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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **A6/2024**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 2 July 2024

SIGNATURE:

In the matter between:

RUTH DZVITI

First Appellant

MARTIN DZVITI

Second Appellant

and

EHLERS FAKUDE INCORPORATED

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] On 18 July 2023 the court *a quo* issued a warrant of execution against two immovable properties belonging to the appellants and declared the immovable properties specially executable. It is against the aforesaid order that this appeal has been noted.

FACTS

- [2] The facts that informed the order granted by the court *a quo* on 18 July 2023 are common cause between the parties. On 7 May 2018 the respondent obtained a judgment against the appellants for payment of the amount of R 245 673, 73 together with interest and costs. The judgment amount pertained to monies due and owing in respect of professional services rendered by the respondent to the appellants.
- [3] The judgment debt remained unsatisfied, and the respondent applied for a warrant to execute against the movable property of the appellants. A warrant was duly issued in the court *a quo* on 30 May 2018. The warrant was executed by the sheriff at the place of residence of the appellants on 1 October 2018 on the first appellant. The relevant portion of the sheriff's return of service reads as follows:

“This is to certify that on 1 October 2018 at 11:45 at 5[...] S[...] Street, Noordwyk Ext 15, Midrand payment of the judgment debt plus costs has been demanded. As was unable to pay the judgment debt in full or in part, the goods described in the inventory contained in the notice of attachment, were judicially attached.”

- [4] The value of the attached movable assets was wholly inadequate to satisfy the judgment debt and the respondent proceeded to launch an application in terms of the provisions of section 66(1)(a) of the Magistrates Court Act, 32 of 1944 (“the Act”) for a warrant to execute against an immovable property of the appellants. Such an order was granted, but the respondent for reasons that are irrelevant to the present appeal, abandoned the warrant.

- [5] This led to a further application in terms of section 66(1)(a), which application and order forms the subject matter of the present appeal.
- [6] The application was issued on 24 October 2022. The appellants did not take any steps to oppose the application and the matter was set down on the unopposed roll for 20 March 2023. At literally the eleventh hour and on the evening of the 19th of March 2023 the appellants filed a notice of intention to oppose the application. In the result, the matter could not proceed on 20 March 2023. The appellants filed an answering affidavit on 6 April 2023, the respondent filed a replying affidavit on 26 May 2023 and heads of argument on 28 June 2023.
- [7] In the result, the matter was ripe for hearing on 18 July 2023. Prior to the hearing date and on 11 July 2023 the appellants, filed a notice of their intention to apply for a postponement of the matter. At the hearing the appellants appeared in person and the first appellant informed the court that the appellants required a postponement in order to obtain legal representation. The respondent opposed the application for postponement. Having considered the history of the matter and the fact that the issuing of a warrant to execute is a preliminary step in the process to eventually sell the immovable properties in execution, the court *a quo* dismissed the application for a postponement and granted the order referred to *supra*.

Grounds of appeal and discussion

- [8] The appellants relied on several grounds of appeal. In discussing the grounds of appeal, it is apposite to have regard to the requirements for the issuing of a warrant to execute against immovable property contained in section 66(1)(a) of the Act, to wit:

“(1) (a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such

money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.”

- [9] I pause to mention, that some of the grounds of appeal have been repeated under different headings. The appellants’ first ground of appeal is titled “*Erroneous Factual Findings*”. Under this heading, the appellants firstly maintain that the court *a quo* erred in denying the appellants the right to obtain legal representation. This ground of appeal is directed at the court *a quo*’s refusal of the appellants’ application for postponement. The court *a quo* had due regard to the history of the litigation between the parties and the nature of the relief sought by the respondent. From the facts it is clear the appellants had ample time, to wit from 24 October 2022 to 19 July 2023, a period of 9 months to obtain legal representation. It is noteworthy that the appellants did not seek legal assistance when they prepared their answering affidavit. At that stage the appellants were clearly of the view that they could conduct their own defence.
- [10] In considering an application for a postponement, a court should have regard to the prejudice such a postponement will cause to the other party. This much was conceded by Ms Ngqele, counsel who appeared on behalf of the appellants. Having had regard to the facts before the court *a quo* coupled with the reasons for the refusal of the postponement, I am of the view that the court was correct in its finding.
- [11] The further grounds under this heading, to wit: the magistrate failed to consider documents that were filed in the respondent’s application; the magistrate erred in finding that the appellants were frustrating the execution of the order that was granted on 27 February 2018, the magistrate erred in not finding that the appellants have endeavoured to satisfy the debt and erred in finding that the

immovable properties were not mortgaged and subject to preferent claims by other creditors, are without any merit. The grounds are firstly not borne out by the facts and secondly, have no relevance to the requirements for an order in terms of section 66(1)(a).

[12] Under the heading “*Errors in findings in law*” the only relevant ground is the appellants’ contention that the magistrate erred in granting judgment without any demonstration by the respondent as to the steps that it took to notify the preferent creditor of the application as set out in section 66(2). The provisions of section 66(2), however, only apply after an order in terms of section 66(1)(a) had been granted. In the result, this ground of appeal is ill conceived and without any legal foundation.

[13] The appellant’s “*Second Ground of Appeal*” is premised on the fact that the sheriff only attempted to execute the warrant against movable property upon the first appellant. The appellants are married in community of property and consequently have a joint estate. It follows that the first appellants failure to point out sufficient movable assets in the joint estate to satisfy the debt suffice. The “*Third Ground of Appeal*” relates to the magistrate’s finding that the sheriff rendered a *nulla bona* return. Having regard to the facts before the court *a quo* and the provisions of section 66(1)(a), this ground has no relevance to the order that was granted.

[14] Lastly, the appellants under the “*Fourth Ground of Appeal*”, maintain that the magistrate erred in not considering the fact that the respondent had not made use of the mechanisms envisaged in section 65 of the Act. Section 66(1)(a) only requires an endeavour to execute against movable property. This ground of appeal is, once gains, without any legal foundation and ill-conceived.

[15] In the result, I am of the view that the appeal has no merit and should be dismissed.

Order:

I propose the following order:

The appeal is dismissed with costs.

**JANSE VAN NIEUWENHUIZEN, J
JUDGE OF THE HIGHT COURT
GAUTENG DIVISION, PRETORIA**

I agree.

**KEKANA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

It is so ordered.

DATES HEARD:

23 May 2024

DATE DELIVERED

APPEARANCES

For the Appellant's: Advocate F Ngqele

Instructed by: Chivizhe Katiyo Attorneys

For the Respondent: Mr Fakude

Instructed by: Ehlers Fakude Incorporated