FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 3471/2007

In the matter between:

MRS PHUTI JOYCE TLALE N.O.	1st Applicant
MRS PHUTI JOYCE TLALE	2nd Applicant

and

MOMENTUM GROUP LIMITED	1st Respondent
SHERIFF OF KROONSTAD	2nd Respondent
ABSA BANK LIMITED	3rd Respondent

JUDGEMENT: MOLEFE, AJ

HEARD ON: 23 AUGUST 2012

DELIVERED ON: 20 SEPTEMBER 2012

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[1] This is an application for an order in the following terms:

(a) That the attachment of the first and second defendants/applicants' movable goods on the 30 January 2012 by the second respondent as contained in the Inventory to the Notice of Attachment in Execution is in contravention of Section 39 of the Supreme Court Act 59 of 1959, as those constitute "necessary furniture and household utensils" and do not exceed in value the amount determined by the Minister from time to time by notice in the gazette;

(b) That in the event it is found that the said goods indeed fall within the definition of "necessary furniture and household utensils" as per Section 39 of the Supreme Court Act 59 of 1959, but that they do exceed in value the amount determined by the Minister from time to time by notice in the gazette, that there are exceptional circumstances that exist and the amount of each item is increased to double the amount therein stated;

(c) That the attachment of the applicants' movable goods attached by the second respondent on the instructions of the first respondent on the 30 January 2012 as contained in the Inventory to the Notice of Attachment in Execution be uplifted and set aside;

(d) The costs of this application be borne by the first and second respondents on an attorney and client scale jointly and severally (sic) one paying the other to be absolved.

(e) Granting the applicants such further and/or other relief as the Court may deem appropriate.

[2] For the purpose of this application, the first and second defendants will be referred to as the first and second applicants and, Momentum Group Limited, Sheriff of Kroonstad and Absa Bank Limited, will be referred to as the first, second and third respondents respectively.

[3] The applicants were husband and wife. The third respondent sued the applicants jointly and severally, for the payment of the sum of R322 344,37, interest on the capital claim at the rate of 13% per annum reckoned and capitalised monthly as from 13 June 2007, an order declaring the bonded property executable as well as the costs on the special scale as between attorney and client.

[4] The claim arose from the amount owed by the applicants in terms of a mortgage bond registered over their property.

[5] The applicants defended the action and the second applicant stated that she was the first applicant's widow and averred that during 1996 her late husband took out a life policy with Southern Life Insurance Company Ltd, now known as Momentum Life Insurance Company (the first

respondent). The second applicant also averred that on 9 July 1977, the aforesaid policy contract was ceded to the third respondent by her husband to cover the bond in the event of the death of her husband or the second applicant before the debt owed to the third respondent was paid up.

[6] The second applicant further averred that after the death of her husband, she made enquiries at the first respondent and established that a claim had already been submitted to the first respondent in order to have the proceeds of the policy paid out to the third respondent and that a cheque was drawn in favour of the third respondent in the amount of R172 902,30. She further alleged that on 9 February 2005, she also paid an additional amount of R107 000,00 to the third respondent in respect of the same homeloan debt covered by the mortgage bond and that the debt owed to the third respondent was extinguished and that she was entitled to a refund of R110 000,00 from the third respondent.

[7] The second applicant was advised by her attorneys and counsel to join the first respondent in the proceedings and a

Third Party Notice was served upon the first respondent. The first respondent took exception against the third party notice as the notice showed no cause of action against the first respondent. On the 11 November 2010, the following order was granted by CHG van der Merwe AJ:

(a) the exception against the third party notice is upheld;

(b) the third party notice is struck out;

(c) the application for leave to amend is dismissed;

(d) the defendants are granted leave to amend the third party notice within ten days of date of this judgment;

(e) the defendants to pay the costs of the exception and the notice of amendment and application for leave to amend the third party notice.

[8] On the advise of her attorneys and counsel, the applicants made an application for leave to appeal the aforesaid order and on the 17 February 2011, the application was dismissed with costs.

[9] On the advise of her attorneys and counsel, the applicants made an application for leave to appeal the aforesaid order and on the 3 August 2011, the Supreme Court of Appeal

dismissed the application with costs.

[10] The first respondent taxed their bill of costs as per aforesaid court orders on the 10 October 2011 in the sum of R65 721,61 (sixty five thousand, seven hundred and twenty one rand and sixty one cents) and issued a Writ of Execution against the applicants' movables. On the 20 January 2012, the Sheriff attached the following movables from the applicant's home:

10.1 A ladder;

10.2 Lounge suite and coffee table;

10.3 Wall unit and television set;

10.4 2 x microwaves;

10.5 Dining-room suite and sideboard;

10.6 Deep freezer;

10.7 2 x double bed headboards and dressing table;

10.8 2 x single bed head boards and dressing table;

10.9 Refrigerator.

The Sheriff put the valuation of the attached movables at R15 500,00.

[11] The applicants attorneys, after unsuccessfully requesting that the first respondent should release the attached goods "as the attachment was in contravention of section 39 of the Supreme Court Act 59 of 1959 as the goods constituted property not liable to be seized in execution", proceeded with the application before the court.

[12] The issue to be determined by the court was whether the attached movable goods constitute "necessary furniture and household utensils" and do not exceed in value the amount determined by the Minister from time to time by notice in the gazette.

In the event that it was found that the movable goods indeed fell within the definition of "necessary furniture and household utensils" but that they exceded in value the amount determined by the Minister from time to time by notice in the gazette, that there were exceptional circumstances that existed and the amount of each item be increased to double the amount therein stated.

[13] The applicants' counsel also raised the issue that apart from

the provisions of section 39, it is contrary to "*ubuntu*" and that it is cruel that "a large corporation is hounding a poor widow for a paltry sum relative to its wealth, and seeks to deprive the applicant of basic furniture and utensils thereby also threatening her dignity as enshrined by the constitution".

[14] It is a well established principle in law that the successful party is entitled to have costs order made in its favour against the unsuccessful party. The applicant's papers in respect of the Third Party Notice showed no cause of action against the first respondent and despite the fundamental defects of the joinder application, the applicants persisted with her attempts to persuade the two courts that the first respondent should be joined as a party. However her attempts were unsuccessful and cost orders were made against her.

[15] Section 39 of the Supreme Court Act 59 of 1959 provides as follows:

> "The Sheriff or a deputy-sheriff shall not seize in execution of

any process –

a) the necessary beds and bedding and wearing apparel of the person against whom execution is levied or any member of his family;

b) the necessary furniture, other than beds and household utensils in so far as they do not exceed in value the amount of R2000 as determined by the Minister from time to time by notice in the Gazette …"

The section 39 is meant to protect certain assets belonging to a debtor from execution because it was recognised that such assets constituted necessities without which it would be unduly difficult to survive. The section provides judicial supervision of execution against movables.

[16] In **JAPHTA v SCHOEMAN AND OTHERS; VAN ROOYEN v STOLS AND OTHERS** 2005 92) SA 140 CC at 151, Mokgoro J, writing on behalf of the Constitutional Court with reference to the similar provision of the Magistrate's Court Act, found that:

"Section 67 of the Act serves to limit the range of movables that may be attached. The section lists certain movables that

> are exempt from execution in all cases. It is clear from the list that the Act seems to insulate from execution, certain items necessary for the debtor to survive."

[17] It was submissions of the counsel for the applicants that the court should follow the case of **JAPHTA** above. In the case of **GUNDWANA v STEKO DEVELOPMENT** 2011 (3) SA 608 CC it was decided that where the value of the goods attached is modest and the deprivation of the debtor of those goods will achieve more humiliation and deprivation of a dignified life of the judgment debtor than the satisfaction of the judgment debt. In this instance it can't be said that the amount of R15 500 is so insignificant to the first respondent that it would only be serve to humiliate the applicants.

[18] In *casu*, I do not believe that the applicant's attached movables as listed in the inventory are "the necessary furniture other than beds and household utensils" and that they are needed for the survival of the applicants. Furthermore, it is clear from the sheriff's inventory that the attached movables exceeded in value the amount of R2 000,00 as determined by the Minister. (Section 39(b) of the

Supreme Court Act 59 of 1959). I do not agree that the attached movables are exempted from execution.

[19] On the issue of "*ubuntu*", counsel for the applicants relied on the **PORT ELIZABETH MUNICIPALITY v VARIOUS OCCUPIERS** 2005 (2) SA 140 CC, wherein the Constitutional Court held that:

> "The Constitution and PIE confirm that we are not islands onto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a uniting motif of the Bill of Rights, which is nothing if not structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

[20] *"Ubuntu*" is an African ethic or humanist philosophy focusing on people's allegiances and relations with one another. The word "*Ubuntu*" has its origins in the indigenous languages of Southern Africa. A definition of "*Ubuntu"* offered by Liberian peace activist Leymah Gbowee was "I am what I am because of who we all are". This concept is that you cannot

be human all by yourself, there should be inter connectedness. When you have the "*Ubuntu*" quality, you are known for your generosity.

[21] I commend and agree with the concept of "*Ubuntu*" but the interest of creditors to recover debts owed to them have also to be taken into consideration and not be overlooked. One cannot disregard the interest of creditors because the applicants perceive them to be contrary to the concept of "*Ubuntu*".

The procedure put in place for execution in order to recover money owed is reasonable and without it, the administration of justice would be severely hampered. Creditors deprived of the execution procedure would be left in a difficult financial situation with debts unfairly created, which they otherwise are unable to recover.

[22] In **STIFF v Q DATA DISTRIBUTION (PTY) LTD** 2003 (2) SA 336 (SCA) at 343 by Mthiyane JA said that:

"Costs are awarded to a successful party in order to indemnify

> him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity, but that does not affect the principle on which it is based."

[24] There are other factors which militate against a finding that the execution is unjustifiable. In c*asu*, it is as a result of the applicants' actions and persistence (on the advise of her attorneys) to continuously and recklessly pursue and involve the first respondent in litigation, and consequently incurring unnecessary legal costs.

[25] It would appear to me that the poor widow was ill advised by her attorneys to pursue a dead-end cause. They should have abided by the decision of the court *a quo* and not proceeded with litigation, causing her to incur unnecessary legal costs.

[26] Accordingly I make the following order:

26.1 The attachment in execution is not in contravention of section 39 of the Supreme Court Act 59 of 1959;

` 26.2 The application is dismissed;

26.3 The applicants are directed to pay the costs hereof.

D. S. MOLEFE, AJ

On behalf of applicants: Adv. S. J Reinders
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On behalf of respondents: Adv. F R Memani
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