



**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.: 5512/2016

In the matter between:

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

Applicant

and

**JOHNNY BOTHA t/a JOHNNY'S CONSTRUCTION
AC BOTHA**

First Respondent
Second Respondent

CORAM: MENE, AJ

JUDGMENT BY: MENE, AJ

HEARD ON: 02 FEBRUARY 2017

DELIVERED ON: 23 FEBRUARY 2017

[1] In this matter the applicant seeks an order declaring the immovable properties of the respondents specially executable in order to satisfy the judgment that the applicant had obtained against the respondents. The

applicant obtained a judgment from this court for an amount of R1 393 093.57, interests on the said amount and costs of the suit.

- [2] The properties which are the subject matter of this application are: (1) portion 1 of Ert [...], Extension [...], Bloemfontein, held in terms of deed T20684/2009 and known as 200 Paul Kruger Avenue, Universitas, Bloemfontein (hereinafter referred to as the 'first house'); (2) Unit G1, Sectional Title Scheme known as Cowboy 113, held in terms of SK 459/2006 and known as 204 Paul Kruger Avenue, Universitas, Bloemfontein (hereinafter referred to as the 'second house').
- [3] Subsequent to the judgment there were negotiations that ensued between the applicant and the respondents on how this judgment debt could be settled. When the negotiations yielded to nothing, a writ of execution was caused to be served by the Sheriff on the respondents but the return of service indicated that the respondents told the Sheriff that it was 'impossible to pay the amount claimed or any sum'. Accordingly the Sheriff attached movable assets of the respondents to the total value of R16 100.00 which was not enough to satisfy the judgment debt hence this application.

- [4] This application is opposed by the respondents. The basis of the opposition is that the first house is the primary residence of the respondents and the second house accommodates the oldest son of the respondents. The oldest son is staying with his family in the second house. If the houses are declared especially executable the constitutional rights of the respondents to housing will be infringed. The respondents further contend that there are alternative remedies which will infringe less on the constitutional rights of the respondents to housing such as postponing the execution of the houses or waiting until 25 August 2017 to allow the respondents an opportunity to pay the debt. The respondents are waiting for payment of their debt from a company (hereinafter referred to as 'third party') against whom they had obtained judgment of R2.8 million and such amount becomes payable on 23 August 2017 as per an already existing order of this court. In the meantime the respondents are tendering to pay R20 000.00 per month until 23 August 2017 when the whole judgment debt could be fully paid.

LEGAL POSITION

- [5] In matters of this nature the court should consider certain factors before deciding whether to issue a writ or not. These factors are listed in *Jaftha v Schoeman; Van Rooyen v Stoltz 2005 2 SA 140 (CC)* at paras 56-58. The list is

however not exhaustive. The court can consider and pay attention to the most significant factors that might have to be taken into account in the weighing-up of the interests of debtor and creditor.

- [6] In *Gundwana v Steko Development* 2011 3 SA 608 (CC) at para 54 it was stated that execution itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing.

APPLICATION OF THE LAW TO THE FACTS OF THE CASE

- [7] I will now proceed to deal with the factors that I consider to be important in this case.

THE CIRCUMSTANCES UNDER WHICH THE DEBT WAS INCURRED

- [8] The applicant and the respondents entered into an agreement in terms of which the applicant would supply building material and trusses to the respondents on an open account. In turn the respondents had to pay an amount of

R1 393 093.56 to the applicant. When the respondents failed to pay that money, the applicant sued the respondents for the said amount together with interest thereon. Respondents filed their notice of intention to defend but the applicant proceeded to obtain summary judgment against the respondents on 8 October 2015.

**THE AMOUNT OF THE JUDGMENT DEBT AND ATTEMPTS
MADE BY THE RESPONDENTS TO PAY OFF THE DEBT**

- [9] The judgment debt or any portion thereof has not been paid when this matter was heard. As a result of this failure to pay interest has accrued and accumulated and the total amount owed could therefore be close to two million rand. Even though there were extensive negotiations to try to settle the debt, these negotiations yielded to nothing.

**THE FINANCIAL POSITION OF THE RESPONDENTS AND
WAYS IN WHICH THE DEBT CAN BE PAID**

- [10] The financial position of the respondents has not been divulged before this court except that they cannot pay the debt and that there is an amount of R20 000.00 that has been tendered as an instalment towards the payment of the debt from January 2017 until August 2017. On how and

where this money will come from, the court is left totally in the dark. The court is also left in the dark in respect of the financial position of the oldest son of the respondents who is staying in the second house with his family. I must say that I am not impressed with this lack of disclosure and take a dim view on this failure by the respondents to place all the facts before court.

[11] The respondents, on their own version, are conducting a construction business. I expected them to disclose the business' financial position or the assets it has. However this was not done. The only evidence before me is that the business is owed money by a third party and that such third party is struggling to pay the respondents.

[12] Even though it is clear that the third party is struggling to pay the respondents, the respondents contend that the amount that would be recovered from the third party would be used to satisfy the judgment debt owed to the applicant. I must say, and as correctly argued by the applicant, that it is doubtful that the money owed by the third party to the respondents will be recovered. I say this for the following reasons: there is a dispute between the third party and its creditor (Eastern Cape Provincial Department of Human Settlements). This dispute has been going on for quite some time now. It is not certain whether it will be finalized in

August 2017. In fact this arbitration dates back from 2014 and it was supposed to have been finalized on 29 February 2016 but it was not. Even if it could be finalized in August 2017 there is no guarantee that it will go in favour of the third party and if this eventuality arises, there is no way that the respondents will recover their debt.

[13] Considering the age of the respondents (59 and 60 years respectively), the amount owed (close to two million rand) and the amount tendered as monthly instalment (R20 000.00), it is difficult to say how long the respondents will be able to pay such amount if the eventuality arises that the third party does not pay in August 2017. The cession agreement entered into between the third party and the respondents in respect of the debt that is owed by the Eastern Cape Provincial Department of Human Settlements will at the end of the day not be worth the paper it is written on or offer any comfort to the applicant.

[14] I must further add that the money owed by the respondents is not a trifling amount. As argued by the applicant this amount is very significant to its survival, otherwise the applicant will face the same predicament the respondents find themselves in.

WHETHER THE TWO HOUSES ARE USED AS PRIMARY RESIDENCES OF THE RESPONDENTS

[15] It is common cause that the two houses are occupied by the respondents and the respondents' oldest son respectively and are used as their primary residences. However it is important to mention that even though the respondents built these houses, both houses have bonds registered in favour of Absa and one Mr. Liau Michael Hlaheng respectively. In respect of the first house the respondents are still owing Absa Bank an amount of R142 000.00. In respect of the second house the respondents have a bond with Absa Bank for the purchase of the site and also a bond of R1 million registered in favour of Mr. Hlaheng. The bond was registered in favour of Mr. Hlaheng on 18 May 2016 as is evident from annexure JB3 to the opposing affidavit. The court remarked as follows in Jaftha (*supra*) at paragraph 58: "*..... If the judgment debtor willingly put his or her house up in some manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure*". Even though the respondents argued that the houses are their primary residences, they willingly put them as security for debt. The question that boggles my mind is what would happen if they fail to fulfil their obligations in respect of the debt owed to Absa Bank and Mr. Hlaheng. Logic dictates that they did not mind if they lost their houses should they fail to fulfil their obligations. The other worrying factor is that they put their second house as security for

debt while knowing that they owed money to the applicant. They deliberately and consciously hypothecated the second house as security for a loan obtained from Mr. Hlaheng. This factor militates against not granting the execution of the houses. Furthermore it has not been shown that there is an abuse of court procedure on the part of the applicant.

RIGHT TO HOUSING AND ALTERNATIVE REMEDIES

[16] It was argued on behalf of the respondents that their right to housing will be infringed should the houses be declared to be especially executable and that there are less infringing measures available. These measures are inter alia (i) the applicant should wait until August 2017 to allow the respondents an opportunity to pay the debt; (ii) stay of proceedings until August 2017 and allow the applicant to supplement its papers and place the matter before court if the debt is not paid; and (iii) to order that the properties may only be executed at the end of August 2017.

[17] As indicated in paragraph 12 above there is no guarantee or any certainty that in August 2017 the third party will pay the respondents. To stay the matter will be detrimental to the applicant. It will most likely put the applicant into serious financial trouble. The applicant indicated that it has a lot of pressure from its creditors and that drastic action could be

taken by its creditors should it fail to effect payment any time soon. Should action be taken against it, it would be put out of business.

[18] On the right to housing that will be infringed, it was argued on behalf of the applicant that the respondents could find adequate housing by renting a place. The respondents have shown that they can afford to pay an amount of R20 000.00 per month. This money could be used to pay rent. It was further argued that should the houses be declared executable, there would be extra money in the pockets of the respondents which was meant for respondents' creditors. I am inclined to agree with the applicant. Indeed the respondents will be able to afford a decent, adequate and affordable place with the amount that has been tendered. In respect of the second house I do not have facts or evidence that has been placed before me regarding the financial status of the household of the respondents' oldest son. I must say that this is a simple stratagem used by the respondents to avoid showing that their oldest son (and his spouse or partner) can afford a decent and adequate housing. I therefore do not find that their right to adequate housing will be infringed if their properties are declared especially executable.

[19] Under these circumstances I find that there is no reason why the properties of the respondents should not be

declared specially executable now.

[20] In the result I make the following order:

The properties described hereunder are declared specially executable:

Portion 1 of Ert [...], Extension [...], Bloemfontein, held in terms of deed T20684/2009 and known as 200 Paul Kruger Avenue, Universitas, Bloemfontein;

Unit G1, Sectional Title Scheme known as Cowboy 113, held in terms of SK 459/2006 and known as 204 Paul Kruger Avenue, Universitas, Bloemfontein.

- (1) The respondents to pay the costs of this application on a party and party scale.

B. S. MENE, AJ

On behalf of the applicant: Adv. P.J.J. Zietsman
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the respondents:

Adv. A.P. Berry
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN