IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER: 3473/2021

In the matter between:-

REVOLVER CREEK TRUST CC Applicant

and

ABOVE AVERAGE INVESTMENTS CORPORATION 20 CC Respondent

JUDGMENT

GREYLING-COETZER AJ

[1] The applicant seeks an order declaring certain immoveable properties of the respondent specially executable in terms of Rule 46.

[2] The applicant obtained default judgment against the respondent in respect of an action for monies lent and advanced on 6 May 2019. The default judgment was granted in the amount of R400 000.00 together with interest *a tempore morae*, calculated in terms of per paragraph 21 of the summons until date of final payment, together with cost of suit.

[3] Pursuant to obtaining the default judgment, the applicant issued a warrant of execution, but was unable to attach any moveable assets of the respondent. The respondent however made two payments, totaling R50 000.00, towards the reduction of the judgment debt, the last payment of which was made in December 2019. As a result of persistent non-payment, the applicant pursued an application for liquidation of the respondent. In this respect an order for final liquidation was obtained on 24 August 2020.

[4] Pursuant to the granting of the liquidation order, the respondent engaged the applicant in respect of possible payment terms and settlement of the amount giving rise to the final liquidation order. The parties concluded a written settlement agreement in terms of which the respondent would make various payments on specified dates, and the subsequent setting aside of the liquidation order. The settlement agreement further contained a suspensive condition that should payments not be made as agreed within 14 days from date of the conclusion of the settlement agreement, being 18 November 2020, the settlement agreement will become null and void.

[5] The respondent failed to comply with its obligations in terms of the settlement agreement by failing to make the agreed payments timeously or at all. Due to this failure, the applicant now relying on the default judgment, seeks this court to declare the immoveable property of the respondent executable as envisaged in Rule 46(1)(a)(ii).

[6] In substantiation of the aforesaid, the applicant relies on returns of service issued by the Sheriff, which indicate that the warrants of execution against the respondent's moveable property could not be served, notwithstanding various attempts to do so. The reasons provided for this are that the respondent is unknown at the service address, and pursuant to telephonic communication with the director of the respondent, one Mr Mdluli, it was established that the respondent has moved. However, Mr Mdluli refused to provide the respondent's new address to the Sheriff. As such, it was submitted that the only inference that can be drawn is that the respondent possesses no moveable assets to satisfy the judgment debt.

[7] In support of this application the applicant alleges that neither of the three immoveable properties which the applicant seeks to be declared executable are residential properties, nor are they private residences of any natural person(s). These properties are vacant land.

[8] This application is opposed by the respondent. The respondent however admits the facts relied on by the applicant, save to allege that the respondent was unable to adhere to the terms of the settlement agreement as a direct result of the liquidation order granted against the respondent under case number 985/2020. This being so, as a very lucrative contract the respondent had in place was cancelled pursuant to the liquidation order being brought to the third party's attention.

[9] The respondent further alleges that an undertaking was made by the respondent to the effect that as soon as the respondent commences with 'operation' and obtains its refinery license, it would make payment to the applicant.

[10] The respondent denies evading the Sheriff. Its confirmed that the vehicle utilized by Mr Mdluli (director of the respondent) was confirmed under oath not belonging to the respondent, but that it belongs to one Mr Mazula.

[11] The respondent alleges that Portion 4 of Farm 320, Camelot, Registration Division J.U., Province of Mpumalanga, contains surface material (gold) to the value of R608 106 000.67.

[12] The respondent further alleges that Portion 56 of Farm Greenstone, N 917, Registration Division J.U., Province of Mpumalanga, is valued at R430 000.00

[13] Nothing in the respondent's affidavit sets out a defense to the relief sought by the applicant. At best it shows that the respondent was not *mala fide* in its non-payment in terms of the settlement agreement.

[14] In terms of Rule 46, and subject to the provisions of Rule 46A, no writ of

execution against the immoveable property of any judgment debtor shall be issued unless (1) a return has been made of any process issued against the moveable property of the judgment debtor from which it appears that the said judgment debtor has insufficient moveable property to satisfy the writ; or (2) such immoveable property has been declared to be specially executable by the court, or where judgment is granted, by the registrar under Rule 31(5).

[15] In the application of Rule 46(1)(a)(ii) a court stands to consider all legally relevant factors and must be satisfied that good cause exists for granting the order. In the present matter before me it is evident that alternatives for securing payment have been considered and pursued without success.

[16] Although no *nulla bona* return of service has been placed before court, the Sheriff's returns of service, clearly indicate the attempts made and result. This taken with the version placed before court by the respondent, of inability to pay and that the motor vehicle utilised by the director of the respondent is not that of the respondent, it is reasonable to conclude that the respondent possesses no moveable assets which could satisfy the judgment debt.

[17] What is remaining is whether good cause exists. According to the respondent the immoveable properties which the applicant seeks to declare executable are worth much more than the judgment debt. However, the respondent places reliance for this allegation on a geologist and metallurgist report which does not relate to a property in question, but to Portion 4 of the Farm Camelot, No 320, as opposed to Portions 2 and 3, to which this application relates.

[18] I am satisfied that good cause has been shown to declare the immoveable properties executable as sought.

[19] I therefore make the following order:-

1. The following properties are declared specially executable:-

   1.1 Portion 2 of Farm Camelot, No. 320, Registration Division J.U., Province of Mpumalanga, in extent 39.4334 hectares, held by deed of transfer T2481/2018;

1.2 Portion 3 of Farm Camelot, No. 320, Registration Division J.U., Province of Mpumalanga, in extent 19.8016 hectares, held by deed of transfer T2481/2018; and

1.3 Portion 56 of Farm Greenstone, No. 917, Registration Division J.U., Province of Mpumalanga, in extent of 9224/00 square meters, held by deed of transfer T12476/2017.

2. The issuing of a writ of execution as envisaged in Rule 46(1)(a)(ii) for the attachment of the immoveable properties described above is authorised.

3. Cost of suit.

GREYLING-COETZER AJ

DATE OF HEARING:	19 JULY 2022
DATE OF JUDGMENT:	18 OCTOBER 2022
FOR THE APPLICANT:	Adv. Fourie Instructed by Cronje, De Waal-Skhosana Inc E-mail: schalk@cdwlaw.co.za
FOR THE RESPONDENT:	Adv. Sambo Instructed by BV Mbungela Attorneys E-mail: bv@nm-attorneys.co.za