held in trust, would be a court order instructing the second respondent how to deal with the money.

[19] I agree with the submission on behalf of the first respondent that the applicant acted in breach of the agreement and was simply helping itself to the money. If it had not been stopped by the order granted pursuant to the first respondent's urgent application, the probabilities are that the applicant's attorneys would have accounted to the applicant for the money. In my view, a costs order against the applicant on the attorney and client scale is justified in the circumstances.

[20] In the result, an order is granted in terms of prayers 1 and 2 of the applicant's amended notice of motion. The applicant is ordered to pay the costs of the first respondent's urgent application on the attorney and client scale.

Counsel for applicant: Adv. D van den Bogert.
Instructed by: Tim du Toit & Co Inc.

Counsel for first respondent: Adv. J P van den Berg.
Instructed by: Doman Weitsz Attorneys