IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No.: CA86/2025

Reportable	NO

In the matter between:

RALTON COLIN MOSES **Appellant**

and

GEOR GEHENR MOSES **Respondent**

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] This is an appeal against the Gqeberha regional magistrate's decision (the court a quo), dismissing an application for a warrant of execution against immovable property, to wit, Erf 1[...] Pearston, situated at 1[...] M[...] Street, Pearston.

[2] The grounds of appeal are outlined in the notice of appeal dated 02 May 2025. Without detailing each ground *seriatim*, the appellant highlights the following key issues: that the court erred in finding that the municipal value of the immovable property is an amount of R17 800; it failed to consider that the immovable property was used for commercial purposes and not a primary residence; and that the court a quo failed to consider that the respondent lacked sufficient means to satisfy the judgment debt.

[3] The respondent opposes the appeal, stating that he will endeavour to resuscitate his business and liquidate the debt. Furthermore, so he claims, the sale of property will take away his ability to earn an income and settle the appellant's debt.

The background

[4] On 19 May 2023, the appellant obtained a judgment against the respondent in the following terms:

'(a) That the cancellation of the agreement between the plaintiff and the defendant is confirmed;

(b) The defendant is ordered to pay the sum of R319 500;

(c) Interest on the sum of R319 500 at the prescribed legal rate calculated from the date of judgment to the date of payment in full;

(d) The defendant is hereby ordered to pay costs of the action on party-and-party scale.'

[5] Subsequently, the appellant's bill of costs was taxed in the amount of R11 739. Despite certain payments being made in the appellant's account, the debt remained unsettled.

[6] On 03 February 2025, the Deputy Sheriff returned the warrant of execution against the movable property, indicating insufficient attachable movable assets to satisfy the judgment debt.

[7] The respondent subsequently visited the appellant's home and undertook to make payment towards reducing the debt before the end of April 2024, but he failed to make any further payment. Due to the respondent's failure to pay the debt as agreed, the appellant brought an application for execution against the immovable property in terms of s 66(1) of the Magistrates' Court Act, 32 of 1994 (the Act).

The legal framework

[8] Section 66 of the Act provides the execution against immovable property in instances where the judgment debtor has failed to satisfy the debt, and where the attachment of movables is not feasible due to insufficient assets.

[9] The relevant section provides:

'**66 Manner of execution**

(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. (my underlining)

(b) Upon such failure to pay any instalment in accordance with any court order, execution may be effected in respect of the whole of the judgment debt and of costs then still unpaid, unless the court, on the application of the party that is liable, orders otherwise.'

[10] The constitutional validity of s 66(1)(a) of the Act was tested in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*(Jaftha)[1]. The Constitutional Court (CC) in *Jaftha*[2] emphasised the importance of judicial oversight in matters involving execution against the immovable property of a judgment debtor.

[11] The CC concluded that s 66(1)(a) of the Act should be read as though the words ‘a court, after consideration of all the relevant circumstances, may order execution’ appear before the words ‘against the immovable property of the party’.

At paragraph 52, the court held that:

‘I have held that section 66(1)(a) of the Act is overbroad and constitutes a violation of section 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure. I have held further that section 66(1)(a) is not justifiable and cannot be saved to the extent that it allows for such executions where no countervailing considerations in favour of the creditor justify the sales in execution. I now turn to the appropriate remedy.’

[12] In relation to the appropriate remedy, the CC was persuaded that an appropriate remedy would require a creditor to approach a court for execution against the judgment debtor’s immovable property, and the court would then order execution only if the circumstances of the case make it appropriate. At paragraph 55, the CC held that:

‘It is my view that this is indeed an appropriate remedy in this case. <u>Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution.</u> The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on sections 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against

[1] (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004).
[2] Ibid.

immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.'(accentuation added)

[13] The CC emphasised the principle of judicial oversight, utilising the phrase 'on good cause shown', which is also applicable to the wording of s 66(1)(a) of the Act. Essentially, the circumstances constituting 'good cause' will be contingent upon the specific facts of the case.

[14] The practical effect of *Jaftha* is that, among the relevant circumstances that must be considered, the court dealing with execution against the immovable property must examine whether the property is a primary residence of a judgment debtor . Thus, pursuant to *Jaftha,* the rules of the magistrates' court (and those of the high court) were amended. They distinguish between immovable property that is the primary residence of the judgment debtor, on the one hand, and other immovable property, on the other.

[15] Magistrates' Court Rule (MC Rule) 43A outlines the court's procedure for execution against a judgments debtor's primary residence, which seeks to protect homeowners from losing their homes unfairly. In respect of other immovable property MC Rule 43 is applicable. The relevant provision provides:

'Subject to the provision of Rule 43A, no warrant of execution against the immovable property of any judgment debtor shall be issued unless-

(a)

(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 movables property to satisfy the warrant or;

(ii) such immovable property has been declared to be specifically executable by the court.

The findings of the court a quo

[16] The magistrate, correctly, recognised that she was required to consider all relevant circumstances before she could order execution. She found, in the exercise of her judicial oversight, that the immovable property did not have sufficient equity to satisfy the debt owed and that respondent had made various payments in an attempt to settle the judgment debt. Hence, she considered that execution would not be just and she dismissed the application.

The material evidence

[17] I turn to the facts underpinning the findings of the court a quo. It is convenient to first address the latter finding, that the respondent has made various attempts to settle the judgment debt. It was common cause that the respondent had made various payments to the applicant after the issue of summons, but before the default judgment was granted. These payments were accounted for in determining the amount of the judgment debt. They have no impact of the present application. However, the respondent purported to dispute the amount of the outstanding debt, and alleged that payments that he had made after the judgment had not been accounted for by the applicant. In his answering affidavit, he said:

> ‘I have made several other payments into the applicant’s bank account specifically on 7 May 2024. I further recall several other payments in 2024 and will endeavour to obtain proof of same …’

The response, which the court a quo appears to have accepted, is unduly coy. He does not say when these payments were made or what the amounts were, nor does he say how the payments were made or from what bank accounts they were paid. He provided no record of these payments, which must be in his possession.

[18] The approach to evidence in application proceedings is now well-established. In *Plascon-Evans Paints*[3] Corbett JA explained:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact … If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination … and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks ….'

[19] Not every denial constitutes a real, genuine or bona fide dispute of fact. In *Wightman*[4] Heher JA explained:

'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

[20] The respondent's denial of the outstanding quantum and of the applicant's averment that he has failed to make payments in reduction of the

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[3] *Plascon-Evans Paints Limited v Van Riebeeck Paints* (Pty) Limited 1984 (3) 623 (A) at 634H-635B.

[4] *Wightman t/a JW Construction v Headfour (Pty) Limited and Another* 2008 (3) SA 371 para 13.

debt fall fairly within the category of evidence described in *Wightman.* It did not raise a genuine, or bona fide dispute of fact. Accordingly, the court a quo erred in its conclusion that the respondent had made various attempts to repay the judgment debt. On a proper application of the test to be applied in application proceedings she was bound to find that there had been no attempt to make any further payment after judgment.

[21] I revert to the finding that the immovable property had insufficient equity to satisfy the debt owed. It was common cause that the immovable property has been improved by the erection of a home on the property, however, it was not used for residential purposes. It was the respondent's commercial property from which he had operated a business, selling liquor, and he did not reside on the property. He said that he was not currently trading, but that he intended to commence trading again from the property in the near future. Thus, the respondent said that if he did not trade from the premises, he would have no other means by which to pay the judgment debt.

[22] It appears from the judgment that the court a quo recognised that the property was not the primary residence of the judgment debtor. However, it relied, erroneously, on the provisions of rule 46A of the Uniform Rules of Court, which apply only in the High Court. Although the wording of Uniform Rule 46A and MC Rule 43A is similar, the court a quo's reliance on Uniform Rule 46A suggests that its decision was predicated on the wrong principle, that the immovable property had been the primary residence of the respondent. To this extent, the court a quo misdirected itself.

[23] The essential findings which underpin the conclusion reached in the court a quo that the immovable property did not have sufficient equity to satisfy the debt were two-fold. First, it found that the immovable property has a municipal

value of R17 800, and, secondly, that the municipal account showed an arrears of approximately R15 000, which would have to be paid to the municipality before any amount could flow to the applicant. The municipal account presented in evidence reflects an arrear amount of R14 202,97, not R15 000,00. The finding of the value of the property is more problematic. The respondent did not place any value on the property in this affidavit, save to say that the property was 'not worth much'. He attached the municipal valuation which informed the findings of the court a quo. The valuation annexed reflects a valuation taken from the 2012 Valuation Roll, more than ten years before the litigation. Moreover, it reflects the value of the land at R17 160. It placed no value on any improvements on the property and reflected, instead, that the building clause was not yet due. Thus, it reflects the valuation in respect of a vacant erf in 2012, and the valuation placed before the court could have had little or no bearing on the sum which the property, together with the improvements on it, was likely to fetch on the sale in execution. In this respect, too, the court a quo had misdirected itself.

[24] Finally, the court a quo, in the exercise of its oversight, gave no consideration to the fact that the sheriff could find insufficient movable property to satisfy the judgment debt and that the respondent had failed to honour his undertaking to make payment. On the respondent's own admission, he was unable to make payment of the judgment debt at the time of the application. He gave no explanation of how he intended to find the means to start trading again nor for his not trading at present. There is accordingly no 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.[5]

[25] In the result, the following order is made:

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[5] See *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC) para 54.

1. The appeal succeeds.
2. The order of the regional court is set aside and replaced with the following order:
   (i) The assistant registrar of this court is authorised to issue a warrant of execution against the immovable property, which is described as Erf 1[...] Pearston, situated at 1[...] M[...] Street, Pearston.
   (ii) The respondent shall pay the applicant's costs.
3. The respondent shall pay the costs of the appeal, with counsel's costs to be taxed on scale A as contemplated in rule 67A read with rule 69 of the Uniform Rules of Court.

N. CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

I agree.

J.W EKSTEEN

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant	:	Mr L Ncanywa
Instructed by	:	Litehmba Ncanywa Inc
		c/o Nettletons Attorney
		Makhanda

For the Respondent	:	Adv G R Joubert
Instructed by	:	Howard Collen Inc.
		Gqeberha
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