IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

11/02/2015

Case No: 35357/2009

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

11/02/2015

In the matter between:

CHANGING TIDES 17 (PTY) LTD	Applicant
and	
ELIZABETH JAKOBA DILLEY	First respondent
SELBY PETER PRINSLOO	Second respondent
UNICE ALDEAN PRINSLOO	Third respondent

JUDGMENT

VAN DER WESTHUIZEN, AJ

1. This is an application for declaring Erf 5288 Eersterust ext 6 Township, Registration Division J.R, Province Gauteng, measuring 315 sqm, and held by deed of Transfer no T74564/2007 specially executable.

2. Although the respondents opposed this application and had filed heads of argument, there was no appearance on behalf of the respondents when the matter was called. Counsel for the applicant

advised me that his colleague, who had filed heads on the respondents' behalf, told him that there would not be representation on the respondent's behalf at the hearing of this application.

3. I indicated that in view of the sensitivity of the matter, the application being one for declaring the mentioned property specially executable, I would deliver a written judgment. This is my judgment.

4. During March 2007, the first respondent entered into a loan agreement, coupled with an Indemnity Bond in favour of the Applicant.

5. Second and third respondents bound themselves jointly and severally as sureties and co-principal debtors in respect of the aforementioned agreements. Second respondent is a previous son-in-law of the first respondent and third respondent was married to the second respondent. However the second and third respondents have subsequently parted ways. Third respondent no longer resides on the property.

6. The applicant alleges that the respondents failed to timeously comply with their obligations under the aforementioned agreements and fell into arrears with the monthly instalments. This is not disputed by the respondents.

7. The applicant proceeded in terms of the provisions of the National Credit Act, no 34 of 2005. A notice in terms of section 129 of the Act was sent to the respondents during May 2009. No response on the part of the respondents was forthcoming and the applicant caused a combined summons to be issued and served upon the respondents. In the absence of an intention to oppose the action, the applicant obtained judgment in the amount of R187 377.18 in respect of the unsettled amount under the bond, including an order for executability of the immovable property the subject of this application.

8. The aforementioned judgment was obtained by default and was granted by the Registrar of this Court. This judgment was granted prior to the amendment of Rule 46(1) of the Uniform Rules of Court and prior to the judgment in *Gundwana v Steko Development & others* 2011(3) SA 608 (CC). In that judgment the Constitutional Court declared the granting of execution orders in respect of immovable property by the Registrar to be unconstitutional.

9. In view of the *Gudwana* judgment, *supra*, the order for execution granted by the Registrar is of no force or effect. The applicant was consequently obliged to approach this court for the order it now seeks.

10. Despite the fact that the applicant has granted the respondents an indulgence and opportunity to rectify their arrear status, the respondents' position has deteriorated.

11. The respondents have raised a point *in limine*. The point relates to the form of the notice of motion, the complaint being that the incorrect format has been used, i.e. that the short form has been used instead of the long form.

12. It is trite that in applications relating to matters incidental to the main proceedings, such applications may be brought using the short form.

13. The respondents submitted in their heads of argument that in view of the judgment in *Absa Bank Ltd v Xonti* 2006(5) SA 289 (C), it is no longer permissible to use the short notice of motion format.

14. The facts of that matter are crisp. The applicant in that matter obtained default judgment against the respondent for payment of an amount due to it pursuant to a mortgage bond. The applicant then applied by way of an urgent application for an order to have the

property declared executable. The court held that because a substantive right is sought, it is required that the longer form of notice of motion be used. In the summons issued in that matter, no order declaring the relevant property executable was sought. Subsequent to the granting of default judgment, a simple notice was used seeking execution. It did not call on the parties to respond thereto. It is not clear from the judgment in that matter whether the respondent had an opportunity to place before that court circumstances that would negate the applicant's right to execution of its judgment. It was further held in that matter that in that jurisdiction, there is a rule of practice that applications for execution orders are to be brought on the long notice of motion.

15. In the present matter, the summons contained a prayer for declaring the property specially executable. The Registrar indeed granted that prayer. In view of the *Gudwana* judgment, *supra*, that order is *ab initio* void. Hence this application.

16. This matter is clearly distinguishable from the Xonti judgment, *supra*. The respondents were clearly advised that an order declaring the property hypothecated under the bond would be sought. This application was served upon the respondents and they indeed filed opposing papers. The respondents were granted ample opportunity to place relevant circumstance before court why the property should not be declared specially executable.

17. Seeking an order declaring property hypothecated under a mortgage bond specially executable remains an incidental matter to the main relief sought. It is trite that absent any extraordinary circumstances, the judgment creditor will normally be entitled to enforce his judgment by executing against the immovable property that is bonded as security. See in this regard In *Firstrand Bank Ltd v Folsher et al* 2001(4) SA 314 (GNP) at 331 paragraph [39].

18. The respondents have not claimed prejudice due to the fact that the short form of notice of motion was used. A mere technical point was taken. The respondents have indeed attempted to place circumstances supporting their contention why the property should not be declared specially executable before court. There is no merit in this defence.

19. It is further common cause between the parties that the respondents were advised of the provisions of section 26(1) of the Constitution and were further advised that they were entitled to place information before the court to support their contention that an for execution will infringe upon the right referred to in section 26(1) of the Constitution. This was contained in paragraph 24 of the Combined Summons.

20. The second complaint by the respondents relates to the issue that the notice in terms of section 129 of the National Credit Act, no 34 of 2005, had not contained a reference, should action be instituted for payment of the arrear monthly instalments, to the fact that should the action succeed, an application for execution may follow.

21. In paragraph 9.2 of the founding affidavit the following is stated:

> *"We respectfully draw the Respondents/Defendants' attention to Rule 46(1) of the Uniform Rules of Court in terms of which the Respondents/Defendants are advised that should the aforesaid property be a primary residence of the Respondents/Defendants, the Respondents/Defendants are entitled to place relevant circumstances before this Honourable Court as prescribed by the Uniform Rules of Court, as to why the Honourable Court should not order the execution of the immovable property."*

22. From the foregoing it is clear that the respondents were aware of the fact that they could place relevant circumstances before this court as to why the court should not order the execution of the immovable property.

23. Counsel for applicant submitted that the section 129 notifications were effected on 22 May 2009, prior to the requirement that such reference should be included in section 129 notices and that in any event, paragraph 24 of the Combined Summons clearly contained such notice. The respondents were also invited in this application to do so. There is no merit in this defence.

24. It follows that the point *in limine* is to be dismissed.

25. The respondents have raised a third technical complaint. This complaint relates as to the whether the deponent to the founding affidavit is duly authorised. It is trite that a challenge to the authority of a deponent to act in the manner it has should be unequivocal and clear.

26. In my view there is no unequivocal challenge to the authority of the deponent to the founding affidavit and in any event the relevant resolution had been attached to the replying affidavit. There is no merit in this defence and it is dismissed.

27. Apart from the aforementioned technical issues, the respondents have failed to raise a *bona fide* defence, or to place relevant circumstances before this court as to why this court should not order the execution of the immovable property referred to above.

28. In paragraph 6 of the opposing affidavit, the second respondent sets out the personal circumstances of the three respondents. General statements are made in that regard.

29. The first respondent previously rented the property form the Town Council. Due to the fact that first respondent was about to lose the property as she had insufficient funds to retain the property, the second respondent purchased the property from the Town Council and paid cash. The property was transferred into the first respondent's name. Thereafter, second and third respondents moved in with first respondent. It would appear the immovable property was unencumbered.

30. The mortgage bond was registered following a loan from the applicant to renovate the property. Second respondent in terms of an oral agreement between the parties undertook to pay the instalments. However, during 2011 the second respondent fell in arrears, due to the fact that he had lost his employment and apparently has since then been unemployed. It is common cause that the first respondent is unable to contribute to payment of the instalments. Third respondent no longer resides there.

31. It appears from the papers that despite the payment of a substantial amount towards the arrears at one point, the amount in arrears continued to mount. It is not readily gleaned from the papers that the judgment amount has not been settled. Counsel for the applicant submitted that the judgment amount is still unsettled. The arrears that escalate merely add to the first respondent's woes in that regard.

32. Considering the circumstances enumerated in *Firstrand Bank Ltd v Folsher, supra,* at 332 paragraph [41] it is clear that the respondents have not placed any circumstance before this court to support their contention that the order for execution should not be granted.

33. There is no merit in the submission of counsel for the respondents in the heads of argument that the prejudice to be suffered by the respondents far outweighs that of the applicant. It would be inappropriate and immoral to expect the applicant to merely standby

and not enforce its right in and to the security that it has in the form of the immovable property.

34. In this regard, it is clear from the facts referred to by the respondents that none of them is or would in the near future be in a position to settle the amounts already due and escalating. There is further no indication that the applicant's judgment order could be settled in some other reasonable manner.

35. It will be recalled that the first respondent stood to lose the property earlier had it not been for the knight in shining armour in the person of the second respondent. However, that armour has now tarnished.

36. From the foregoing, the respondents have failed to show any exceptional circumstance to negate the applicant's right to enforce its judgment by executing against the immovable property that is bonded by security.

37. It follows that the applicant must succeed.

38. Counsel submitted that the applicant seeks an order as to costs on the scale as between attorney and client. Counsel further submitted that the basis for such an order is premised in the loan agreement ~~in paragraph 21 thereof.~~ Mkontwa.

39. Accordingly I grant the following order:

(a) It is declared that ERF 5288 EERSTERUST EXTENSION 6 TOWNSHIP, REGISTRATION DIVISION J.R., PROVINCE GAUTENG, MEASURING 315 SQUARE METRES, HELD BY DEED OF TRANSFER NO. T74564/2007, to be specially executable;

(b) The Registrar of the above Honourable Court is hereby authorised to issue a Warrant of Attachment in respect of the property;

(c) The costs of this application to be taxed by the Taxing Master upon the scale of attorney and client.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

On behalf of Applicant:	W J Roos
Instructed by:	Velile Tinto & Associates Inc.
On behalf of Respondents:	No appearance