REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO. 4837/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

_____ _____
DATE SIGNATURE

In the matter between:

THE STANDARD BANK OF SA LTD Execution Creditor / Applicant

and

EAGLE CREEK INVESTMENTS 522 (PTY) LTD First Execution Debtor / Respondent
PRIME FUND MANAGERS (PTY) LTD Second Execution Debtor
PFM MEDICAL SCHEME MARKETING (PTY) LTD Third Execution Debtor
MASHELE G. F. Fourth Execution Debtor

JUDGMENT

OPPERMAN AJ:

[1] The Applicant seeks, pursuant to Rule 46(1)(a)(ii)[1] of the Rules of Court, to have certain immovable property owned by the Respondent, Erf [...] [...] ("Erf [...]"), declared executable in order for the Applicant to execute a judgment obtained by the Applicant against the Respondent.

[2] The Application is opposed by the Respondent as well as the second, third and fourth execution debtors (hereinafter collectively referred to as 'the Debtors').

AUTHORITY OF DEPONENT AND PERSONAL KNOWLEDGE

[3] The authority of the deponent to the Applicant's founding affidavit was challenged by the Debtors as well as her personal knowledge of the facts she deposed to.

[4] In determining the question whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must

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[1] "46 Execution - Immovables
(1) (a) No writ of execution against the immovable property of any judgment debtor shall issue until-
. . .
(ii) **such immovable property shall have been declared to be specially executable by the court** or, in the case of a judgment granted in terms of rule 31 (5), by the registrar: Provided that where the property sought to be attached is the primary residence of the judgment debtor. no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."

be authorised. The remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is not to challenge the authority in the answering affidavit but instead to make use of Rule 7(1) of the Uniform Rules of Court[2].

[5] The Debtors did not avail themselves of the procedure provided for in Rule 7(1), and it is thus not open to them to challenge the authority of the deponent to the Applicant's founding affidavit either in regard to deposing to affidavits or in regard to instituting the application. During argument this line of attack was abandoned.

[6] The Debtor's attack on the deponent's personal knowledge is without merit. In this matter, the personal knowledge of the deponent to the Applicant's founding affidavit is not relevant; what is relevant is whether or not the Applicant has made out a case on the papers and whether or not the Debtors have disclosed a defence to the relief sought by the Applicant.

COMMON CAUSE FACTS

[7] On 5 March 2013 the Applicant obtained judgment against the Debtors in terms of a written agreement ('the agreement') concluded between the Applicant and the Debtors on 13 December 2011 and made an order of court on 5 March 2013 under case number 2013 / 04837, in terms of which agreement:-

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[2] See Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) para [14]-[16] at 206, 207; Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705C-J; Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) para [18]-[19] at 624-625; ANC Umvoti Council Caucus and Others v Umvoti Municipality 2010 (3) SA 31 (KZP) para [27], [28] at 42, 43; FirstRand Bank Ltd v Fillis 2010 (6) SA 565 (ECP) para [12], [13] at 568, 569; unreported judgment of Opperman AJ, FirstRand Bank Limited v Home Build Investments and Marketing Services (Pty) Limited, C B Azar case no 2013 / 06030, Gauteng Local Division, Johannesburg.

7.1. The Debtors jointly and severally acknowledged their indebtedness to the Applicant in the total amount of R4 874 669, 84.

7.2. The Debtors undertook to make payment in full of their acknowledged indebtedness by the last day of March 2012.

7.3. In the event of a breach of the agreement by the Debtors, the Applicant was authorised to dispose of two immovable properties owned by the Respondent, Portion 1 of Erf [...] Louis Trichardt Township ("Erf [...]") and Portion 6 of Erf [...] Pietersburg Township ("Erf [...]"), and to appropriate the proceeds of the sale thereof to the indebtedness of the Debtors to the Applicant.

7.4. A certificate signed by any manager of the Applicant whose appointment and authority it would not be necessary to prove recording the indebtedness of the Debtors would be *prima facie* proof of such indebtedness.

[8] The Respondent is the owner of the immovable property (Erf [...]) that the Applicant seeks to have declared executable. The Debtors breached the agreement in failing to make payment as stipulated in the agreement. Erf [...] and Erf [...] were sold by the Applicant and the proceeds thereof reduced the indebtedness of the Debtors to R217 843,77 plus interest thereon at the rate of 9% per annum calculated daily and compounded monthly in arrears from 3 January 2014 to date of payment, and R3 715 3121,70 plus interest thereon at the rate of 11% per annum calculated daily and compounded

monthly in arrears from 25 December 2013 to date of payment (total of R3 933 165, 47).

[9] The Respondent has no movable assets to satisfy the judgment obtained by the Applicant against the Respondent and the Respondent's indebtedness to the Applicant, as evidenced by the Sheriff's returns of non-service and a *nulla bona* return of service in respect of the warrants of execution issued against the Respondent and the other execution debtors.

[10] Erf [...] belongs to the Respondent, a company, and is not the primary residence of the fourth execution debtor. The Applicant also has a mortgage bond over Erf [...] and the Respondent is indebted to the Applicant pursuant thereto.

[11] The Applicant does not seek to execute against the Respondent's immovable property pursuant to the agreement, which agreement does not refer to the immovable property. Instead, the premise of the Applicant's application is Rule 46(1)(a)(ii) and the judgment that the Applicant obtained against the Respondent constituted by the agreement that was made an order of court, the judgment not being settled and the Respondent not owning any movable assets to satisfy the judgement.

[12] The Debtors confined their argument in court to three issues and did not persist with all the arguments raised in their heads of argument. I deal with them hereunder.

Agreement made an order of court – Not a judgment

[13] The Debtors argued that Rule 46(1)(a)(ii) does not find application where the 'judgment' relied upon emanates from an agreement which was made an order of court by consent between the parties. No authority was referred to for purposes of this argument. It is difficult to understand why an agreement which was made an order of court would not constitute a judgment for purposes of the Rule.

Declaration of property executable only after movable property has been excussed

[14] In *Ledlie v Erf 2235 Somerset West (Pty) Ltd* 1992 (4) SA 600 (C) it was stated at 601H:

". . . It is also clear that a Court may declare immovable property executable if it has been shown to the satisfaction of the Court that the debtor does not have sufficient movable property to satisfy the writ. *Cape Town Council v Estate Jaliel* 1911 CPD 11; *Lansdowne Concrete, Etc, Co v Davids* 1927 CPD 132; *Dorasamy v Messenger of the Court, Pinetown, and Others* 1956 (4) SA 286 (D) at 290C-F."

[15] In *Absa Bank Ltd v Ntsane* 2007 (3) SA 554 (T) the following was stated at para [88]:

"[88] The Court faced with such an application should refuse to grant such an application unless and until the plaintiff has persuaded the Court by acceptable evidence that no other reasonable alternative exists to enforce its right." *Erasmus* *Superior Court Practice* B1 - [...] / 336

[16] With reference to Rule 46(1)(a)(ii), the Debtors have contended that despite the production of a *nulla bona* return, the Applicant has not

demonstrated that the Debtors have no movable or other assets other than Erf [...] to satisfy the Applicant's claim.

[17] The Debtors did not present any evidence of their own to support this proposition but instead referred to a certificate of indebtedness annexed to the founding affidavit in which reference is made to an Audi Q7 3.0 TDI VS Quattro ('the Audi'). The Audi was the subject matter of an instalment sale agreement which agreement was part of the total indebtedness and formed part of the settlement reached, which was made an order of court.

[18] There is no evidence at all that the Audi is still in the possession of the Debtors. If it were, one would have expected the Debtors to say so under oath. The deponent to the answering affidavit is Mr Gezani Freddy Mashele, the Fourth Execution Debtor. The *nulla bona* return records per (the Sheriff of Brits speaking) the following: '*Mr Mashele informed that the 1st, 2nd and 3rd Defendants no longer exist and that he has no movable/disposable property wherewith to satisfy the amount of the Writ or any part thereof*'. This, of course, constitutes *prima facie* proof. The Debtors elected not to place any evidence before this court to counter the factual accuracy of the *nulla bona* return.

[19] The court was also referred to a letter written by applicant's attorney which informs that certain furniture would be left outside the property if it was not going to be collected by a certain time on 14 December 2012. The exchange between the Sheriff and Mr Mashele quoted previously, occurred on 7 May 2013. Any furniture which might still have been available as at 7 May 2013 was not disclosed by Mr

Mashele to the Sheriff nor did the Debtors place any evidence before this court to suggest differently.

[20] The Applicant has filed an affidavit in terms of Chapter 10.17 of the Practice Manual. The property is not a primary residence. This court is satisfied that on the evidence before it, the Applicant has demonstrated that the Debtors have no movable or other assets other than Erf [...] to satisfy the Applicant's claim.

Breach of the agreement

[21] The Debtors deny that the agreement was breached. This denial is bald and unsubstantiated. A robust approach is required and the version is rejected. [3] This is warranted as :

21.1. The Debtors have never previously raised the denial of the breach;

21.2. The parties agreed in terms of the agreement which was made an order of court that any certificate issued under the signature of any manager of the applicant, shall be prima facie proof, not only of the amount owing but also of the fact of the breach of such agreement: and

21.3. In the event of a breach of the agreement by the Debtors, the Applicant was authorised to dispose of two immovable properties owned by the Respondent, Erf [...] and Erf [...], and to appropriate the proceeds of the sale/s thereof to the

[3] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E - 635C; Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) para [12], [13] at 275, 376; Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd 2011 (1) SA 8 (SCA) para [20], [21] at 14; Renier Nel Inc and Another v Cash On Demand (KZN) (Pty) Ltd 2011 (5) SA 239 (GSJ) at para [30], pp 245, 246.

indebtedness of the Debtors to the Applicant. This occurred. The Debtors did not apply to interdict these sales nor to set them aside once they had occurred. It can safely be assumed that this did not happen as the Debtors were in breach as alleged.

[22] Something was sought to be made of the incorrect reference in paragraph 20 of the agreement, to paragraph 19. Paragraph 20 is the breach clause and provides that if payment 'referred to in paragraph 19' is not made on due date, the balance of 'the indebtedness' would become due and payable. The reference to paragraph 19 is clearly an error and should be paragraph 18. Any confusion which might exist is removed when regard is had to clause 4 which defines 'indebtedness' as 'The Eagle Creek current account, the loan account, the Prime Fund account, the VAF account 40, the VAF account 41 and the VAF account 36'. It is clear that in the event of a breach, all monies owing would become payable.

CONCLUSION

[23] The Applicant is accordingly entitled to the relief sought by it.

ORDER

[24] I accordingly grant the following order:

24.1. Erf [...] [...], Registration Division LT, Province of Limpopo, measuring 1178 square meters in extent and held under title deed of transfer T16453/2007, is declared executable.

24.2. The registrar is authorised to issue a warrant of execution in respect of the immovable property described in paragraph 24.1 hereof.

24.3. The Respondent, 2nd, 3rd and 4th Execution Debtors are to pay the costs of this application as between attorney and client, jointly and severally, the one paying the other to be absolved.

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I OPPERMAN

Acting Judge of the High Court

Heard: 13 May 2015
Judgment delivered: 19 May 2015
Appearances:
For Applicant: Adv Ho'Lin
Attorneys: Jason Michael Smith Inc
For Respondent: Adv LCM Morland
Attorneys: Myburgh Attorneys