IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case Number: 53745/2021

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED. **NO**
DATE	SIGNATURE

METBOARD PROPERTIES LIMITED **PLAINTIFF**

AND

MVAMBO INTELLIGENT TRANSPORT SOLUTIONS **1ST DEFENDANT**

(PTY) LIMITED

ALBERT SEPATAKE MOKOENA **2ND DEFENDANT**

JUDGMENT

This Judgment was handed down electronically and by circulation to the parties' legal representative by way of email and shall be uploaded on CaseLines. The date of the hand down is deemed to be on the **10 FEBRUARY 2026.**

MAKUME J:

1. This is an application in terms of Rule 46A of the Uniform Rules of Court. The Applicant seeks an order to declare two immovable properties of the Respondent specially executable and that the properties be sold on auction to recover a judgment debt of about R676 000.

2. The judgment arises out of a breach of the lease agreement by the Respondents which led to action being instituted against the respondent, default judgment was granted.

3. It is common cause that the Sheriff attached movables belonging to the respondent to the value of R205 000. The attached goods have not been removed for sale, instead, the applicant issued this application which is being opposed.

4. The respondent opposes the application on the following grounds:

   4.1 Firstly, that the applicant has not complied with the requirements of Rule 46A(3)(b), in that there has been no service of the notice on Standard Bank and other interested parties.

   4.2 That the applicant must first exhaust the process of selling their attached movables prior to leveraging the immovable property.

5. I deal first with the pertinent background facts, which are largely common cause. During or about the year 2019, the first respondent duly represented by the second respondent concluded lease agreements with the applicant in respect of property situated at Aeroton in Johannesburg. The second Respondent bound himself in writing as surety and co-principal debtor *in solidum* and in favour of the applicant for the due and punctual payment of rental and all additional

amounts owing, or which may become due and owing to the applicant by the first respondent.

6. The first Respondent experienced financial problems and became unable to make payment of the monthly rental due in terms of the lease agreement. On 9 November 2021, the applicant issued summons against both respondents claiming payment of the sum of R677 425.62 (Claim A) and R114 120.72 (Claim B).

7. During March 2022 default judgment was granted in favour of the applicant against the first and second respondents in the total amount of R791 546.34.

8. It would seem from the papers that the respondents started making payments in liquidation of the amount and as at July 2023, the respondent had reduced the capital by an amount of R165 000.

9. On 4 May 2023, the Sheriff attached movables to the value of R205 000, but did not remove same on instructions of the Applicant's attorneys. At that time, the capital owing was the sum of R626 546.34 to which interest and legal costs still had to be added.

10. On 3 June 2024, after the parties had failed to reach an agreement about further instalments payment, the Applicant issued this application in terms of Rule 46A, seeking an order as follows:

    10.1 The immovable property described as 1[...] P[...] Road, S[...] 8[...], Portion 96, 9[...] N[...], Soweto, Johannesburg, 1071 square metres in extend held by deed of transfer T[...].

    10.2 1[...] P[...] Road, S[...] 8[...], Portion 91, 872 square metres in extend 9[...] N[...], Soweto, Johannesburg held by deed of transfer T[...], he declared specially executable.

11. In support of the application, the applicant says the following at paragraphs 21 and 22 of his founding affidavit:

> "I submit that should the respondents' assets as identified by the Sheriff be sold on auction, that I would obtain a fraction of the amount of assets valued by the Sheriff. I submit further that I would not be able to recoup the entire amount claimed as per the order, which to-date is at minimum a total of R626 546.34. This amount excludes interest and the legal costs."

COMMON CAUSE FACTS

12. It is common cause that the second respondent is the owner of the immovable properties, which are the subject of this application.

13. On 4 March 2023, the writ of execution was served on both the respondents by the Sheriff, who placed under attachment movables valued at R205 000. No other movable assets were pointed out to the Sheriff, which could have made up the difference between the capital amount and the attached movable.

THE ISSUES

14. What is in issue in this matter is the following:

14.1 Whether the respondent indicated movables of sufficient value to the Sheriff, to enable the Sheriff to realise sufficient amount of money to settle the admitted debt.

14.2 Whether the nonjoinder of Standard Bank as a preferent creditor suffices to deny the Applicant the order declaring the immovable property specially executable.

14.3 Both properties classified as residential as required by Rule46A.

15. The starting point in answering the first issue is the interpretation of Rule45(3) read with Rule46(1)(a)(i) which read as follows:

> “Whenever by any process of the Court, the Sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself, or by his assistant proceed to the dwelling house, or place of employment, or business of such person (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached) and there;
>
> (a) demand satisfaction of the writ and failing satisfaction;
>
> (b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the writ and failing such pointing out;
>
> (c) search for such property.”

16. Rule46(1)(a)(i) reads as follows:

> "Subject to the provisions of Rule 46A, no writ of execution against the immovable of any judgment debtor shall be issued unless –
>
> (i) a return has been made of any process issued against the movable property of the judgment debtor, from which it appears that the said person has insufficient movable property to satisfy the writ.

17. On 4 May 2023, the Sheriff presented himself at the residential home/business premises of the first and second respondents and demanded payment of the amount indicated on the writ, to which the second respondent must have told the Sheriff that the respondent has no such amount of money. The second respondent must have then pointed out to the Sheriff the movables that are indicated on the Sheriff's inventory, which come to an estimated value of R205 000.

18. In his answering affidavit, the second Respondent confirms that the Sheriff, Mr Meso required him to point out to him the property of the first respondent that were on the premises. He confirmed that he pointed out to the Sheriff the items that are listed in the inventory. He then says that other movable assets of the first respondent are not kept at the property, but were kept at respective locations or sites where the first respondent render services to its customers or clients.

19. What the second Respondent fails to tell this Court is that he did not tell Mr Meso, the Sheriff that there were other movables of the first Respondent and as to where those movables are and what the nature of those movables are. It must be remembered that the first respondent conducts business at the properties that the applicant seeks to attach

and that is why the Sheriff was sent or directed to that place not to sites of the customers of the Respondent.

20. It is further strange that the respondent does not say that he is making those movables available for attachment and that they be sold. Respondent is still free, even after the granting of this order to sell the movables and pay the judgment debt and costs. This application is not about the sale of the movables. It is an order to say that if the debtor does not make means to pay, then the immovable property will be sold.

21. The Respondents have referred this Court to the matter of *NSB v AFB*, case number 260/2019 (EC) Division of the High Court held at Makhado, a judgment delivered on 25 October 2022. The facts in that matter are distinguishable, in that the Court found that the null bona return on which the applicant relied was defective and could not sustain an argument that there were no movables pointed out.

22. The next judgment that the respondent referred this Court to is the SCA decision in *Bongile Samuel Nkola v Argent Steel Group (Pty) Limited*, case number 406/2017, a judgment delivered on 26 March 2018. That matter does not support the contention raised by the respondent that the Sheriff did not ask to be shown other assets. At paragraph 8 of that judgment, the Court makes the following remarks:

> "There is no evidence on record that any movables assets, corporeal or incorporeal were pointed by Mr Nkola to the Sheriff. Yet in his answering affidavit in the application, he claims to have more than sufficient movable assets of significant value, far in excess of the judgment debt, against which the applicant can execute, should it choose to do so, without having to

execute against my immovable property."

23. The SCA in rejecting that notion said the following at paragraph 10 and 11 of the judgment:

> "[10] The question that springs to mind immediately is why Mr Nkola possessed of such wealth, did not dispose of his incorporeal property and pay the admitted debt to Argent. His stance is that Argent must seek out the movables and sell them before attempting to execute again his immovable properties. He would place the duty on the judgment creditor, instead of resolving his financial problems himself.
>
> [11] I consider that the common law and the rules place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point out this out and make them available."

24. In *Silva v Transcape Transport Consultants & Another* 1999 (4) SA, Wunsch J held that Rule 45 did not remove the Court's discretion. In that matter, the debtor had not pointed out movable property to the Sheriff that were available to satisfy the judgment debt. It is exactly what happened in this matter.

25. Fisher J in *Absa Bank v Njolomba* 2018 (5) SA 508 at page 560, paragraph 41, dealt with the event where the attached goods were insufficient to satisfy the debt and said the following:

> "Conversely, it would seem to be an exercise in

> futility for a creditor to sell by auction household goods that have little value."

26. The second issue raised by the Respondent is that, because Standard Bank holds a bond over one of the properties, it should have been joined as a party to the application, because Standard Bank has an interest in the outcome of the application.

27. In paragraph 51 of the answering affidavit, which was in response to paragraph 37 of the founding affidavit, the respondent says the following:

> "I wish to add that I acquired these properties by obtaining finance from the bank. I still have a mortgage bond on the property at 1[...] P[...] Road, S[...] 8[...], Portion 97 situated 95 N[...], Soweto, Johannesburg. The mortgage bond currently sits around just above R400 000 and it is held with Standard Bank of South Africa."

28. The Respondent says nothing in the answering affidavit that the applicant should have joined Standard Bank in the proceedings. This is stated for the first time in the respondents' heads of argument. The Respondents rely mainly on the provisions of Rule 46A(3)(b) read with the provisions of Rule 46(5)(a) of the Uniform Rules of Court.

29. Rule46A(3)(b) requires that an application to declare immovable property executable shall be on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including entities referred to in Rule 46(5)(a) which are the following, preferent creditors, the local authority and the body corporate.

30. The notice of motion was served on Standard Bank on 12 April 2024 and on 16 April 2024, a notice of opposition to that mediation, notice was served on Standard Bank. The notice of opposition was served by the respondent on the City of Johannesburg and the applicant.

31. The question to be answered is whether the words on notice should be understood to mean joinder. Standard Bank's interest in this matter is to recover money it has loaned to the respondent and if the property is eventually sold, Standard Bank who have registered a bond over the property will enjoy the status of a preferent creditor without having to be joined. In this instance, Standard Bank has been notified of this process and will certainly file their claim with the Sheriff prior to the date of sale in accordance with Rule 45(11)(a)(i) and (ii) of the Rules of Court.

32. It is in my view a fallacy to suggest that the prayers on notice in Rule 46A(3)(b) requires that Standard Bank should have been joined or cited as a party in the application. It is sufficient and incompliance with the rule if notified and it is up to them to decide if they want to intervene, then they will bring such an application.

33. Standard Bank has said nothing, even though they have notice of the application, which means, they are convinced that their rights are not threatened, they will participate in the proceeds of a sale at an appropriate time.

34. In support of their contention on nonjoinder, the respondents referred this Court to the SCA decision in *Cuducap (Pty) Limited v Philippus Johannes de Bruyn*, case number 69/2023 delivered on 13 March 2024. The facts and issues in that matter are far apart from the facts in this matter. In Cuducap, the SCA found that Standard Bank should have been joined,

because the High Court had made a ruling cancelling the bond that had been registered over a property without Standard Bank having been cited as a party.

35. In paragraph 9 the SCA said the following:

"It was not competent for the full court to make that order. It granted relief that was not sought by Mr de Bruyn. Furthermore, the full court made findings adverse to Standard Bank's interests without it being a party to the proceedings before the full court and the High Court. The law on joinder is well settled. A court would not deal with matters where a third-party who may have a direct and substantial interest in the litigation was not joined in the suit or where adequate steps could not be taken to ensure that its judgment will not prejudicially affect the party's interests, nor would it make findings adverse to any person's interest without that person first being a party to the proceedings before it."

37. Lastly, the second respondent contends that both properties constitute primary residents for him and his family. He omits to say at paragraph 73 of his heads that in fact, both properties also double-up as business premises of the first respondent.

38. The Respondent raises this defence prematurely. The defence of primary residents can only be meaningfully dealt with when an eviction application is before court. I agree with the applicant's submission that whether or not the properties are utilised as primary residence by the second Respondent and his family cannot be a defence to an application to declare the properties executable. The Applicant has compiled with the requirements of Rule 46A.

39. I am satisfied the Applicant have complied with the

requirements of Rule 46A(2)(a)(i) and 46A(2)(b). A Court will not order executability without having considered all the relevant factors. In this regard, the offers made by the respondent to liquidate the judgment debt were rejected has been insufficient. The second Respondent boast of possessing other assets and that business is still going on and yet, he does not inform the Court about his income and expenditure to enable the applicant to assess his affordability.

40. The ideal objective, according to Chapter 10.17 envisaged under Rule 46A is to establish a payment plan for arrears and so as to nullify a payment of the accelerated balance. In his application, the applicant drew the respondent's attention to section 26(1) of the Constitution of the Republic of South Africa. Despite that, the respondent failed to place information before this Court regarding relevant circumstances within the meaning of section 26(3) of the Constitution.

41. The immovable property which are sought to be declared executable were not acquired by means of a state subsidy, neither was the debt sought to be incurred in order to acquire the two properties. The debt emanates as a result of the respondents having breached the terms of a lease agreement.

42. The second Respondent operates a business and uses both properties as his business premises. He, the second respondent does not say that he cannot afford alternative housing, even though he is still running the business and as I have indicated earlier on, he is still free to sell his motor vehicles and pay the debt long before the sale in execution takes place. I am satisfied that the Respondents' opposition to this application is flawed and meant to delay payment. In the result, I am satisfied that the application should be

granted and I make the following order;

1. The immovable property described as:

   1[...] P[...] Road, S[...] 895, Portion 96, 9[...] N[....], Soweto, Johannesburg, 1071 square metres in extend held by deed of transfer T[...] (“1[...] P[...] Road”).

   1[...] P[...] Road, S[...] 895, Portion 91, 872 square metres in extend 9[...] N[...], Soweto, Johannesburg held by deed of transfer T[...] (“1[...] P[...] Road”).

Are declared specially executable.

2. The Registrar of the Honourable Court is authorised and directed to issue a Warrant of Execution in respect of immovable properties.

3. The immovable property at 1[...] P[...] Road is to be sold without reserve alternatively to be sold subject to the reserve price of R 990 000.00.

4. The immovable property at 1[...] P[...] Road is to be sold subject to a reserve price of R 850 000.00.

5. A copy of this order is to be served on the Respondents as soon as practicable after the granting of this order.

6. The second Respondent is order to pay the costs of this application on the attorney and client scale.

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MAKUME J

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:	Adv M Rodrigues
Instructed by:	Van Rheede Attorneys
For the Respondent:	Adv P Mbana
Instructed by:	Razano Attorneys