FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 5512/2016

In the matter between:

JOHNNY BOTHA t/a JOHNNY'S CONSTRUCTION **First Applicant**

A C BOTHA **Second Applicant**

and

KABELO INVESTMENTS (PTY) LTD t/a CENTRAL TIMER AND TRUSS **Respondent**

CORAM: HEFER, AJ

JUDGMENT: HEFER, AJ

HEARD ON: 22 SEPTEMBER 2017

DELIVERED ON: 8 FEBRUARY 2018

---

[1] The Applicants seek leave to appeal against a judgment of Mene AJ in terms of which certain properties of the Applicants were declared specifically executable.

[2] The properties concerned are the properties situated at 200 Paul Kruger Avenue as well as 204 Paul Kruger Avenue, Universitas, Bloemfontein.

[3] After having obtained summary judgment against the Applicants, a writ of execution against movables was issued in the amount of R1 393 093,57 together with interest thereon. After service of this writ of execution, the Sheriff managed to attach movable assets to the value of R16 100,00. Thereafter the Respondents moved for an application to have the property concerned declared executable.

[4] The Applicants opposed the application on three grounds namely:

(i) the Applicants, their adopted child and their major son, G.H.L. Botha's right to adequate housing in terms of Section 26 of the Constitution, i.e., to reside at 204 Paul Kruger Avenue;

(ii) the Applicants' son, M.L. Botha and his family's rights to adequate housing in terms of Section 26 of the Constitution, i.e., to reside at 200 Paul Kruger Avenue; and

(iii) the Applicants obtained judgment against an entity which judgment is in excess of the amount claimed by the Respondent. Whereas such amount was to become payable during August 2017, (whilst the application was adjudicated during February 2017), the prejudice that the Respondent stood to suffer i.e., to wait until August 2017 for payment would have been less than the prejudice that the Applicants and their family stood to suffer.

[5] After referring to **Jaftha v Schoeman, Van Rooyen v Stoltz and Others** 2005(2) SA 140 CC as well as **Gundwana v Steko Development** 2011 (3) SA 608 CC Mene AJ came to the conclusion that there was no reason why the properties of the Applicants should not be declared specifically executable.

[6] In the **Jaftha**- matter the Court stated that an order authorising the sale in execution may ordinarily be appropriated unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. In considering whether such a sale should be authorised, a Court might consider, but are not limited to the following factors:

(i) the circumstances in which the debt was incurred;

(ii) any attempts made by the debtor to pay off the debt;

(iii) the financial situation of the parties;

(iv) the amount of the debt;

(v) whether the debtor is employed or has a source of income to pay off the debt.

[8] Mene AJ referred to the Constitutional Court matter of **Gundwana v Steko Development** 2011 (3) SA 608 CC where Froneman J said the following:

> "... *if the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative cause should be judicially considered before granting execution orders.* "

[9] Applying these considerations to the present matter, to my mind the most important is the alternative which was proposed by the Applicants, namely the funds which might have been obtained through the judgment against the entity known as Quthing Construction. According to the Applicants there were a possibility that such funds, in excess of the amount indebted to the Respondents was expected to be paid a mere seven months later.

[10] Mene AJ did not believe that Applicants were going to receive such funds as anticipated by the Applicants.

[11] Although there might have been some doubts regarding the receipt of such monies, considering the provisions of Section 26 of the Constitution dealing with the right to adequate housing, I am in respectful disagreement with Mene AJ. Regarding circumstances and considerations in matters where a person's primary residence is at stake, such a person should be allowed the benefit of the doubt, in particular regarding the consideration of "*a reasonable manner without involving those drastic consequences*" referred to in the **Gundwana**- matter.

[12] Although it is Applicants' major son and his family who reside at 200 Paul Kruger Avenue, and not the Applicants themselves, I do [illegible] onsider it appropriate to differentiate in regards to the two properties concerned as suggested by *Mr. Zietsman*, appearing on behalf of the Respondents.

[13] I am therefore of the opinion that there is a reasonable possibility that another Court might draw a conclusion, different from that of the Court *a quo*.

Therefore the following order is made:

ORDER

1. Applicants are granted leave to appeal against the judgment and order dated 23 February 2017 .

2. The costs in regards to the application for leave to appeal are costs in the appeal.

J.J.F. HEFER, AJ

On behalf of Applicants:	Adv. J.H. Els Instructed by Rossouws Attorneys BLOEMFONTEIN
On behalf of Respondent :	Adv. P.J.J. Zietsman Instructed by Honey Attorneys BLOEMFONTEIN