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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

....
DATE SIGNATURE

CASE NO: 14095/15

In the matter between:

M M	**APPLICANT**
And	
RESCUE ROD (PTY) LTD	**RESPONDENT**

And in the matter between:

RESCUE ROD (PTY) LTD	**APPLICANT**
And	
M M	**1ST RESPONDENT**
M I	**2ND RESPONDENT**
S M AND DAUGHTER WATER RETICULATION AND SEWER CC	**3RD RESPONDENT**

J U D G M E N T

KEIGHTLEY J:

INTRODUCTION

1. This matter involves efforts by a creditor, the respondent, Rescue Rod (Pty) Ltd (the creditor), to execute against immovable property (the Bushkoppies property) owned by the applicant, Ms M, for a debt incurred by a close corporation (the CC) of which Ms M's ex-husband (Mr M), was the sole member. To complicate matters further, Mr and Ms M were married in community of property, and Mr M assumed obligations as surety and co-principal debtor for the CC's debts to the creditor. The Ms subsequently divorced in September 2015.

2. The creditor obtained an order declaring the Bushkoppies property executable by default, after Ms M's attorneys withdrew and she failed to file an answering affidavit. When the Sheriff proceeded to effect the attachment of the property and its execution by way of a sale in execution, Ms M applied for, and was granted, an urgent stay of execution, pending an application for rescission of the order declaring the property executable.

3. The first application before me is the rescission application by Ms M. The creditor opposes the rescission application. In addition, it has filed a counter-application in which it seeks an order declaring Ms M to be jointly and severally liable with Mr M for payment of the balance of the debt, and for an order that Ms M be cited on the writ of execution authorizing the Bushkoppies property to be sold in satisfaction of the debt.

4. Before dealing with each of the applications, it is important to provide some detailed background facts underpinning the litigation.

FACTS

5. Ms M is in her sixties, her ex-husband is about 10 years her senior. The Bushkoppies property was the former matrimonial home. Ms M continues to reside there and it is her primary residence. Mr M was involved in the business of the CC. In May 2013, he bound himself as surety and co-principal debtor to the creditor for the debts of the CC. The creditor provided services to the CC in return for payment. However, it seems that the business of the CC ran into difficulty and by November 2014, it was indebted to the creditor in the amount of R163 787. 13. When payment was not forthcoming, the creditor instituted an application against the CC for its winding up. The parties to that litigation were the creditor, as applicant, and the CC as respondent. The application was issued on or about 16 April 2015 under the same case number as the present applications.

6. At that stage, Mr and Ms M were still married in community of property. In order to stave off the winding up application, Mr M entered into a Deed of Settlement (the Settlement) with the creditor. He did so in his representative capacity as regards the CC. However, the Settlement also contained provisions in terms of which Mr M bound himself in his personal capacity. The relevant terms of the Settlement may be summarised as follows:

    (a) The CC admitted its indebtedness to the creditor for the capital sum of the debt, interest and costs of the application in the sum of R10 000. 00.

    (b) Mr M acknowledged that he had bound himself as surety and co-principal debtor in May 2013.

    (c) The Settlement recorded that Mr M “herewith intercedes in these proceedings and acknowledges his indebtedness to the (creditor) as surety and

co-principle debtor *in solidium* with (the CC) for payment of the amounts recorded".

(d) The Settlement further recorded that: "Notwithstanding that (Mr M) has not been cited in these proceedings and is not a party to the liquidation application (Mr M) herewith consents to be bound by the Order of this Honourable Court and to judgment being entered against him in his capacity as surety and co-principal debtor ...".

(e) The CC and Mr M undertook to pay the indebtedness of R167 787. 13 "on or before the 30th June 2015 or upon transfer of the (CC's) property situate at ...." (there followed a description of two immovable properties registered to the CC, neither of which was the Bushkoppies property).

(f) On breach, the CC became entitled to issue out a writ "without further notice to the (CC) and/or (Mr M) for attachment of property in execution of the Order".

(g) The (creditor) was entitled "to approach the above Honorable Court on the same papers filed in this application, duly supplemented, for an Order as prayed for in the Notice of Motion." I point out in this regard that the Order prayed for was the winding up of the CC.

7. The Settlement was made an order of court on 6 May 2015.

8. The CC and Mr M did not comply with the terms of the Settlement. Accordingly, the creditor first proceeded to issue out a warrant of execution in respect of movables. However, the M's Trust filed interpleader proceedings claiming ownership of the attached movables, and consequently the execution proceedings in respect of movables failed to discharge the indebtedness.

9. During the course of 2015 Ms M instituted divorce proceedings against Mr M. A decree of divorce was issued on 15 September 2015. In terms of the settlement agreement that was made an order of court along with the decree of divorce, Ms M became the sole owner of the Bushkoppies property. The property was transferred into her name in October 2015. It had previously been registered in both of their names.

10. In February 2016 the creditor instituted an application in the High Court to have the Bushkoppies property declared to be executable. This application (the execution application) was again instituted under the same case number. The creditor cited the CC, Mr M and Ms M as the respondents. Although they were so cited, neither Mr M or Ms M were ever formally joined in the proceedings.

11. By the time the execution application was filed Mr and Ms M were no longer married, their joint estate was dissolved, and Ms M was the sole owner of the the Bushkoppies property.

12. Ms M filed a notice of intention to oppose the execution application. According to her founding affidavit in the rescission application, her attorneys requested a deposit of R35 000 to continue acting on her behalf. She says that, as a pensioner, she could not afford to make the payment, and her attorneys withdrew on 4 March 2016. She was not advised by her attorneys that the matter would proceed in her absence, and on an unopposed basis on 8 March 2016. After her attorneys withdrew she did not receive a notice of set down from the creditor informing her that the matter would proceed on the 8 March 2016. Ms M states that she was not aware that the matter would proceed. Although she had filed a notice of opposition, she never filed an answering affidavit in the proceedings.

13. The matter duly proceeded on the unopposed roll on 8 March 2016 in Ms M's absence, and an order was made declaring the Bushkoppies property to be executable. The order read as follows in relevant part:

> "The First and Second Respondent's 100% interest in (the Bushkoppies property) is declared executable"

14. The party cited as First Respondent in the execution application was Mr M, and the person cited as Second Respondent was Ms M. It is common cause that in the founding affidavit in the execution application the creditor had averred that the Bushkoppies property was owned and registered jointly in the names of both Ms. The creditor attached a copy of a title deed search to its founding affidavit in support of this averment. It is also common cause that that title deed search was out of date, as by the time the execution application was launched, Ms M was the sole registered owner of the property. It follows that the execution application was pursued, and the order was granted on the erroneous basis that both Mr and Ms M were the joint owners of the Bushkoppies property.

15. A writ of execution was issued pursuant to the order of executability. The writ was dated 24 August 2016. In it, only Mr M is cited as the judgment debtor. The writ was served on 5 October 2016. Ms M states that the attachment came as a shock to her, as she had not been served with an order declaring the property executable. She instructed her current attorneys to act on her behalf in defending her rights in the property. Following the intervention of her attorneys, the urgent application was launched to stay the auction of the property pending the institution of a rescission application by Ms M.

RESCISSION

16. Ms M applies for the rescission of the execution order. An important point I made earlier bears repeating: although Mr and Ms M were cited as respondents in the execution application, neither of them had been formally joined in the proceedings. This is important because the original parties to the proceedings were the creditor and the CC; and the relief originally sought was the winding up of the CC. The creditor did not originally seek relief in the form of obtaining a judgment debt against the CC, Mr M or Ms M. What prompted the shift away from the relief originally sought (i.e. winding up of the CC), and the citing of Mr and Ms M as parties to the proceedings, was the Settlement entered into by Mr M.

17. Of further significance is the fact that at the time the execution order was sought and granted, the joint estate had been dissolved by divorce, and Ms M was the sole owner of the Bushkoppies property, Mr M no longer holding any proprietary interest in it.

18. In her founding affidavit Ms M submitted that she was never a judgment debtor in respect of the debt upon which the creditor sought to execute against her property. When execution was sought, she was the sole owner of the property, and the creditor was not legally entitled to execute against her property. This, she submitted, constituted a *bona fide* defence to the execution application.

19. She averred further that she was not in willful default in respect of the execution application: she did not have the resources to pay her attorneys to prosecute her opposition to the execution application, and she did not know, and was not given notice, that the matter was to proceed on 8 March 2016 in her absence. She is a pensioner, and English is not her first language. Thus, she would not have been in a

position to conduct her own legal opposition to the execution application. Further, she pointed out that as the Settlement made reference to the transfer of two properties held by the CC in payment of the debt, she did not comprehend how the creditor could lawfully seek execution against the Bushkoppies property, which was now owned by her exclusively, and she assumed that there was some error on the part of the creditor in this regard.

20. At the hearing of the application, counsel for Ms M submitted in addition that the execution application was procedurally flawed as neither Mr nor Ms M had ever been formally joined in the proceedings, which, as I have already pointed out, had begun life as an application for the winding up of the CC. Counsel emphasised the fact that judgment had never been entered against Ms M seeking to hold her liable for the debt to the creditor. It was submitted that execution against Ms M's property could not properly be granted without a pre-existing judgment holding her liable for the debt. It was also argued that the execution application was fatally flawed in that the Bushkoppies property was no longer part of the joint estate (which had become dissolved on divorce), and that it was no longer held in co-ownership by Mr and Ms M. It was submitted that the order was erroneously sought and granted consequent on this fundamental flaw.

21. The creditor disputed that Ms M had made out a proper case that she had not been in willful default, labeling her explanation as being very weak. The creditor also relied on the fact that Mr M had entered into the Settlement during the course of the marriage. As the marriage was in community of property, the effect of him acknowledging his indebtedness to the creditor for the debts of the CC was binding on the joint estate.

Even though the marriage had subsequently been dissolved by divorce, the debts of the joint estate remained exigible from the former parties to the marriage. Thus, the creditor argued that it was entitled to obtain the declaration of executability against the Bushkoppies property, notwithstanding that it was now owned by Ms M. On this basis, the creditor disputed that Ms M had a *bona fide* defence to the executability order.

22. As to the failure to join Mr and and Ms M to the proceedings before instituting the execution application, counsel for the creditor submitted that such joinder was unnecessary because of the fact that in the Settlement Mr M had consented to intercede in the proceedings, and that he had consented to judgment being granted against him. Further, he had agreed that the creditor could approach the court, on supplemented papers for a further order.

23. In my judgment, this is a proper case in which to grant rescission. Of central importance is the fact that the order at issue has the very real potential to deprive Ms M, who is a pensioner, of her primary residence. This is a significant factor when viewed in the context of the remaining facts of this particular case.

24. It is so that even after a marriage in community of property has been terminated, unpaid debts of the joint estate may be recovered from the now separate estates of the previous parties to the marriage.[1] Thus, the mere fact that Mr and Ms M's marriage ended after the Settlement was made an order of court, does not mean that the creditor may not pursue a claim against Ms M's estate for her share of the debt.

[1] *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 476 J - 477C

25. However, there are important riders to this. In the first place, it seems that the liability of the spouse who did not incur the debt is limited in that :

> "... such a debt may be enforced by the creditor concerned for the whole amount outstanding against the estate of the spouse who incurred it and for half the amount against the estate of the other spouse."[2]

26. By the time that the execution application was instituted, the M's were divorced, and the property was no longer registered to them jointly. There was no acknowledgement of this in the execution application. In fact, in the founding affidavit the Ms are described as being still married to each other in community of property, and being the joint registered owners of the Bushkoppies property. It was on that basis that the order sought was to have the 100% interest by Mr and Ms M declared to be executable.

27. In my view, the entire basis for the particular relief sought by the creditor, and granted by default, was erroneous: the parties were no longer married in community of property, and Ms M's interest in the property could not be attached and executed against on that basis, as was asserted in the founding affidavit in support of the execution applicaiton. In addition, Mr M no longer held any interest in the Bushkoppies property. This being the case, there was simply no basis on which the court could properly have declared his interest in the property executable. The transfer of the property into Ms M's name subsequent to the divorce put paid to this. Had the court known that the parties were no longer married, and that Mr M no longer had an

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[2] *Nedbank Ltd v Van Zyl*, *op cit*. The court did not find it necessary to express any view as to the precise nature of the post-nuptial liability of the spouses for community debts. However, in *BP Southern Africa (Pty) Ltd v Viljoen en 'n Ander* 2002 (5) SA 630 (OPA) at 637E, the court appeared to endorse this view by finding that the wife in that case was liable for "at least the half" of the communal debt in those circumstances.

interest in the property, it could not possibly have granted the order in the terms that it did.

28. This in itself, in my view, is sufficient to establish a foundation for setting aside the order of executability.

29. Even if it could be argued that a limited form of an order of executability would have been competent against the Bushkoppies property in respect of Ms M's obligation for the joint debt, this does not assist the creditor. For one thing, the order it sought and was granted was an order for the full debt in respect of the M's joint interests in the property. The creditor did not seek to make out an order for executability against Ms M for her half share of the debt that was incurred by Mr M. Even it it had, Ms M was never formally joined in the execution application. By the time that application was instituted, she was divorced, and was entitled to be joined in her individual capacity. Any "intercession" made by Mr M in the Settlement, could not be held to cover her, post-divorce, so as to excuse the creditor from its procedural obligation to join her as a fully fledged party to the execution proceedings. The creditor sought to argue that such joinder was not necessary, as Ms M's interest in the execution application was merely financial. It relied in this regard on *Strydom v Engen*[3] in which it was held that in proceedings where the validity of a suretyship was in dispute, a wife in community of property did not have a substantial and direct interest in the outcome, and thus her joinder was not necessary. In the present case, however, the execution application had profound implications for Ms M's constitutional right to adequate housing under s26 of the Constitution. There can be no question that she had a substantial and direct

[3] 2013 (2) SA 187 (SCA) at para [24]

interest in the proceedings declaring that her property could be executed for a debt incurred by her ex-husband while they had been married in community of property.

30. Furthermore, in its execution application the creditor relied expressly on Mr M's judgment debt. In a section headed "Judgment against First Respondent" in the founding affidavit in the execution application, the creditor sets out the history of the Settlement and its terms. It is clear from the averments contained in this section that the creditor relied on the Settlement constituting a judgment debt against the First Respondent, who was Mr M. The creditor does not claim to have obtained a judgment against Ms M. In fact, by virtue of its counter-application, the creditor implicitly acknowledges that it has never obtained judgment against Ms M for the debt owed to it. It has been stated as a trite principle that:

> "generally, property cannot be made the subject of an order of attachment in pursuance of a writ of execution unless judgment has been taken against the debtor."[4]

31. More recently, a full court of this Division found that a money judgment is "the cornerstone of the order for execution; it is a necessary averment that forms part of the cause of action to obtain an order for execution."[5] A warrant of execution obtained after divorce may be set aside in circumstances where the warrant is based on a judgment taken against an ex-husband for debts incurred during the existence of a marriage in community of property on the basis that:

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[4] *Breedenkamp v Comax Wholesalers (Pty) Ltd* 1965 (2) SA 876 (C) at 879B

[5] *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another* [2018] ZAGPJHC 487 (12 September 2018)

"it necessarily involves execution being levied upon property of a person without judgment having been taken against that person for the amount for which execution is levied."[6]

32. For this reason, too, in my view, the declaration of executability granted by default against Ms M's property falls to be rescinded. The creditor based its execution application on the full amount of Mr M's debt in the absence of a judgment against Ms M, and notwithstanding that Ms M, who was now the sole owner of the property, stood to be severely prejudiced in respect of her constitutional right to adequate housing in consequence of the order.

33. From what I have stated above, it should be clear that the execution application was fundamentally flawed in a number of respects. As I have indicated, some of these flaws constitute sufficient reason to set aside the execution order on the basis that it was erroneously granted. At the very least, the flaws establish a *bona fide* basis upon which Ms M may defend the application for an order of executability against her property.

34. This is particularly so in circumstances where Ms M's right to adequate housing is so directly implicated. Courts are enjoined to be constitutionally vigilant in granting orders of executability by default. In this case, Ms M did not file an answering affidavit and so the court had no information before it about her personal circumstances and the impact that an order of executability would have on her constitutional rights. There is no evidence that after her attorneys withdrew Ms M was given notice of the set down by the attorneys for the creditor. She was thus not afforded a proper opportunity to attend the proceedings and apprise the court of her personal circumstances. I am satisfied

[6] *Breedenkamp v Comax Wholesalers (Pty) Ltd*, above, at 879C

that in these circumstances, she was not in willful default. Given the importance of her right of access to adequate housing, she ought to be afforded a proper opportunity to place before the court her defence to the execution application, and to provide the court with reasons why, given her personal circumstances and the history of the debt, her property should not be declared to be executable.

35. For these reasons, I find that the application for rescission should be granted.

36. I turn now to the question of the counter-application.

COUNTER-APPLICATION

37. The relief sought in the counter-application is based on Ms M's alleged joint and several liability for the indebtedness of the joint estate arising out of the Settlement entered into by Mr M that was made an order of court.

38. The counter-application is not made conditional on the success or failure of the application for rescission: in the counter-application the creditor stands by its submission that the rescission application is without merit. It asks the court, in effect retrospectively, to make an order declaring Ms M to be liable jointly and severally with Mr M and the CC under the Settlement that was made an order of court on 6 May 2015. It lists a new amount of indebtedness in this regard: the amount of indebtedness is now R98 787. 13, and no longer the amount cited in the Settlement and in the execution application. The creditor gives no explanation for this new amount of indebtedness in the papers filed in the counter-application, and Ms M takes issue with this. The creditor further seeks to have Ms M cited in the writ of execution authorising the sale of the Bushkoppies property.

39. It is not clear from the founding affidavit quite what the relationship is envisaged to be between the counter-application and the rescission application, particularly in the event that, as has now occurred, the rescission application is granted. The effect of the execution order being rescinded is that the execution application remains open for determination, and Ms M is now entitled to file an affidavit opposing the application. One of the defences foreshadowed in her rescission application was that no judgment debt was ever made against her. The purpose of the counter-application seems to be to circumvent the consequences of Ms M succeeding in her rescission application by asking the court nonetheless to grant the very order that was absent when the creditor instituted its execution application. The creditor does this in circumstances where it does not abandon or withdraw its execution application. Instead, it seeks to avoid the consequences of rescission by applying for relief that ought properly to be determined in the execution application. In my view, this is an improper basis upon which to approach the court.

40. There are further difficulties with the counter-application. The counter-application is filed under the same case number as the original application for the winding up of the CC. As I have already indicated, Ms M was never properly joined in the proceedings that led to the execution order. This is one of the reasons why that order was open to rescission. The counter-application simply seeks to circumvent this fundamental procedural flaw by fashioning the declaratory relief sought in the form of a counter-application to an application (the rescission application) brought by Ms M herself. The fact of the matter is that Ms M was placed in the position of having to seek a rescission precisely because, among other things, the creditor obtained an order of executability without properly joining her, as the owner of the property, to the proceedings. It would

be improper, in my view, for the court to overlook this fundamental procedural irregularity by entertaining the counter-application on the basis that the joinder issue is irrelevant because the creditor is simply responding to Ms M's application.

41. There is also the not insignificant fact that there is no proof that Mr M was ever served in the counter-application, although he is cited as a respondent. Counsel for the creditor conceded that he could not produce any proof or make any submissions to the contrary in this regard. The failure to serve the counter-application on one of the parties cited means that the application is not properly before the court.

42. There are no facts placed before the court in the counter-application to establish the quantum of the debt for which the creditor seeks to have Ms M declared liable. The Settlement records a debt of R167 787.13, yet the creditor wants an order that Ms M is liable to it under the Settlement in an amount of R98 787. 13. No explanation is given as to how this amount is arrived at. Ms M disputes the amount of the indebtedness claimed for this reason, and correctly so in my view. This in itself is sufficient to deny the creditor the relief it seeks in the counter-application.

43. There is a further problem with the counter-application: the creditor does not only seek to obtain a money judgment against Ms M for the Settlement debt, but it also seeks to have Ms M cited in the writ of execution. It is not clear from the founding affidavit in the counter-application whether or not the creditor seeks a new order of executability. In essence, however, given the fact that I have ruled that the execution order must be set aside, it follows that a new order of executability will have to be made in order to secure a writ of execution and thus to give effect to the relief that the creditor expressly seeks in the counter-application.

44. Since the original executability order was granted (which order has now been set aside), and following on a long line of cases dealing with the protection of the right to adequate housing in the context of executions against the primary residences of judgment debtors, the Uniform Rules of Court have been amended to give practical effect to that protection.

45. Rule 46A now governs the circumstances in which an order of executability may be made against Ms M's property. This rule applies: "Whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor".[7] Further, a court considering an application for an order of executability must, among other things, consider alternative means of settling the judgment debt other than executing against the primary residence. A court may not authorise execution unless, having considered all relevant factors, it considers that execution is warranted.[8] Various procedural obligations are placed on the judgment creditor under Rule 46A in terms of what it must file as part of its application for an order of executability.[9] Presumably because the counter-application was filed in 2016, long before the Rules were amended, it does not comply with these new prescripts. The fact remains, however, that if the creditor wishes to succeed now with an order permitting it to execute against Ms M's property, it must comply with these requirements. Further, any decision by the court must be in accordance with Rule 46A as it now stands.

46. The creditor does not address these issues in its counter-application, not even by way of supplementation of its original founding affidavit in that application. This demonstrates, in my view, that the creditor did not properly think through the counter-

[7] Rule 46A(1)
[8] Rule 46A(2)(a)(ii) & (b)
[9] See Rule 46A(5)

application, and its relationship with the rescission application. The creditor failed to appreciate that if the rescission application was granted, the original writ of execution would fall away, and a fresh order of executability would have to be obtained before Ms M could be "inserted" (which is the terminology used). The creditor also failed to appreciate that in considering whether or not to grant an order of executability, the court would be guided by the requirements now laid down in Rule 46A.

47. These considerations are not merely of procedural importance. They have great material significance for Ms M. The consequence of the counter-application is that she stands to lose her primary residence. She has constitutional rights that require protection in these circumstances. This is particularly so in the present case where Ms M did not incur the debt in the first place; the debt was not incurred to fund the purchase of the property; the Settlement made provision for an alternative means of recovering the debt (viz. the transfer of the two properties that are still registered in the name of the CC); while the CC is in liquidation, it is not clear what steps the creditor has taken to seek to recover its debt from the principal debtor's estate; Ms M is now the sole owner of the property and, as a pensioner, she is reliant on it as her primary residence. These are circumstances that the court is enjoined to consider and properly weigh before it can lawfully declare Ms M's property to be executable. I would be failing in my obligations in this regard were I to consider granting the creditor the relief it seeks in the counter-application in the circumstances prevailing in this case.

48. For all of these reasons, I find that the counter-application is ill-founded, and that the creditor is not entitled to the relief it seeks.

ORDER

49. I make the following order:

1. The order granted by Vally J under case number 2015/14095 on 8 March 2016 is hereby rescinded.

2. The respondent in the rescission application is ordered to pay the costs of the rescission application.

3. The counter-application by the respondent in the rescission application is dismissed with costs.

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R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard	**: 10 SEPTEMBER 2018**
Date of Judgment	**: 09 OCTOBER 2018**
Counsel for the Applicant	**: N STRATHERN**
Instructed by	**: KAREN SHAFER ATTORNEYS**
Counsel for Respondent	**: LOUW**
Instructed by	**: HUTCHEON ATTORNEYS**