

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: GRAHAMSTOWN**

CASE NO. 4383/2017

In the matter between:

Z W GENTLEMAN

Applicant

and

KOBUS GOOSEN

First Respondent

MR BLOM

Second Respondent

THE DISTRICT COURT: CRADOCK

Third Respondent

JUDGMENT

JOLWANA J

[1] This matter came to this Court by way of a review against the Respondents in which Applicant seeks the following relief:

“1. That the Honourable Magistrate erred in law when he entertained the application brought by the first respondent declaring the property, Erf 409 Cradock executable without making sure that the third respondent has jurisdiction.”

[2] Being concerned as to Applicant’s position and that Applicant’s heads did not necessarily advance what seemed a compelling argument, Adv Beard kindly acted as an *amicus curiae* to the Court and to whom we are grateful. In the end however she was unable to advance submissions in favour of the Applicant.

[3] Section 22 (1) of the Superior Courts Act No. 10 of 2013 gives this court power to review proceedings of the Magistrates’ Court in the following terms:

“22 (1) The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are –

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.”

[4] Second and Third Respondents have filed a notice to abide. The First Respondent opposes the application and seeks the dismissal thereof.

[5] I do not intend to detail the history of the matter in the court *a quo*. However a brief summary of the relevant facts is necessary to put this application in its proper factual context.

[6] The Respondent obtained a default judgment against the Applicant in the sum of R47 743.27 together with costs and interest thereon at 15:5 % per annum. A warrant of execution against applicant’s movable property was issued.

[7] The Applicant’s tractor, a Ford 5610 was placed under judicial attachment by the sheriff. The sale in execution of the said tractor was advertised in the local newspapers and was sold by public auction for R14 200.00.

[8] Because the sum of R14 200.00 which was realized in the sale in execution was insufficient to satisfy the judgment debt, another warrant of execution was issued for the attachment of Applicant’s other movable property in respect of which the sheriff returned a *nulla bona*.

[9] Respondent established that Applicant was the owner of an immovable property being Erf 409, Cradock. He thereupon moved an application in the Magistrate’s Court to have that property declared executable.

[10] That application was opposed and Applicant moved two other applications, one for the condonation of the late filing of an application for the rescission of the default judgment as well as an application for the rescission of the default judgment. The application for condonation was dismissed resulting in the rescission application being automatically dismissed as well. The application to declare Applicant’s immovable property executable was granted.

[11] In this application the two dismissed applications are not challenged nor is the court’s jurisdiction to entertain the original action which resulted in the application for the Applicant’s immovable property to be declared executable. Having given this

truncated background to this application it is now apposite that I deal with the review application which I proceed to do below.

[12] This application is based on the following averments made in the Applicant's founding affidavit:

"7. This is an application to have the decision of the Third Respondent set aside.

8. The application is based on the contention that the decision to declare my property executable, Erf 409, Cradock was unlawfully issued in the absence of jurisdiction of the Third Respondent to entertain such application in that the value of the property exceeded the jurisdiction of the Third Respondent and no consent was given to the Third Respondent as the decision declaring the property executable was a default judgment.

9. The Third Respondent made a decision without considering all relevant circumstance. The most important one being the value of the property.

10. The Third Respondent failed to comply with Section 66(1)(a) of the Magistrate's Court Act 32 of 1944 read in accordance with the order of the Constitutional Court in *Jafta v Schoeman and others* 2005 (2) SA 140 (CC). It is further submitted that the decision to declare the property executable would not have been made had all relevant circumstances of the matter been properly considered in accordance with the required procedures. The Third Respondent made a decision without considering the size of the property and the value of the property.

11. In spite of being in possession of Windeed Document (See Annexure "TYA2") depicting the date the property was bought, the amount it was bought for, the size of the property, the information that will make ordinary person to enquire into the value of the property before making a Judgment, the Second Respondent and Third Respondent failed to make such inquiry to inform themselves. The value of the property R810 000.00 from (See Annexure "TYA1", the valuation report from Inxuba Yethu Municipality.)

12. It is further submitted that the Third Respondent had a duty to request the information regarding the value of the property from the First Respondent in order for the Third Respondent to verify whether it had a jurisdiction or not."

[13] The Applicant also made the following submissions in his founding affidavit:

"33. I will request the Court to consider the following personal circumstances.

33.1 The First Respondent acted negligently in repairing my Tractor for R47 000.00 but have it sold for R15 000.00 instead of establishing the reserve price given that the market value of that Tractor was R130 000.00.

33.2 The house on the property provides shelter for me and six members of my family.

33.3 If my property is eventually sold, I have to be evicted and this will make us homeless and at my age it will be difficult for me to purchase an equivalent property that my family and I can be comfortable with.

33.4 There is no other remedy available and I request the court to grant the relief sought as I have a right to just and lawful procedure.

33.5 For the Third Respondent to entertain a case while it lacks the jurisdiction amount to unlawful expropriation of land which is unconstitutional and unlawful.

33.6 The issue of Jurisdiction is determined at the time that the proceedings are instituted. The Jurisdiction of the Third Respondent in matters dealing with the value

of a claim in terms of Section 29(1)(a) of the Magistrate's Court Act 32 of 1944 does not exceed R100 000.00.

33.7 Judgment given in a Case in respect of which Court lacks Jurisdiction is void. The Magistrate should always ensure that the Court has a Jurisdiction in respect of the type and value of claim and where parties are silent the Magistrate should raise the issue."

[14] It is unfortunate that the papers were drawn in the manner that they were. It would be remiss of the Court to keep silent when attorneys or advocates, who are after all officers of the Court appear to have given questionable legal advice on basic principles. It appears from the application for condonation as well as the application for rescission of the default judgment in the Magistrate's Court that the Applicant had legal representation even there. Furthermore the First Respondent makes the following averment in his answering affidavit:

"As I have said the applications were argued on 10 March 2016 and both applicant and I were legally represented. The matter was presided over by Magistrate Blom."

[15] This averment is not denied by the Applicant. The multitude and the magnitude of the errors as well as the very basis on which the application is made suggest that insufficient thought was given to this matter. I will mention just a few below.

[16] Firstly at paragraph 31 of the founding affidavit the ground for the review is said to be section 24(1) the Supreme Court Act. Section 24 (1) would have been the correct and relevant section in terms of what it used to provide for, except that the Supreme Court Act 59 of 1959 was repealed in terms of schedule 1 of the Superior Courts Act 10 of 2013.

[17] At paragraph 33.6 of the Applicant's founding affidavit reference is made to section 29(1)(a) of the Magistrates' Court Act 32 of 1944 making provision for the magistrates' court having jurisdiction where the value of a claim does not exceed R100 000.00. In fact the correct jurisdictional limit for a district court is R200 000.00.

[18] The very basis for this application defies legal logic in respect of all the issues raised by the Applicant. It is even possible that the underselling of the tractor whose value is said to be R130 000.00 could have been avoided had the Applicant been properly and professionally advised from inception.

[19] While it may be so that the market value of the tractor was R130 000.00 as Applicant says it was, no legal basis has been put forward for the contention that a reserve price ought to have been set. I am not aware of any regulatory framework

that requires a reserve price to be set in respect of a sale in execution of movable assets.

[20] In the papers it appears that in the main there are two reasons which are cited as being the basis for the review. The first one is the issue of jurisdiction and the second one is non-compliance with the Jaftha case (referred to more fully hereafter).

[21] The Applicant seems to be accepting that the Magistrate's Court did have jurisdiction to entertain the antecedent action in that the First Respondent's claim was R47 000.00 and therefore within the jurisdiction of the Magistrate's Court. Applicant has no issue with the Court granting the judgment as it did in so far as jurisdiction is concerned. As I understand it, his case is that having granted the judgment on the basis of which his immovable property was sought to be declared executable, the Court should have refused to entertain the application to declare Applicant's immovable property executable. This is based on the fact that the value of the property is R810 000.00, far above the jurisdiction of a district court.

[22] The reasoning of the Applicant in this regard is difficult to understand. The court having jurisdiction to entertain the matter, on a debt of R47 000.00, so the argument goes, lacks jurisdiction to deal with an application to execute its own judgment. It seems to me that Applicant loses sight of the fact that the application to declare immovable property executable is, for all intents and purposes, an application in which what is sought is consequential relief. Therefore the Court which dealt with the main case should have jurisdiction to deal with the consequential relief flowing from its own judgment.

[23] In any event reliance on section 29(1)(a) of the Magistrates' Court is misplaced. Section 29(1)(a) provides as follows:

"29. Jurisdiction in respect of causes of action

- (1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in –
 - (a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette;"

[24] The question that follows logically from this provision is whether the application was for "the delivery or transfer of any property." The answer is obviously in the negative as the application was for Applicant's immovable property to be declared executable. How an application to have property declared executable could be

confused with an application for the delivery or transfer of property is very difficult to discern.

[25] Again it appears that the basis upon which Applicant was advised to apply for the review of the matter, namely lack of jurisdiction on the basis of section 29(1)(a) of the Magistrates' Court Act, was ill conceived

[26] Applicant further raises the issue of the lack of jurisdiction of the Magistrates' Court on the basis of the size and value of the property. On this occasion the issue is raised as non-compliance with section 66 (1) (a) of the Magistrates' Court Act and the case of *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others* 2005 (2) SA 140 (Jaftha). In paragraph 10 of the applicant's founding affidavit the following is said:

"The Third Respondent failed to comply with Section 66(1)(a) of the Magistrate's Court Act 32 of 1944 read in accordance with the Order of the Constitutional Court in *Jaftha v Schoeman and Others* 2005 (2) SA140 (CC). It is further submitted that the decision to declare the property executable would not have been made had all relevant circumstances of the matter been properly considered in accordance with the required procedures. The Third Respondent made a decision without considering the size of the property and the value of the property."

[27] Section 66(1)(a) of the Magistrates' Court Act provides as follows:

"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."

[28] In the Jaftha case the Constitutional Court said at paragraph 63:

"However, once the Sheriff has issued a *nulla bona* return indicating that insufficient movables exist to discharge the debt, the creditor will need to approach a Court to seek an order permitting execution against the immovable property of the judgment debtor. The court will decide whether or not to order such execution having considered all relevant circumstances."

[29] It is common cause that after First Respondent received a *nulla bona* return in respect of movable property, he approached court to declare Applicant's immovable property executable. First Respondent has placed facts before this court on how that application was dealt with in the Magistrates' Court.

[30] In his opposing affidavit First Respondent makes the following averments which have not been denied by the Applicant:

“15. My application to declare the immovable property executable was granted on 17 March 2016, after the presiding Magistrate had asked my attorneys to make one further attempt to execute against movable property because the applicant had indicated during the course of the applications that he was in fact possessed of additional movable property against which execution could be levied.

16. My attorney attended to the Magistrate’s request and the Sheriff again returned a *nulla bona* return of service finding no movable property and the Applicant having failed to point out any movable property for attachment in satisfaction of the judgment debt.”

[31] This brings into sharp focus the question whether the whole legal framework around the sale in execution of immovable property which is a primary residence is intended to protect people against whom there is a judgment for payment of a sum of money, who, while being able to pay, refuse or neglect to do so. I do not think so.

[32] On 19 August 2015 Applicant filed an affidavit opposing the application for his immovable property to be declared executable in which the following is said at paragraph 13:

“AD PARAGRAPH 11 THEREOF

The content of this paragraph is denied. The Sheriff never went to my farm house for the purposes of attaching any movable property as he/she would have found plenty of property to be attached. I have 5 (five) vehicles all registered in my name, livestock and furniture. The claim of *nulla bona* is malicious and untrue and I put the Sheriff to the proof that on the farm there was nothing to attach (See Annexure “TYA1” to TYA5”).

[33] On his own showing the Applicant is more than able to pay the balance owing but has failed to do so. His failure to pay and therefore protect his home from being attached and sold by public auction by the sheriff has not been explained. Instead he embarks on unnecessary and obviously expensive litigation on an unsustainable basis that the court *a quo* did not have jurisdiction when it clearly did. This, in circumstances in which the Applicant has not provided any authority for the proposition that a litigant in a Magistrate’s Court must enquire into the value of the property for purposes of ensuring that the value thereof is within the monetary jurisdiction of that Court before it considers the application to declare the property executable.

[34] This is clearly an abuse of Court process which calls for stringent censure. The First Respondent has asked for costs on an attorney and client scale against the Applicant. The circumstances of this matter and the facts indeed call for such an order.

[35] Accordingly Applicant's application must fail.

[36] The following order will issue:

1. The application is dismissed;
2. Applicant is ordered to pay costs on as attorney and client scale.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

LOWE, J

I agree.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for Applicant: V V Sangoni

Instructed by: Milli Attorneys

GRAHAMSTOWN

Counsel for Respondent: D Dela Harpe

Instructed by: McMallun Attorneys

GRAHAMSTOWN

Head on: 23 August 2018

Delivered on: 20 September 2018