Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 17539/2011

in the matter between:

ABSA BANK LTD Applicant

and

ZIMELE PLANT HIRE CC First Respondent
Registration no.: 2003/0254/18/24

PHAZAMILE EDWARD TOM Second Respondent
ID No.:

MODI ELSIE TOM Third Respondent
ID No.:

JUDGMENT DELIVERED ON WEDNESDAY 27 FEBRUARY 2013

DOLAMO, J:

[1] Two applications served before this Court. In the one application the applicants sought an order in terms of which an immovable property being erf no. 2574 Eerste River situated in the City of Cape Town, Stellenbosch Division (" the property") and registered in the names of the second and third Respondents be declared executable. The Respondents in turn launched, on an urgent basis, an application for the stay of the sale in execution of their movables, which were attached pursuant to a writ of execution.

[2] I shall, for purposes of convenience, refer to the first application as the *declaratory*

application and the second application to suspend the sale in execution as the *suspension application.* I shall furthermore refer to the applicant in the declaratory application, in both applications, as ABSA while the respondents in the first application, though applicants in the suspension application, simply as respondents or as first, second and third respondents respectively.

[3] It is common cause between the parties that on 8 March 2012 ABSA obtained default judgment against the Respondents for payment of the sum of R94 819.85, interest thereon at the rate of 9% per annum, capitalised monthly, from 2 June 2011 to date of final payment and costs on an attorney and client scale which costs shall be taxed. At the time when default judgment was granted the plaintiff did not apply for an order declaring the immovable property executable.

[4] Prior to obtaining the default judgment and the launch of the declaratory application against the respondents and on 8 July 2011, ABSA through its attorneys directed a letter of demand to the second respondent wherein payment of the some of R94 819.85 was demanded. Paragraph 3 of this letter reads as follows: *"if you are unable to effect payment of aforesaid amounts you are invited to contact our offices or alternatively our client to make acceptable arrangements for the payment of the amount due to our client in instalments or otherwise."* It will appear that the first respondent, encouraged by this overture responded in a letter dated 10 August 2011 wherein he stated in paragraph 4 thereof that the first respondent propose to settle the amount owing and payable to ABSA in reasonable monthly instalments of R4500.00 commencing on 7 September 2011 and thereafter on 7 of every month. They gave as a reason for its inability to pay the present economic climate and its deteriorated financial position. According to Respondents, they sincerely believed and were confident that they will turn around its financial fortunes in the

not so distant future but submitted that, in order to do so, will have to restructure their payment obligation to their creditors.

[5] On receipt of the respondents offer, ABSA came with conditions for the acceptance thereof, these conditions are contained in a letter the contents of which reads as follows:

> *"We record that we act on instructions received from ABSA Bank Ltd. We have considered it prudent to inform you at this stage of the following general requirements set out by our client with regard to the debt due by you to our client and to which you must please adhere;*
>
> > *1. If you are unable to effect immediate payment of the debt and want to submit any proposal to our client that will entail a delay in making payment you will be required to sign an unconditional consent to judgment. Signing such unconditional consent to judgment will however, not be an indication of our client's willingness to accept any offer made to our client now or in the future, our clients rights are fully reserved and particular its right to recover the amount due to it by whatever means the law provide.*
> >
> > *2. No request for delayed payment of your obligations, whether as principle debtor or surety will be considered before we have been provided with the information stipulated below in respect of you personally where applicable also in respect of the principle debtor, namely;*
> >
> > > *2.1. Full and comprehensive financial statements were available;*
> > >
> > > *2.2. All information pertaining to all immovable properties, the amounts outstanding in respect of mortgages thereon and the value you place on each such property. The value that you place on such property substantiated by an evaluation if available;*

2.3. An comprehensive list of your assets and liabilities substantiated with documentary proof insofar as is possible;

2.4. Copies of all vehicle registration documents;

2.5. Copies of your television licence and details of your DSTV subscription including subscription number;

2.6. Copies of instalment agreements;

2.7. Copies of all loan agreements

2.8. Full and precise details of ail short-term insurance policies including the replacement value place on movable assets;

2.9. Full and precise details of all life insurance policies with documentation indicating the loan value in respect thereof;

2.10. Full and precise details of all income derived from whatever source properly vouched by documentation;

2.11. Full and precise details of all expenditure properly vouched by documentation.

3. Full and precise details as to further securities that you are prepared to offer to our client in respect of the debt, inclusive of;

3.1. immovable property free of any present mortgage;

3.2. session of claims not already ceded,

3.3. insurance policies with value capable of being ceded;

3.4. movable property identified by serial number, capable of hypothecation by notarial bond;

4. If it is your contention that your estate has been sequestrated or placed under administration or that you labour under a like legal disability you are to provide us with full details as to the trustee of your estate or other curator that is in control

thereof If it is claimed that the debt is subject to a debt review you are to provide us with a debt councillors details as well as a copy of the Court order pertaining to this particular debt.

5. on receipt of an adequate response to this letter we shall consider your submissions in collaboration with our client. We however, *stress that the action embarked upon will not be stayed as a result of any response hereto or any offer that may be made.*

6. you are liable for any legal costs incurred herein. To keep costs to a minimum we suggest that you full comply with this letter. Incomplete or insufficient information will negatively impact on any submission received.

We shall only revert to you once we have received our client instructions. ”

[6] Notwithstanding these onerous requirements the respondents instructed their attorney to put further settlement proposals to ABSA. in a letter dated 21 September 2011 respondents' iegal representative stated that they confirm their instructions to facilitate negotiations in respect of the repayment of the debt owing to ABSA. In the same letter they confirmed that the respondents' instructions were to have no objection to signing an unconditional consent to judgment and to pay the necessary legal fees incurred. The respondent's attorneys further stated that respondents, however, believed that delving into the financials of the close corporation (first respondent) and that of the sureties (second and third respondents) will prove to be a worthless exercise and a waste of time. This according to the respondents, was because the respondents had suffered

grave financial difficulties over the past 3 years and as such found themselves in a position where they were unable to meet their financial obligations timeously or in full. The offer to pay the sum of R4500.00 per month was to commence on 7 October 2011 and thereafter on or before the 7th day of each subsequent month was again repeated.

[7] The respondents also alleged that the problems of the first respondent with its various clients has been sorted at and that the cash flow of the first respondent has stabilized and as a result it had, since March 2012, been paying a sum of R4500.00 to the applicant. Respondents also alleged that during this period they were not aware that ABSA went ahead and obtained default judgment against them. They submitted that they only became aware of this development on 11 April 2012 when the Sheriff of the Court came to the first respondent's offices. Second respondent further submitted that he immediately thereafter made a payment on 12 of April 2012 and sent an email on 12 April 2012 to ABSA's legal representatives to enquire as to what was the current state of affairs. On 13 April 2012 he received an answer through email wherein he was told that the monthly payments were accepted on condition that he signs a consent to default judgment and that this was never done. Notwithstanding these developments the respondents continued to pay the sum of R4500.00 per month.

[8] During October 2012 second respondent allege that, to his surprise, he received the declaratory application. As a result he sent an emaii to ABSA's legal representative in which he indicated that he did in fact sign the consent to default judgment and which was delivered at the legal representative's office on 15 March 2012. The respondents also requested ABSA to withdraw the declaratory application or postpone it *sine die* pending the fulfilment of their obligation to pay. In the same email ABSA's wasted costs in

respect of the application were tendered.

[9] In response thereto ABSA's legal representatives replied via email on 30 October 2012 in which they stated that they will proceed with the application and were not interested in debating the matter any further. This did not dissuade the respondents who, on 2 November 2012, made further settlement proposals in terms of which they undertook to pay R20 000.00 on or before 17 November 2012 and to continue with the payments of R4500.00 per month. ABSA was further requested to indicate whether this offer was acceptable and if so to postpone the declaratory application in order to enable a monitoring of the payment progress. On 17 November 2012 the respondent paid a further sum of R10 000.00.

[10] In the action proceedings and in the declaratory application itself, the attention of the respondents was drawn to section 26 (1) and (3) of the Constitution of the Republic of South Africa which accords everyone the right of access to adequate housing. ABSA also alleged that if it was the contention of the second and third respondents that the claim declaring their property executable and that the sale of the property in execution will infringe that right it will be incumbent on them to place before Court information supporting that contention. Furthermore ABSA made reference to the provisions of rule 46 (1) (a) of the rules of this Court which provides for the requirements which are to be met if an immovable property which is a primary residence was to be declared executable.

[11] Pursuant to the default judgment obtained against the respondents, ABSA proceeded with a warrant of execution against their property and on 19 April 2012, the Sheriff served

on the respondents the said warrant and attached goods which, according to ABSA, were not enough assets to satisfy the debt due and owing. Consequently it sought an order declaring the property specially executable.

[12] ABSA submitted that it would be proper for this court to declare the second and third respondents' immovable property executable and for the following reasons:

1. Second and third respondents consented to the property being declared executable in paragraph 8 of the mortgage bond.

2. Respondents received the summons at their chosen *domicilium* addresses but did not respond thereto and did not place any relevant facts before this court as to why the property should not be declared executable or why a right to housing will be infringed by such an order.

3. The amount owing by the respondents is substantial and there appears to be no other manner in which it can be collected from the respondents and attached a certificate which indicated that the outstanding amount on 7 June 2011, to which interest and costs were still to be added was R94 819.85. It appears that the respondents main ground for opposing the application is that ABSA obtained a judgment which made provision for the costs to be taxed by the taxing master of this court and to date that had not been done.

[13] ABSA conceded that the property sought to be declared executable is the primary residence of the second and third respondents. ABSA however, pointed out their registered a mortgage bond over the property of second and third respondents as

security, in favour of ABSA for the due fulfilment of their obligations as sureties for the first respondent.

[14] The respondents' main ground for opposing the application appears to be that there has been payment which amounted to R45 000.00 which came subsequent to the default judgment being obtained and which had substantially reduced the amount owed to ABSA. This payment has since increased to R65 000.00, as on 19 January 2013.

[15] The second and third respondents also submitted that they have been living in the property for the past sixteen years with their three minor children and that this is their primary place of residence. For this and the other reason the respondents submit that ABSA was not entitled to an order declaring the property executable.

[16] The chronology of events as set out by the respondent was vehemently disputed by ABSA. It set out its own version in its reply which also served as an opposing affidavit to the suspension application.

[17] The respondents submitted that ABSA proceeded with the application to have the property declared executable for a relatively small amount. They also submitted that ABSA instituted the proceedings in the High Court which could have been brought in the Magistrates Court. Furthermore, because the applicant adopted this route, the respondents allege that they were deprived of their right in terms of section 73 of the Magistrates Court Act 32 of 1944 to apply for payment of the judgment debt in instalments.

[18] Lastly, the respondent indicated that there are other reasonable methods in terms of which ABSA' s judgment debt can be collected other than to declare their primary place of residence executable. The respondents also allege that ABSA was not playing open cards with the Court in that they failed to supply information that the judgment debt has since been reduce by the payments referred to supra. ABSA is also accused of failing to place information before the court relating to the settlement proposals that were made by the respondents as well as the negotiations that preceded the application,

[19] The questions for determination are whether ABSA was, in the circumstances, entitled to apply for an order declaring the respondents' property specially executable and, if not, whether it can proceed to sell the movables attached in execution even where the respondents have been paying the judgment debt in instalments.

[20] Mr Cooper, argued that ABSA was entitled to an order declaring the respondents' property executable. In support of this argument he referred to the decision of my brother Binns-Ward J in *ABSA Bank Ltd v Petersen* (934/2011) [2012] ZA WCHC 18 wherein he stated that a right to housing was not an absolute right: *"and it is right to adequate housing, not to housing that a mortgagor is unable to afford'.* He also referred to the decisions in *Gundwana v Steko Development* 2011 (3) SA 608 (CC) (that it must be accepted that execution in itself is not an odious thing); *Mkize v Lemvoti Municipality and Others* 2012 (1) SA 1 (SCA) (that the order made in Japhta is aimed at preventing the infringement of the right to adequate housing hence the requirement for judicial oversight in all cases of execution against immovable property), *Japhta v Schoeman and Others, Van Rooyen v Schotz and Others* 2005 (2) SA 140 CC (that it would be unjustifiable for a person to lose his or her access to housing for a trifling amount which is owed); Standard

Bank South Africa Ltd v Sounderson and Others 2006 (2) SA 264 (SCA) (cases where execution against property could conflict with section 26 (1) of the Constitution are likely to be rare and that it is unimaginable that a mortgagee' s right to claim the debt from the property will be denied altogether) and *Nedbank Ltd v Jessa* 2012 (6) SA 166 (WCC) (notification to defendants of the right in terms of section 26 (1) to place information before Court to demonstrate that there would be a violation of the right of access to adequate housing if execution against immovable property were to be allowed).

[21] The crux of Mr Cooper' s submission is that execution against a judgment debtor' s property in itself is not odious. It is a part and parcel of normal economic life. Only when an execution would amount to an infringement of the right to adequate housing would the Court refuse the judgment creditor to execute against the immovable property of the judgment debtor. Otherwise the defendant mortgagor' s right to ownership of his or her home must, in general, yield to the mortgagee' s right to realise its security. That in the circumstances of this case second and third respondents' rights to access to adequate housing will not be infringed by declaring the property executable.

[22] I agree with Mr Cooper' s submissions in this regard. I need however to point out what was said by Binns-Ward J in the *Petersen* matter *supra* at paragraph 33, namely that *"it is only when the exercise of the mortgagee's right [to realise the security] is in bad faith that effect should not be given to the right An indication of bad faith would be provided if the mortgagee seeks to proceed with execution against the defendant's home when it is evident that the judgment debt can probably satisfied in a reasonable manner, without involving the drastic consequences of the loss of the mortgaged home"*

[23] Mr Smit on behalf of the respondent argued that ABSA' s insistence on executing

against the immovable property was in bad faith. Counsel’ s argument was that the respondents have significantly reduced the debt and all indication were that they will continue to meet the monthly instalments of R4500.00. In the circumstances an insistence on execution against the immovable property of the respondents is nothing but an indication of bad faith. According to Mr Smit ABSA refused reasonable proposals for the settlement of the debt which were made even before summons were issued. It persisted with this attitude by issuing summons in this Court in the circumstances where the claim falls under the jurisdiction of the Magistrates Court, and further proceeded with default judgment against the respondents and refusing reasonable requests for postponement of the declaratory application.

[24] While I do not endorse Mr Smit’ s submissions regarding ABSA’ s intention I am, nevertheless satisfied that this is a case where execution against the respondents’ property should not be ordered. There are several factors in this case which militates against such an order. In the first place I am of the view that the respondents have shown an ability to pay the judgment debt in reasonable instalments. It is correct as Mr Cooper pointed out that we do not have the respondents’ financial statement which would have enabled the court to determine whether the respondents have made a full disclosure of their financial position. I agree that this would have been an ideal way of determining the respondents5 financial position. I am satisfied, however, that factors such as the regularity with which the payments were made point to an ability to pay. The alternative will be to execute against their movables if they should fail to pay.

[25] Secondly to order execution against the respondent’ s property will be disproportionate to the outstanding amount of the debt. The severe impact that the

execution process will have on the second and third respondents, together with their dependants, of losing their primary residence, far outweighs any prejudice which ABSA may suffer if an order of execution against the property is not granted.

[26] Lastly there was a proposal that the declaratory application be postponed *sine die* for ABSA to monitor payment of the balance outstanding. This proposal was rejected without considering its merits. There were accusations and counteraccusations made in argument regarding the *bona fides* of each side regarding the postponement of this application. My view is that ABSA unreasonably refused to seriously consider respondents' proposals. Mr Cooper argued that the Court must guard against crafting an agreement for the parties which an order for payment of the debt in instalments will have. I do not purpose going done this route. I have no doubt that ABSA would be anxious to collect what is due and payable to it in the shortest possible period. The circumstances of this case, in particular the progress the respondents have already made in liquidating the debt, do not justify an order declaring their property executable.

[27] After obtaining default judgment against the respondents ABSA proceeded with a writ of execution against their movables. On 11 April 2012 the Sheriff of this Court, authorized and directed by the said writ, attached respondents' movables,

[28] The respondents are now applying in terms of Rule 45A of the rules of this Court, on an urgent basis, for a stay of the sale of these movables in execution pending compliance

with their undertaking to pay the judgment debt in instalments of R4500.00 per month, and, I add, until the capital interest and legal costs are paid in full.

[29] The respondents advanced a number of reasons for the application. In the first place the respondents complain about ABSA’ s conduct. They allege that in paragraph 12.3 of the founding affidavit in the declaratory application it alleged that the amount owing by the respondents was substantial and there appeared to be no manner in which it can be collected from the respondents as a reason for seeking an order declaring their property specially executable, but failed to give a full history of the matter. In particular they complain that ABSA failed to disclose the fact that respondents engaged it in settlement negotiations and that the judgment debt has been partly paid.

[30] Secondly they allege that on 21 January 2013 ABSA’ s legal representatives gave instructions to the Sheriff of this Court to remove and sell in execution the movables which were attached despite the fact that the declaratory application was pending. As a result of this development respondents sought an undertaking that ABSA will not proceed with the sale in execution which ABSA refused to give.

[31] As a result of these development the respondents were apprehensive that the sale in execution was eminent.

[32] The respondents submit that it will be in the interest of justice to stay the sale in execution of their movables. The respondents submit that they have paid the sum of R65

000.00 to date, in reduction of their indebtedness to ABSA and that the sale of these movables, which are necessary for the first respondent to generate income, will deprive them of an important source of income. The respondents argued that should this happen, they will not be in a position to meet their contractual obligations which will spell the end of the first respondent. This they allege was for an outstanding balance of a mere R40 000.00.

[33] As a further reason justifying the grant of the relief prayed for the respondents submitted that ABSA brought the action, which was within the monetary jurisdiction of the Magistrate Court in this Court and consequently deprived them of the right to apply in terms of section 73 of the Magistrates' Court Act 32 of 1944 to pay it in reasonable periodical instalments.

[34] The respondents further allege that ABSA is an exceptionally strong and big financial institution with unlimited financial resources and that the payment of the judgment debt in instalments will not affect its financial status.

[35] Responding to this allegation ABSA pointed out that this was not a mortgage loan agreement secured by a mortgage bond over immovable property but a commercial loan on an overdraft account which it granted to the first respondent subject to second and third respondent's unbounded property being pledged and bonded to ABSA for the payment of the commercial debt. This accordingly, ABSA submitted, was not a relatively small home loan as the respondents seemed to imply.

[36] ABSA also disputed the respondents' allegation that they were making regular

payments. According to ABSA the *"regular* payments were made after the respondents became aware that the Sheriff had a warrant to execute against their movables. The history that preceded the granting of the default judgment, as set out by the respondents, was also disputed, i deem it unnecessary to set out in details ABSA' s version of the events save to point out that these paints a picture of the respondents having negotiated in bad faith for example, the statement in the letter of 21 September 2011 by respondents attorneys that *"delving into the financials of the CC and that of the sureties will prove to be a worthless exercise and a waste of time"* was intended to create the impression that the respondents had no movable assets. This allegation was refuted by the return of service which showed that the Sheriff attached assets valued to the sum of R60 000.00. Had these facts been known, according to ABSA, would have resulted in any offer for payment of a minimal monthly instalment being refused.

[37] Second respondent' s version regarding the consent to judgment was also disputed. In this respect it was pointed out that he was still offering to sign and sent the consent to judgment on 16 April 2012, which was in contrast to his assertion that he had signed and hand delivered the consent to judgment on 15 March 2012.

[38] The offer to increase the monthly instalments in 2012 was also characterised as a misrepresentation. The dispute which arose regarding untaxed legal costs which allegedly were added to his account also enjoyed attention in the answering affidavit. I shall however, not deal any further with it as the respondents' did not persist with it.

[39] It was also alleged that the value of the respondents' property was far in excess of

the requirements of adequate housing which they no longer afforded.

[40] ABSA also pointed out that it was the respondents who, in opposing the declaratory application, alleged that they had sufficient movables against which execution of the judgment debt can be levied. They could therefore not oppose the sale in execution of the same assets which they said were available for execution to be levied against them.

[41] I find no merit in the argument by the respondents that the sale in execution of their movables would result in the total collapse of their means of generating income. The assets attached are not essentia! to the nature of business conducted by the first respondent. Secondly it was they who proposed execution against their movables when opposing the declaratory application. I am mindful that the original debt has been drastically reduced but find no tangible reason to delay satisfaction of the judgment in immediately given that the respondents have executable movable assets.

[42] The general principles which a Court may take into consideration when adjudicating an application in terms of rule 45A, set out by Waglay J, in Go/s *t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (CC) at para [37], do not apply in this matter. It would not be an injustice to execute against the movables of the respondents to satisfy the judgment debt or the outstanding balance thereof.

[43] Regarding costs each party has been partly successful. In the circumstances I deem it fair and just that each party pay his/her/its own costs occasioned by the two applications.

[44] The order I make therefore is the following:

44.1. The application to declare the second and third respondent’ s immovable property being erf no. 5274 Eerste River, situated at 32 Ariene Street, Eerste Rivier and Erf 5275 situated at 34 Arlene Street, Eerste River is hereby dismissed.

44.2. This application in terms of rule 45A of the rules of this Court to postpone execution against the movable properties attached in execution pursuant a default judgment obtained by ABSA on 8 March 2012 is hereby dismissed.

44.3. Each party is to pay its his/or her own costs occasioned by the two applications.

M J DOLAMO

HIGH COURT JUDGE