IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

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

Case No.: 1014/2016

In the matter between:

SUSARA SUSANNA ANDERSON	Applicant
and	
BUTANA MOSES KOMPHELA	1ST Respondent
CECILIA EILEEN NOMBUISELO KOMPHELA	2ND Respondent
THE BODY CORPORATE OF PINEWOOD	3RD Respondent
THE SHERIFF FOR THE DISTRICT BLOEMFONTEIN EAST	4TH Respondent
THE REGISTRAR OF DEEDS	5TH Respondent

HEARD ON: 1 SEPTEMBER 2016

JUDGMENT BY: C. REINDERS, J

DELIVERED ON: 19 JANUARY 2017

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[1] During 2003 the applicant, Susara Susanna Anderson, (Ms Anderson) bought a property known as Unit number 6 Pinewood ("the property") in Bloemfontein. Ms Anderson applies for a declaratory order that she is the owner of the property and that she never lost her ownership as a result of a sale in execution held on 15th October 2014 ("the sale"). She also applies for ancillary relief flowing from the main relief.

[2] Butana Moses Komphela ("Mr Komphela") and Cecilia Eileen Nombuiselo Komphela ("Ms Komphela") are the first and second respondents respectively. It is common cause that the property was bought by them at the sale held by the Sheriff of the Magistrate's Court, Bloemfontein, and subsequently registered in their names on 30 June 2015.

[3] The third respondent is the body corporate of Pinewood ("Pinewood"). The Sheriff for the District of Bloemfontein East and the Registrar of Deeds are the fourth and fifth respondents respectively.

[4] The relief sought by the applicant is based thereon that the authorisation for the attachment of the property which gave rise to the sale in execution thereof to the first and second respondents was without judicial oversight and therefore the sale and transfer is null and void.

Vide: Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005(2) SA 140 (CC)

[5] The declarotor and relief required is sought by way of notice of motion. Even though the facts are in essence common cause, alternatively not seriously disputed, I am to deal with the matter on the basis of the first three respondents' versions.

Vide: **<u>Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) 623 (A)</u>**

[6] These facts are that on the 4th of December 2008 a default judgment was granted in favour of Pinewood against the applicant in the Bloemfontein Magistrate's Court. A warrant of execution against moveable property resulted in a *nulla bona* return. An application in terms of section 66 (1)(a) of the Magistrates' Act 32 of 1944 to declare the property specially executable was granted. Pursuant thereto the property was sold, but before transfer was effected the warrant of execution and the sale of execution were rescinded by court. The default judgment was not rescinded.

[7] Eventually the matter was settled between Ms Anderson and Pinewood in terms of a deed of settlement which was made an order of court on the 23rd December 2010. In terms of Clause 2 of the deed of settlement the applicant consented to the property being executable in case of default (as is envisaged in clauses 3 and 4).

[8] Pinewood avers that subsequent to the settlement applicant again fell in arrears. It is common cause that various letters exchanged hands between the applicant's and Pinewood's attorneys since the 4th of February 2011. I do not intend to deal herewith safe to

state that Pinewood's attorneys acted pursuant to clause 5.2 of the deed of settlement which in essence provides that in case of applicant's failure to make payments in terms of the settlement agreement, Pinewood had to give seven days written notice to the applicant to remedy the breech, failure whereof Pinewood could proceed without further notice to claim the outstanding amount by way of execution against the property.

[9] As mentioned this deed of settlement carried the approval of the Magistrate's Court and was so ordered by consent between the parties. The upshot of the correspondence was that on the 15th of October 2014 the property was sold by way of a sale in execution by the Sheriff of the Magistrate's Court Bloemfontein and on 30th June 2015 duly registered in the names of the first and second respondents.

[10] It was not disputed by Mr Louw on behalf of the applicant that the deed of settlement was made an order of court. It was rather argued that the order did not constitute authority for the clerk of the court to issue a writ to attach the property or for the sheriff to sell the property and, so the argument runs, same only provided that the applicant consents to an order in terms of section 66 in the event of payments in terms thereof not being made. It was submitted that the provision requires that a further order be obtained and therefore the execution creditor would have been obliged to comply with the legal prescripts to obtain an order as expounded in the **Jaftha** decision *supra*.

[11] Mr Groenewald and Mr Els respectively appearing on behalf of the first two respondents and the third respondent, submitted that the applicant consented to her property being sold in execution in the event of her being in default. Mr Els in addition urged me to find that there are insurmountable disputes of facts on the papers which should have been foreseen by the applicant and that the matter should be dismissed for that reason.

[12] I was referred to case law where the court favourably considered the terms of deeds of settlement providing that in the event of the debtor failing to comply with obligations the creditor would be able to proceed to sell the property in execution.

> Vide: **Rakolota v First National Bank and Others, In re: First National Bank v Rakolota (7896/2000) [2014] ZAGPPHC 865 (unreported judgment dated 5 November 2014)**
>
> **First Rand Bank Limited v Nkata 2015 (2) All SA 264 (SCA)**

[13] In the **Rakolota** matter *supra* Phatudi J dealt with the authorities pertaining to judicial oversight and came to the conclusion that the applicant (in that matter) willingly consented to his property being specifically executable in the settlement agreement (at par [27] and further). It suffices to say that I respectfully agree with the views he expressed.

[14] *In casu* it is no different. In clause 5.2 the applicant willingly agreed that the property might be executed in case of failure to comply. The magistrate was so satisfied and issued such an order. The relevant part of the clause reads as follows:

> "...by gebreke waarvan die vonnisskuldeiser sonder enige verdere kennisgewing aan die vonnisskuldenaar betaling van die volle verskuldigde balans van die skuld mag vorder by wyse van uitwinning van die onroerende eiendom van die vonnisskuldenaar."

[15] This order was already granted. I fail to see why a further similar order should have been granted by the magistrate. I am therefore satisfied that the magistrate (and not the clerk of the court as in **Jaftha's** case *supra*) ordered the sale of the property if necessary.

[16] The result is that the application cannot succeed and I issue the following order:

1. The application is dismissed with costs.

C. REINDERS, J

On behalf of Applicant: Adv. M. Louw
Instructed by:
Stander & Partners
BLOEMFONTEIN

On behalf of 1st and 2nd Respondents:	Adv. W.J. Groenewald Instructed by: Van der Berg Van Vuuren Attorneys BLOEMFONTEIN
On behalf of 3rd Respondent:	Adv. J. H. Els Instructed by: Symington & De Kok Attorneys BLOEMFONTEIN