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Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: **C45/2010**

In the matter between:

BERNADETTE ZEMAN

Applicant

and

ANTHONY CHARLES QUICKELBERGE

First Respondent

THE RAILWAY SHED CC

Second Respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

1. The issue that arises in this application is whether leave may be granted

to execute against the judgment debtor's immoveable property.¹

PARTIES

2. The Applicant is Bernadette Zeman ("**Zeman**"), the judgment creditor. Her claim arises from a judgment in this court of 23 August 2010, ordering the First Respondent to pay her the sum of R39 000 (plus interest).
3. The First Respondent and judgment debtor is Anthony Charles Quickelberge ("**Quickelberge**"). Quickelberge resides at 16 Badskop Crescent, Ashbury, Montagu.
4. The Second Respondent is The Railway Shed CC ("**The Railway Shed CC**"). The Railway Shed CC is the owner of Soprano's Restaurant, a restaurant in the Robertson district of the Western Cape where Zeman worked.

BRIEF BACKGROUND AND CONTEXT

5. This is an *ex parte* application for the attachment by Zeman of immoveable property belonging to Quickelberge.

¹ The application was heard *ex parte*. I am indebted to the applicant's attorney, Lourens Ackermann, who appeared *pro bono*, for his extensive and well-researched heads of argument. I have drawn heavily on his heads of argument in preparing this judgment.

6. Because of a judgement by the Constitutional Court², the attachment of immoveable property must, under certain circumstances, be subject to judicial scrutiny before a writ in this regard can be issued.
7. Mr *Ackermann*, who appears *pro bono* for the applicant, argued that, while judicial scrutiny is required in this case, the criteria for attachment of immoveable property have been satisfied.

THE FACTS

8. On 23 August 2010 this court passed judgment in favour of Zeman, awarding an amount of R39 000 plus interest at 15.5% plus costs on an attorney client scale.³
9. On 9 September 2010 a writ of execution against the moveable property of Quickelberge was issued by the Registrar. The writ was served at the address 288 Blouberg Rd, Tableview. A person living there informed the Sheriff of Cape Town that Quickelberge no longer lived at the address.
10. After considerable effort and further wasted costs and delays, Quickelberge was tracked down to an address in Montagu where the writ was served on him and a *nulla bona* return was obtained.
11. The Applicant now stands bare unless she can proceed against the immoveable property owned by Quickelberge.

2 *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC)

3 [2010] ZALC 122 paras [78.3] and [78.4]

THE LAW

12. Every person has the right of access to adequate housing.⁴
13. The context within which the Constitutional Court's decision relating to the attachment of immoveable property took place, was Section 66(1)(a) of the Magistrate's Court Act.
14. Section 66(1)(a) of that Act provides that any judgment or order handed down by a court "*shall be enforceable against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.*"
15. The corresponding rule in the High Court is Rule 45(1) which provides:
"*The party in whose favour any judgment of the court has been pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof ...Provided that, except where immovable property has been specially declared executable by the court or in the case of a judgment granted in terms of rule 31(5) by the registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the registrar perceives therefrom that the said person has not sufficient movable*

⁴ Section 26 of the Constitution of the Republic of South Africa, 1996.

property to satisfy the writ.'

16. Section 26 of the rules of this Court state that execution of decisions of this court must take place in accordance with the procedures pertaining to the execution of decisions in the High Court of South Africa. Rules 45 (1) and 31(5) therefore apply to this matter.
17. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*⁵ the Constitutional Court dealt with the constitutional challenge to section 66(1)(a) of the Magistrates' Courts Act, and found the section to be unconstitutional.
18. The facts briefly were that the appellants had had their houses attached and sold in execution by the respondents. They appealed from the High Court to the Constitutional Court to set aside the sales in execution because, *inter alia*, section 66(1)(a) of the Magistrates' Courts Act was unconstitutional.
19. The Constitutional Court found that that there would be circumstances where it would be unjustifiable to order execution against immoveable property because the advantage that attached to a creditor who sought execution would be far outweighed by the immense prejudice and hardship caused to the debtor.⁶

⁵ 2005 (2) SA 140 (CC)

⁶ at para [43](*own emphasis*).

20. To remedy the constitutional defects of section 66(1)(a) of the Magistrates' Courts Act the words *“a court, after consideration of all relevant circumstances, may order execution” must appear before the words “against the immovable property of the party”*.⁷
21. The facts of *Jaftha*'s case, said the Constitutional Court, demonstrated the potential of the section 66(1)(a) process to be abused by unscrupulous people who took advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances would also be unjustifiable. The section was sufficiently broad to allow sales in execution to take place in circumstances where it would not be justifiable for them to be permitted.⁸
22. It was clear however that the Court realised that whether execution was permissible would depend on the facts, and it provided the following guidelines, including, but not limited to:
- 22.1. the circumstances in which the debt was incurred;
 - 22.2. any attempts made by the debtor to pay off the debt;
 - 22.3. the financial situation of the parties;
 - 22.4. the amount of the debt;

⁷ *Jaftha* at para [67]

⁸ Para [44]

- 22.5. whether the debtor is employed or has a source of income to pay off the debt; and
- 22.6. any other factor relevant to the particular facts of the case before the court.⁹
23. In *Nedbank Ltd v Mortinson*¹⁰ the constitutionality of Rule 45(1) – the equivalent High Court Rule – was subsequently challenged on the same grounds as section 66(1)(a) of the Magistrates’ Courts Act.
24. In terms of Rule 45(1), the Registrar of the High Court is entitled, without any judicial intervention, to issue a writ over the judgment debtor’s immovable property where there are insufficient movable assets to satisfy the judgment debt.
25. A full bench of the High Court, following *Jaftha*, held that Rule 45(1), insofar as it permitted execution against immovable property without judicial sanction, was unconstitutional.¹¹ Again, the Court held that the section could be remedied by the insertion of words “*and a court, after consideration of all relevant circumstances, has authorised execution against the immovable property*” after the words “*movable property*” in the third last line of the Rule¹².

9 Para [60]

10 2005 (6) SA 462 (W)

11 at para [38] of the *Nedbank* case.

26. It was clear therefore that debts could no longer simply be satisfied by the attachment of immovable property and that there were certain circumstances which would require judicial scrutiny.

Is judicial scrutiny required where the judgment creditor has a bond over the immovable property?

27. This was the question facing the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson and Others*.¹³
28. It is dealt with here briefly to distinguish between two types of debt: a debt extraneous to the property, and a debt linked to the property, like a bond. This distinction is relevant but not central to the current matter before me.
29. In the court *a quo* the debtors did not respond to the summons issued by Standard Bank for the outstanding amount owed on the bond, but despite this the court, influenced by *Jafftha*, declined the orders declaring the immovable property executable.
30. On appeal, the Supreme Court of Appeal overturned this decision. The Court *a quo*, according to the SCA, had misinterpreted the *Jafftha* decision. Section 26(1) of the Constitution did not confer an unqualified right of access to housing but only a right of access to “adequate”

12 Para [39]

13 2006 (2) SA 264 (SCA).

housing. Hence the *Jaftha* decision did not decide that all residential property was protected by the provisions of Section 26(1).¹⁴ The SCA pointed out that the situation in the matter before them was very different from that in *Jaftha* because in *Jaftha*:

*“...the sale in execution deprived the debtor of title to the home a state subsidy enabled her to acquire because she was unable to pay a relatively trifling extraneous debt, and no judicial oversight was interposed to preclude an unjustifiably disproportionate outcome. The judgment creditor in Jaftha was not a mortgagee with rights over the property owners here have willingly bonded their property to the bank to obtain capital. Their debt is not extraneous, but is fused into the title to the property.”*¹⁵

APPLICATION OF THE LAW TO THE FACTS

31. The present case is also, as Mr *Ackermann* submitted, clearly distinguishable from *Jaftha*’s case.
32. If I were to follow the reasoning of the SCA in the *Standard Bank* case Quickelberge’s debt is extraneous, and therefore judicial scrutiny is required. That is the purpose of this application.

¹⁴ at para [15] of the *Standard Bank* case.

¹⁵ Para [18] at 274 D-F

33. However, and this is the nub of the applicant's argument, the central question before me is whether, in the words of Cameron JA et Nugent JA in the *Standard Bank* case, there would be an "*unjustifiably disproportionate outcome*" should attachment proceed against Quickelberge. This question can be answered by using the guidelines set out by the Constitutional Court in the *Jafftha* case.

Circumstances in which the debt was incurred

- 33.1. The debt was incurred because of a court order and a writ issued out of this court after a long and arduous struggle by the judgment creditor as a result of the evasive behaviour of the judgment debtor.

Any attempts made by the debtor to pay off the debt

- 33.2. As has already been fully canvassed in the previous application before this court¹⁶, and in the founding affidavit to this application, not only have no attempts been made to pay off the debt by the debtor, but he has taken active steps to avoid paying the debt.

The financial situation of the parties

16 [2010] ZALC 122

33.3. The judgment creditor works as a restaurant manager when and where she can find work; the judgment debtor is by contrast a wealthy man and a prominent businessman in Robertson who can afford to pay what for him is a trifling amount.

The amount of the debt

33.4. The amount of the debt is R39 000 plus interest at 15.5%. As the pleadings of record show, the judgment debtor has assets conservatively estimated at R20m (twenty million rand).

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

33.5. It is clear that the debtor has the assets and/or income to pay the debt, and is simply being bloody-minded and obstinate in refusing to do so.

CONCLUSION

34. Zeman has the right to execute against the immovable property of Quickelberge.

35. The conduct of the First Respondent in avoiding his obligations to the Applicant and evading the consequences of a previous order of this court warrants a punitive costs order. I have explained in my judgment of 23 August 2010 involving the same parties¹⁷ why a costs order can be granted to an applicant who is represented *pro bono* in certain

¹⁷ [2010] ZALC 122

circumstances.

ORDER

36. The Applicant is granted leave to execute against the immoveable property of the First Respondent.
37. The First Respondent is ordered to pay the Applicant's costs on an attorney and client scale.

STEENKAMP J

Date of hearing: 26 November 2010

Date of judgment: 29 November 2010

For the applicant: LW Ackermann

Instructed by: Edward Nathan Sonnenbergs