IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG

Case No: 14307/15

In the matter between

ST CHARLES COLLEGE **APPLICANT**

and

HENRY LOUIS ANDRE DU HECQUET DE RAUVILLE **FIRST RESPONDENT**
GLERYL INGRID DU HECQUET DE RAUVILLE **SECOND RESPONDENT**
STANDARD BANK SA LIMITED **THIRD RESPONDENT**
THE MINISTER OF BASIC EDUCATION **FOURTH RESPONDENT**

JUDGMENT

Delivered on: 12 April 2017

JAPPIE JP

[1] The Applicant, St Charles College, is an independent school as defined in the Schools Act 84 of 1996. The Applicant was granted summary judgment in its favour against Henry and Gleryl Du Rauville who are the First and Second Respondents (the Respondents). The order reads as follows:-

> "1. Summary Judgment is granted for an amount of R428 278.09 together with said amount of interest on aforesaid sum at the rate of 15.75% per annum compounded monthly in arrears from 1st September 2015 to date of final payment.

2. Plaintiff's claim of the amount of R198 832.00 is in dispute against the First and Second Respondents and is referred to the Expedited Roll.

3. Cost of suit on the scale as between attorney and own client."

[2] Subsequently and on 20th June 2016 the Applicant obtained default judgment from the registrar against the Respondents which judgment reads as follows:

"a) Payment of the sum of R198 832.00 (one hundred and ninety eight thousand eight hundred and thirty two rands);

b) interest on R198 832.00 (one hundred and ninety eight thousand eight hundred and thirty two rands) at the rate of 15.75% per annum from 1st September 2015 to date of final payment, calculated daily and compounded monthly;

c) Cost of suit on the scale as between attorney and own client."

[3] Pursuant to obtaining summary judgment but prior to obtaining default judgment the Applicant's attorneys caused to be issued a warrant of execution for the moveable assets of the Respondents. On the 27th May 2016 the Sheriff of the High Court, New Hanover, served the warrant of execution on the Respondents who were unable to satisfy the warrant on demand. The Sheriff's return reads as follows:

"On this 27th Day of May 2016 I served a Warrant of Execution on the first and second defendants Mr and Mrs Du Rauville at [....] S. R., Albert Falls, KwaZulu-Natal.

The defendants were unable to satisfy the warrant on demand and I duly attached the following moveable assets as per inventory…"

[4] The Sheriff was able to attach moveable goods totalling the sum of R6 200.00. This amount falls significantly short when compared to the combined judgment debt of R627 110.09.

[5] The cause of the Respondents indebtedness stem from tuition fees and other ancillary charges in respect of their sons Eric and Jason. The tuition and ancillary fees were incurred during 2014 and 2015. Moreover the Respondents entered into a written agreement in term of which they acknowledge their indebtedness and agreed to terms as to how they would discharge their indebtedness.

[6] Eric and Jason matriculated in 2015 and the Respondents have no other minor children of school going age. Both the Respondents are in full time employment.

[7] It is the Applicant's case that the only means it has of recovering and satisfying the judgment debt is for it to attach and sell in execution the immovable property owned by the Second Respondent. Hence the present application.

[8] The Second Respondent is the registered owner of the immovable property described as Rem and Portion 3 of Erf [....] A. F., Pietermaritzburg – Registration Division FT Held by Deed of Transfer no.: [....] hereinafter referred to as "the immovable property". The immovable property is situated at [....] S. R., Albert Falls, KwaZulu-Natal. The property has two mortgage bonds registered over it in favour of Standard Bank Limited who is the Third Respondent in this Application.

[9] The Applicant brings this application in terms of Rule 46(1)(A) of the Rules. The Rule reads as follows:

> "No writ of execution against the immovable property of any judgment debtor shall issue until –
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> i) a return shall have been made of any process which may have been issued against the moveable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ;"

[10] It is common cause that the Applicant has obtained a return which indicates that the Respondents are not in possession of sufficient movable property to satisfy the writ for the judgment debt. It is clear that the Applicant in the ordinary cause would be entitle to a writ against immovable property owned by either or both Respondents.

[11] In deciding whether or not a court should declare the primary residence of a judgment debtor who is a natural person executable the court ought to consider all circumstances relevant to the particular case. In *Jafta v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 CC* the Constitutional Court gave the following examples of such circumstances:-

a) Whether the rules of court have been complied with;

b) whether there are other reasonable ways in which the judgment debtor can be paid;

c) whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt;

d) the circumstances in which the judgment debt was incurred;

e) attempts made by the judgment debtor to pay off the debt;

f) the financial position of the parties;

g) the amount of the judgment debt;

h) whether the judgment debtor is employed or has a source of income to pay off the debt; and

i) any other factors relevant to the particular case.

[12] In opposing the relief sought, the Respondents contend the following:

i) If the immovable property is sold at a sale in execution the property will not be realised to its best advantage as the property would be the subject of “a forced sale”. This course would involve additional costs to the Respondents.

ii) The property is the family home of the Respondents and accordingly, there is much sentimental attachment thereto.

iii) The Respondents intend paying off the outstanding judgment debt in full and

iv) The bond repayments on the property to Standard Bank is less than the Respondents will be able to rent property for in the greater Pietermaritzburg area.

[13] The Respondents have argued that it is unconstitutional that the dwelling of a parent of a learner at an independent school may be attached to recover tuition fees, while the dwelling of a parent of a learner at a public school may not be so attached. They contend that this constitute differential treatment, and that there are no grounds which justify such differential treatment. Accordingly, such differential treatment constitute unfair discrimination against parents such as them who have of children attending independent schools.

[14] Their position is set out in their notice in terms of Rule 16 A which frames the constitutional issue as follows:

> "Section 41 (6) of the South African Schools Act 84 of 1996 precludes a public school from attaching the dwelling in which a parent of a learner resides for the purpose of enforcement of the payment of school fees owed to the school for which the parent is liable.
>
> However there is no equivalent legislative provision that precludes and independent school from attaching the dwelling in which a parent of a learner resides for the purpose of enforcement of the payment of school fees.
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> The fact that the dwelling in which a parent of a learner at an independent school resides may, on the face of it, be attached by the school for the purposes of enforcement of the payment of school fees while the dwelling in which a parent of a learner at a public school resides may not be attached by the school for the purpose of enforcement of the payment of school fees constitute differential treatment of different categories of parents."

They therefore contend that:

i) the said differential treatment is arbitrary and irrational and the distinction that has been made is unrelated to any legitimate government purpose;

ii) there are no grounds which justify differential treatment and;

iii) accordingly, such differential treatment therefore constitute unfair discrimination against the parents of learners at independent schools.

[15] Counsel for the Respondents have argued that I ought not to declare the immovable property executable. He submitted that the factors mentioned in the opposing affidavit ought to persuade the Court to exercise its discretion in the Respondents' favour. It was submitted that if the Court takes the factors set out in the opposing affidavits into account, it ought to refuse the relief sought by the Applicant.

[16] The main trust of the Respondents' argument was the constitutional point. It was submitted that to grant an order declaring the immovable property executable would in the circumstances of this case, be a violation of the Respondents' right to equality. The Respondents contend that they ought to be placed on an equal footing with those parents of children who attend public schools.

[17] Section 41 (6) of the South African Schools Act 84 of 1996 provides as follows:-

> "A public school may not attach the dwelling in which a parent resides."

That is to say the section prohibits a public school from attaching the dwelling of a parent of a learner for the purpose of enforcement of the payment of school fees. Whereas the dwelling in which a parent of a learner at an independent school such as the Respondents reside may be attached by the school for the purpose of enforcement of the payment of school fees constitute differential treatment. It was argued that this differential treatment constitute unfair discrimination.

[18] In Jafta's case (cited above) the Constitutional Court set out some of the circumstances a court should consider in deciding whether or not to declare a primary residence of a judgment debtor executable. In the present case the judgment debt is substantial. It was incurred in circumstances over which the Respondents had control. The Respondents made an informed choice of enrolling their sons at an independent school. That is to say that they knew that by enrolling their sons with the Applicant they would incur the cost of tuition fees and they did so voluntarily. The Respondents had the choice, if they so wished, to enrol their sons at a public school and thus would have avoided their present predicament.

[19] There is further evidence that the Respondents had considered selling the immovable property. This contradicts any sentimental claim that the Respondents may have to the loss of their primary residence. There is no suggestion that they cannot afford alternative accommodation

[20] In my view there is no evidence that could persuade a court to exercise its discretion in favour of the Respondents to avoid the attachment and execution of the immovable property.

[21] The constitutional challenge raised by the Respondents has to be considered in the light of section 172 of the Constitution. It reads as follows:

> "When deciding a constitutional matter within its power, a Court – (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;"

[22] The Respondents do not seek to have any law or conduct declare inconsistent with the Constitution. However, what is sought is to make independent schools subject to the same legislative prohibition contained in section 41(6) of the Schools Act as that which is applicable to public schools. By this means they seek to put parents of learners at independent schools on the same footing as parents of learners at a public school.

[23] There are two difficulties with the Respondents' argument. Firstly, the constitutional challenge that the Respondents are subject to differential treatment can only succeed if it can be shown that such differential treatment constitute unfair discrimination. In *Harksen v Lane NO and Others 1997 (11) BCLR* at 1489 the Constitutional Court held that that for differentiation to amount to unfair discrimination it is for an applicant to prove that the differentiation is based on characteristics that have the potential to impair the fundamental dignity of human beings; or could affect them adversely in a comparably serious manner.

[24] As to whether differentiation amounts to discrimination must be answered objectively. If a court finds that the differentiation does not amount to discrimination then there can be no question as to whether the differentiation amount to unfair discrimination. In the present matter the Applicant in seeking to execute against the Second Respondent's immovable property does not actually or potentially fundamentally impair the dignity of the Respondents. It was the Respondents' choice to send their sons to an independent school. They could exercise such a choice because they enjoyed a higher economic status than the majority of parents who choose to send their children to public schools. The exercise of a choice that is based on economic or financial

consideration, as in the present case, does not fundamentally impair the dignity of a parent who choose to enrol his child at independent schools. I, therefore, take the view that the differentiation as contended for by the Respondents do not constitute discrimination let alone unfair discrimination. Consequently I find no merit in the Respondents' constitutional challenge.

[25] Secondly the Respondents contention adversely affects every independent school as to how it may seek to recover unpaid tuition fees. Parties representing the interest of independent schools have not been joined in these proceedings and they have not been informed that their interest could be adversely affected by the outcome of the present litigation. Thus there is a material non-joinder of all interested parties.

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[26] For the reasons set out above I find that there is no merit in the Respondents opposition to the order sought. Consequently the order that will issue is as follows:-

1. The immovable property described as :- Remainder of Erf [....] A. F. Registration Division FT KwaZulu-Natal Province in extent of four thousand two hundred and forty two (4242) square metres held by Deed of Transfer No. [....] is declared executable.
2. That the Registrar is hereby authorised to issue a warrant of execution in respect of the aforesaid immovable property, and
3. The First and Second Respondents are directed to pay the Applicant's cost of the application on an attorney and client scale.

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Date of Hearing:	28th February 2017
Date of Judgment:	12 April 2017
Counsel for the Applicant:	Advocate Jennings
Instructed by:	E R Browne Incorporated
Counsel for the Defendants:	Advocate J P Pretorius
Instructed by:	Desmond Mayne & Company