



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 27105/2019

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

Signature: **Date:** 12

In the matter between:

TRANSACTION CAPITAL BUSINESS SOLUTIONS (PTY) LTD Plaintiff

and

BUSI NTULI COMMUNICATIONS (PTY) LTD First Respondent

LEMMY BIODUN ADEBULE Second Respondent

BUSISIWE COMFORT ADEBULE Third Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy hereof to Caselines.

MOULTRIE AJ

- [1] The applicant applies for an order requiring payment of amounts owed to it by the respondents pursuant to a court order granted on 20 August 2021, together with ancillary relief, including an order declaring certain immovable property registered in the name of the second respondent and mortgaged as security for the indebtedness specially executable and authorising execution thereon without first proceeding against the respondents' moveable property ("the special executability order"). It is common cause that the immovable property is the second and third respondents' primary residence.
- [2] In their answering papers, the respondents initially sought to resist the money judgment sought on a plethora of grounds, including (i) *lis alibi pendens*; (ii) the status of the applicant as a registered credit provider; (iii) lack of authority to conclude the underlying credit agreements upon which the court order based; (iv) inadmissibility of various documents annexed to the founding papers as evidence on the grounds of non-compliance with the Electronic Communications and Transactions Act, 25 of 2002; (vi) the enforceability and scope of the suretyships executed by the second and third respondents; and (vii) overcharging of penalties and interest. At the hearing of the matter, however, the respondents' counsel quite properly informed me that the only ground of defence persisted with is the final one raised in the answering affidavit regarding the appropriateness of the grant of the special executability order.
- [3] In my view, the point is well-taken by the respondents.
- [4] It is trite that it is, in general, inappropriate for execution to be levied against immovable property without an attempt first having been made to satisfy the judgment debt by recourse to the judgment debtor's movable property. This general principle is reflected in Rule 46(1)(a)(i). Execution may, however, be levied against immovable property in the first instance should a court specifically make an order under Rule 46(1)(a)(ii) allowing such execution. Furthermore, Rule 46A applies in circumstances where the immovable property in question is the primary residence of the judgment debtor.

- [5] Rule 46A(2)(b) stipulates that “a court shall not” grant a special executability order in respect of a judgment debtor’s primary residence “*unless the court, having considered all relevant factors, considers that execution against such property is warranted*”. Of particular relevance in the current instance is Rule 46A(2)(a)(ii), which requires that a court considering an application for a special executability order “*must ... consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence*”.
- [6] While it is undoubtedly correct that there are many instances where the evidence canvassed in the papers serving before a court would be sufficient to satisfy it that a special executability order against a judgment debtor’s primary residence without recourse first to their other assets is warranted, I do not consider that to be the case in this instance.
- [7] The allegations in the founding affidavit in support of the special executability order are contained in paragraphs 79 to 106 of the founding affidavit. Apart from the allegation in paragraph 82 regarding the inutility of a certain life insurance policy ceded by the second respondent for the purposes of execution, as the second respondent is still alive and the applicant can only claim thereon upon his death (and which I accept), the allegations that are of particular relevance to Rule 46A(2)(a)(ii) (i.e. alternative means of satisfying the judgment debt) are those contained in paragraphs 86 and 87 of the founding affidavit.
- [8] These allegations are as follows: (i) that “*[t]he applicant is rarely (if ever) successful in executing moveable assets ... for the simple reason that these assets are mostly still under financing by another financing / banking institution, thus granting them the right of preferred creditor against the proceeds of the sale thereof*”; (ii) that “*there is no proof or record in the applicant’s database of any mortgage debt which has ever been settled in full historically by executing against the movable property of the debtor*”; and (iii) that “*it is most likely that the proceeds of the movable assets will not satisfy the total debt*”.
- [9] To these purely speculative allegations (which the founding affidavit makes no

attempt to tie to the actual circumstances of these particular respondents) is added the somewhat opportunistic and patronising allegation that prior execution against movable property would leave the respondents “*in an even worse position as opposed to merely allowing the applicant to execute against the immovable property*”. Plainly, the respondents themselves do not agree.

- [10] What is conspicuously absent from the founding papers is any allegation or evidence that tends to demonstrate that the respondents’ movable assets will indeed be insufficient to satisfy their indebtedness.
- [11] Meritorious as I consider the respondents’ contentions to be, however, I do not consider that they justify the dismissal of the application altogether, or its postponement, as they contend. I also do not consider that it would be appropriate to grant only partial relief (i.e. the money judgment) without the order of special executability, as that would (as the applicant correctly points out in paragraph 87.3 of the founding affidavit) potentially only result in the unnecessary incurrence of legal costs in the event that it indeed transpires that the respondents’ moveable property is insufficient to satisfy the judgment debt.
- [12] In my view, the respondents’ valid objections are most appropriately addressed by the inclusion in the order of a requirement that execution of the judgment debt must first be levied against the respondents’ movable property and authorising a warrant of execution against the immovable property only in the event that such movable property is insufficient to satisfy the judgment debt. This is similar to the order contemplated in Rule 46A(8)(d) and is an order that I consider to be appropriate in terms of Rule 46A(8)(i).
- [13] I canvassed my concerns with counsel for the applicant, who undertook to prepare a draft order incorporating such a requirement. Having been furnished with the draft order containing the relevant requirement, the updated amount of the indebtedness (which comported with the content of a certificate of balance dated 3 October 2022 and which had been uploaded onto the Caselines file for the matter) and an amended reserve price, I confirmed the content thereof with the respondents’ counsel on the limited basis that it represented an appropriate order to make in the event that I was minded (as I

am) not to dismiss the application (or the special executability relief), or to postpone the application.

[14] I am satisfied with the content of the draft order. In particular, I am satisfied that the limited basis upon which the applicant has successfully resisted the application does not justify departing from the various contractual stipulations requiring the respondents to pay the applicants costs on the attorney and client scale.

[15] In the circumstances, I make an order in terms of the draft submitted by the applicant, which is annexed hereto marked "X".

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 3 October 2022

JUDGMENT SUBMITTED FOR DELIVERY: 12 October 2022

APPEARANCES

For the Applicant: RA Carvalheira

Instructed by: EVDM Attorneys

For the Respondents: S Aucamp

Instructed by: Ledwaba Mazwai Attorneys