In the High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg

Case No AR34/15

In the matter between :

Microzone Trading 474 CC	Appellant
and	
Rathnavelu Govender	First Respondent
Dolly Govender	Second Respondent
Registrar of Deeds KwaZulu-Natal N.O.	Third Respondent

Judgment

Lopes J

[1] This is an appeal against the whole of the judgment and order of the additional magistrate Ms Khuzwayo, which was handed down on the 31st October 2014 in the Chatsworth Magistrates' Court.

[2] The history of the matter may be summarised as follows :

(a) on the 23rd February 2011, the appellant, a money-lender, obtained a judgment against Rathnavelu Govender, the first respondent herein, for payment of the sum of R6 465,73 together with interest thereon calculated at the rate of 42% per annum from the 25th July 2008 to date of payment and costs in the sum of R264.

(b) A warrant of execution was issued against the property of the first respondent on the 23rd February 2011, and the Sheriff attached movable property to the value of R1 650.

(c) On the 26th June 2012 an interpleader affidavit was received from the son of the respondents claiming ownership of the property which had been attached. On the instruction of the appellant's attorney the Sheriff released the attachment on the 25th October 2012.

(d) On the 24th August 2011 the appellant obtained judgment against Dolly Govender, the second respondent herein, for payment of the sum of R6 213,98 together with interest calculated at the rate of 42% per annum from the 1st February 2009 to date of payment and costs in sum of R646. The Govenders are married to each other in community of property

(e) On the 11th December 2012 a Notice to Appear in terms of s 65A (1)(a) of the Magistrates' Courts Act, 1944 was served on the first respondent. The matter was apparently heard on the 19th February 2013, when the first respondent informed the appellant's attorney that he was still unemployed and the matter was struck off the roll.

(f) The Notice to Appear was re-issued, and the s 65A enquiry was heard on the 29th October 2013. It is clear from the record of those proceedings that Mr

Govender remained unemployed, and had little income, doing odd jobs like painting and cutting grass. He confirmed that he had no movable assets which he could sell to satisfy the judgment debt. In the circumstances the appellant's attorney requested that the matter be adjourned *sine die*.

(g) Mrs Govender also appeared at the s 65A enquiry on the 29th October 2013. Mrs Govender confirmed that she had no movable assets which could be sold to satisfy the judgment debt and at the request of the appellant's attorney the matter was also adjourned sine die. At the end of that enquiry the first respondent indicated to the learned magistrate that his son could repay the debt in instalments, but nothing was finalised in that regard and no such payments have been made.

(h) On the 14th January 2014 the appellant caused an application to be brought in the Chatsworth Magistrates' Court seeking authority to attach and sell in execution the immovable property which is the home of the Govenders, in order to obtain monies with which to satisfy the indebtedness of them, to the appellant. From the founding affidavit, the amount owed by the Govenders was by then R28 868,39. The municipal valuation of Mr and Mrs Govender's home was R350 000.

(i) On the 27th May 2014 one Ruphus Wiseman Makhanya, an attorney practising as a professional assistant with Legal Aid South Africa, delivered an opposing affidavit on behalf of Mr and Mrs Govender, taking the point *in limine* that the appellant had previously brought two cases which had been consolidated seeking the same relief. He submitted that in the circumstances the application to declare the immovable property executable was *res judicata*.

(j) The previous cases relied upon by Mr Makhanya were the same cases in which judgment was obtained on the 23rd February 2011 and the 24th August 2011 respectively.

(k) Mr Makhanya also raised the fact that Mrs Govender had made a payment of R5 000 towards her debt. That amount was paid on the 10th March 2014.

(l) In the appellant's replying affidavit the appellant's attorney denied that the appellant had used the same facts in the previous actions. The payment of R5 000 by Mrs Govender was admitted. The appellant's representative pointed out that the previous application had been dismissed because the founding affidavit of the appellant had been inadequate to support the request for execution. In addition, the appellant had not, at the default judgment stage, instituted s 65A enquiries and not done everything in its power to make out a case which would justify the declaring executable of the immovable property owned by Mr and Mrs Govender.

(m) The replying affidavit also drew to the court's attention that the s 65A enquiries had subsequently been held and were unsuccessful in establishing any financial ability on the part of the Govenders to repay their indebtedness. Although Mrs Govender had handed in a payslip and a schedule of expenses, that had demonstrated a complete inability to meet the debt.

[3] The matter came before the learned magistrate, Ms Khuzwayo, on the 31st October 2014. She dismissed the point *in limine* of *res judicata*, and found that the appellant had failed to satisfy the court that it had exhausted all the other avenues to have the payment of the debts owed by Mr and Mrs Govender satisfied. The

application was dismissed with costs and the matter referred back to the s 65 enquiry for review on the financial standing of Mr and Mrs Govender.

[4] The appellant now appeals against that judgment alleging that the magistrate had placed an onus on the appellant to establish that the Govender's right to access to adequate housing had not been infringed, and that the appellant had not exhausted all other avenues to obtain payment of the debt. The learned magistrate should have held, as a matter of law, that the onus was on Mr and Mrs Govender to satisfy her that their right of access to adequate housing would be infringed if the order sought was granted. The appellant further submitted that the learned magistrate erred in finding that the appellant had not exhausted all its avenues to have the debt satisfied, particularly with regard to the two s 65A enquiries which had been held, and that those enquiries had yielded no source of funds.

[5] The matter came before us on appeal on the 9th November 2015. Two days prior to the hearing the attorney from the Pinetown Justice Centre acting on behalf of Mr and Mrs Govender withdrew as their attorney of record. The appellant's attorney addressed a lengthy letter to the attorney, Mr Anith Luckan, complaining that, inter alia, the notice of withdrawal did not comply with the provision of Rule 16(4) of this court. Mr Luckan responded to the appellant's attorney's letter pointing out that Legal Aid had withdrawn as attorneys of record because they had been unable telephonically to contact Mr and Mrs Govender with regard to the appeal. They simply advised that the respondents had been notified by the previous representative, Mr Makhanya, that the appeal was set down for the 9th November

2015. Ms Y Ramchander is recorded on the letterhead of Mr Luckan as, what appears to be, his partner.

[6] It is indeed necessary that any attorney withdrawing shall do so timeously. This is a duty which he owes not only to his clients in order to enable the clients to make other arrangements, but also to the court. The withdrawal in this case was so late as to place Mr and Mrs Govender in great difficulty because they did not have time to locate and appoint another attorney in Mr Luckan's stead.

[7] In all the circumstances of the matter we made an order on the 9th November 2015 :

(a) adjourning the matter to the 1st December 2015;

(b) issuing a rule nisi calling upon Mr Luckan and/or Ms Ramchander and/or Mr Makhanya and/or the Legal Aid South Africa to show cause to this court why an order should not be made directing them to pay the wasted costs *de bonis propriis*, which costs were occasioned by the adjournment of the appeal hearing because of the irregular withdrawal of Legal Aid South Africa as attorney of record for Mr and Mrs Govender.

(c) Costs were reserved.

(d) Legal Aid South Africa was directed to deliver heads of argument by the 23rd November 2015.

[8] When the matter came before us on the 1st December 2015, Mr *Luckan*, a contract employee and attorney at the Pinetown Justice Centre of Legal Aid South Africa appeared. He accepted that the instructions given to him by superiors to withdraw from the appeal were incorrect.

[9] Mr *de Beer* informed the court that a further payment of R5 000 was made by the second respondent. He submitted that this should not affect any decision by this court as to whether the learned magistrate erred in refusing the application made by the appellants. It does, however, indicate some willingness on the part of the Govenders to discharge their indebtedness.

[10] The matter of judicial oversight in order to alleviate the injustices which may result where a debtor's home is sold for an insignificant amount of money was considered in *Jafta v Schoeman and Others; van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC). In summarising factors which a court would consider in deciding whether to grant an order that immovable property be declared executable, Mokgoro J stated at paragraph 60 :

'In summing up, factors that a court might consider, but to which a court is not limited, are : the circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factors relevant to the particular facts of the case before the court.'

[11] In this matter nothing is revealed about the circumstances in which the debt was incurred. Mr *de Beer*, who appeared for the appellant, informed the court that the appellant was what may be described as a 'micro-lender'. Nothing in the application before the Magistrates' Court indicates how it came about that Mr and Mrs Govender were loaned this money. Relevant factors in this regard are whether the Govenders themselves approached the micro-lender, or whether they were the subject of a marketing campaign generally or even specifically directed to Mr and Mrs Govender themselves. Given the parlous state of the Govenders' finances, it seems probable that a prima facie case of reckless lending is suggested by the circumstances. What is of grave concern in this regard is that there was obviously an agreement by the Govenders to pay interest at 42% per annum. Given the current overdraft rate of some 8.5% and the prescribed legal rate of 9.5% per annum, a rate of 42% may be viewed as excessive in the sense of being unconscienable or exorbitant. Whether or not it is illegal in the context of the relevant regulations governing lending rates, we have not been informed.

[12] With regard to the attempts made by Mr and Mrs Govender to pay off the debt, it is true that they have not exactly been forthcoming in this regard. An amount of R5 000, however, was paid off by Mrs Govender on the 10th March 2014. Their failure to make payments is no doubt exacerbated by their financial situation.

[13] The financial situation of the Govenders is clearly dire. In the s 65A enquiry, it appeared that Mrs Govender earned a weekly salary of approximately R633. This has to be viewed against the family's expenses of several thousand rand per month.

It also seems clear that Mr and Mrs Govender are entirely reliant upon their son in order to be able to survive financially.

[14] The amount of the debt is in my view very small considering the indebtedness of the Govenders. Their outstanding indebtedness when the application was instituted, and taking into account the payment of R5 000 by Mrs Govender, would have been R23 868,39. Thus the debt owed at the stage of the learned magistrate's decision was approximately three and a half per cent of the value of the immovable property.

[15] It appears that Mr Govender is unemployed, obtaining occasional income doing painting and cutting grass. Mrs Govender's income appears, at least, to be irregular. It is clear from their evidence at the s 65 enquiry that neither of the Govenders have any resources which would enable them promptly to pay off the debt.

[16] Notwithstanding their impoverished position, Mr and Mrs Govender, at the application to declare the immovable property executable, made an offer of R300 per month each towards settlement of the debt. This was rejected by the appellant.

[17] A relevant fact with regard to the exercise of judicial oversight in this case, is that the debt was not owed because of the Govenders' default on a mortgage bond,

given for the purpose of purchasing the Govenders' home. This debt was provided in circumstances of which we have not been apprised, and to recover it, the appellant seeks to prejudice the rights of the Govenders to access to adequate housing in terms of s 26 of the Constitution.

[18] I refer to the statement of Froneman J in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) at paragraph 54 :

'In *Jaftha*, Mokgoro J, before listing some relevant factors that needed to be considered in judicial oversight of the execution process, warned that " it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight." Mindful of that warning, I would merely add the following. It must be accepted in life that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only where there is a 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. If there are no other proportionate means to attain the same end, execution may not be avoided.'

[19] Taking into consideration all the factors of the matter, in my view the learned magistrate would have failed in her duty of judicial oversight had she declared the immovable property belonging to the Govenders to be executable. In my view there is no reason why the matter cannot revert to the s 65A court and the agreement by the Govenders to repay R300 per month each revisited. The offer of R600 per month by the Govenders was one in line with their financial circumstances, a factor which should have been known to the appellant prior to loaning them the money.

[20] In all the circumstances I make the following order :

(a) the appeal is dismissed;

(b) the appellant is directed to pay the respondents' costs, save for the wasted costs of the appellant and the respondents, occasioned by the adjournment on the 9th November 2015. Those costs shall be borne by Legal Aid South Africa (Pinetown Justice Centre) and shall not be recoverable from the respondents.

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Marks AJ

I agree

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Lopes J

It is so ordered.

Date of hearing 1st December 2015:

Date of judgment : 5th January 2016

Counsel for the Appellant : A de Beer SC (instructed by Louis M Podbielski)

For the Respondents :A Luckan (instructed by Legal Aid South Africa (Pinetown Justice Centre)