THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 406/2017

In the matter between:

BONGILE SAMUEL NKOLA **APPELLANT**

and

ARGENT STEEL GROUP (PTY) LIMITED

t/a PHOENIX STEEL **RESPONDENT**

Neutral citation: *Nkola v Argent Steel* (406/2017) [2018] ZASCA 29 (26 March 2018)

Coram: Lewis, Saldulker and Swain JJA and Pillay and Makgoka AJJA

Heard: 13 March 2018

Delivered: 26 March 2018

Summary: A judgment debtor who claims that he has sufficient movable assets to satisfy the debt cannot avert execution against his immovable property unless he makes the movables, including incorporeals, available for execution.

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ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Beard AJ and Beshe and Lowe JJ concurring, sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Lewis JA (Saldulker and Swain JJA and Pillay and Makgoka AJJA concurring)

[1] The issue in this appeal is whether a judgment creditor is entitled to have two immovable properties belonging to the debtor declared specially executable when the movable assets of the debtor are alleged to exceed the value of the judgment debt. The parties have been locked in litigation for several years. The appellant, Mr B S Nkola, has an admitted liability to the respondent, Argent Steel Group (Pty) Ltd t/a Phoenix Steel (Argent). The court of first instance (the East London Circuit Local Division of the High Court – Jacobs AJ) granted the application and declared the properties, both residential, executable.

[2] Jacobs AJ gave leave to appeal to a full court of the Eastern Cape Division, Grahamstown. The full court (Beard AJ, Beshe and Lowe JJ concurring) dismissed the appeal. Mr Nkola has brought a second appeal with the special leave of this court. The argument he makes is that he has substantial movable assets in the form, largely, of shares in companies that he controls, but also expensive motor cars, and that Argent should have obtained execution in respect of these before seeking execution in respect of the immovable properties. He proffers no explanation as to why he has not realized these assets in order to pay his admitted liability. His argument assumes that the creditor, Argent, must find these assets, and that he is under no obligation to make them available for execution. I shall consider the

essential facts giving rise to the litigation before discussing the argument that Mr Nkola makes.

[3] The judgment debt is in the sum of R914 712, plus interest and costs. It arose from a deed of suretyship that Mr Nkola signed in 2008 in favour of Argent, guaranteeing the obligations of a company controlled by him, School Furniture and Timber Products (Pty) Ltd (School Furniture), to which credit facilities had been extended by Argent. School Furniture did not honour its obligations to Argent, which claimed R2 851 504 from Mr Nkola as surety.

[4] In July 2011, Argent applied for and was granted a default judgment against Mr Nkola in the sum of R914 712. Mr Nkola's application for rescission of the judgment was dismissed. Argent first tried to execute against the movable property of Mr Nkola. The sheriff attached household furniture at one of his houses in October 2013. His return stated that Mr Nkola was unable to pay the judgment debt, and that goods described by him in an inventory had been attached. Mr Nkola's wife filed an affidavit shortly after the sheriff's return was made claiming that the furniture and household goods belonged to her. The goods were released from attachment.

[5] On 17 January 2014, Argent brought the application under consideration for a declaration that the two immovable properties be declared specially executable. However, the parties entered into a settlement agreement in May 2014, in terms of which the latter would pay R100 000 a month to Argent to settle the debt. The agreement was made an order of court and Mr Nkola consented to execution in the event of his default. Mr Nkola failed to pay a single instalment.

[6] As I have said, Mr Nkola has throughout, including in this appeal, argued that before the immovable properties could be sold in execution, his movable assets should have been attached and sold in execution. It is of course correct that in executing a judgment, a debtor's movable property must be attached and sold to satisfy the debt before the creditor can proceed to execute against immovable property. Only if they are insufficient to fulfill the debt may a creditor proceed against immovable property. The common law rule is given effect in rules 45 and 46 of the Uniform Rules of Court.

[7] Rule 45(3) requires the officer of the court executing the order to demand payment of the debt by the debtor, and failing payment, 'demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy' the writ of execution, and failing such pointing out, search for such property. The rules specify how incorporeal movable property is to be attached.

[8] There is no evidence on record that any movable assets, corporeal or incorporeal, were pointed out by Mr Nkola to the sheriff. Yet in his answering affidavit in the application, he claims to have 'more than sufficient movable assets of significant value (far in excess of the judgment debt) against which the applicant can execute should it choose to do so, without having to execute against my immovable properties.' Mr Nkola continued:

'I am the shareholder in five active companies . . . .The applicant would be at liberty to execute against any/all of my shares or loan accounts in these companies . . . but which attachment has not been done for reasons which are not apparent to me presently. I have other movables too, which should be excussed, over and above my said shares and loan accounts (in four of aforementioned companies these are valued at the sum of R2,763,00.00) These other movables of mine are, inter alia, motor vehicles (valued at R1,597,617.00), furniture and fittings . . . and a Liberty Life retirement annuity policy . . .'.

[9] Mr Nkola went on to say that, although he owned assets of significant value, he could not afford to pay the instalments that he had undertaken to pay under the settlement agreement for various reasons. But, he said, when certain problems had been resolved (which he anticipated would occur in December 2014), he would be able to settle the debt to Argent.

[10] The question that springs to mind immediately is why Mr Nkola, possessed of such wealth, did not dispose of his incorporeal property and pay the admitted debt to Argent. His stance is that Argent must seek out the movables and sell them before attempting to execute against his immovable properties. He would place the duty on the judgment creditor instead of resolving his financial problems himself.

[11] I consider that the common law and the rules place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point these

out and make them available. The sheriff's return read together with Mr Nkola's 'defence' raised in his answering affidavit, show him to be a 'tricky' debtor of the kind referred to by Voet 42.1.42 (in Gane's translation), cited by Wunsh J in *Silva v Transcape Transport Consultants & another* 1999 (4) SA 556 (W). Voet wrote:

'Generally the judgment debtor himself is asked to point out to the person making the execution the property which he wishes to be taken and sold off with a view to the securing of a judgment debt. If he refuses to do so or does so in a tricky manner or points out what is not enough, the court servant himself seizes at his discretion those things from which the money can most readily be made up. He does so up to the limit of the debt.'

[12] Wunsh J held in *Silva* that rule 45 did not remove the court's discretion. He considered that, because the debtor in that matter had not pointed out movable property that was available to satisfy the judgment debt, he had behaved in a tricky manner, and had deliberately frustrated the creditor's efforts to obtain payment. Wunsh J said (at 563D-E):

'This is pre-eminently a case where the interests of justice do not dictate that the execution of the judgment should be stayed and a case where execution should proceed against the [debtor's] immovable properties.'

Silva was endorsed in *Tirepoint (Pty) Ltd v Patrew Transport CC & others* [2012] ZAGPJHC 34; 2012 JDR 0417 (GSJ).

[13] Mr Nkola argued nonetheless that the sheriff had not issued a *nulla bona* return and that it was common cause that he had movable assets that he could use to satisfy the debt. Rule 46 deals with execution against immovable property. Rule 46(1)*(a)*(i) provides that no writ of execution against immovable property shall issue until a return has been made that the debtor does not have sufficient movable property to satisfy the writ, or (ii) the immovable property is declared specially executable by a court. The requirements of sub-rules (i) and (ii) had not been met since there was no *nulla bona* return, it was argued. The submission was that sub-rules (i) and (ii) have as a matter of practice been read to require that there must be a *nulla bona* return before immovable property can be declared specially executable.

[14] Counsel for Mr Nkola cites as authority for this proposition two judgments: *Firstrand Bank Ltd v Folscher & another and similar matters* 2011 (4) SA 314 (GNP)

and *Nedbank v Molebeloa* [2016] ZAGPPHC 863. He argued that these judgments have changed the common law, reflected in *Silva*. However, both those cases deal with a completely different factual matrix. They follow on the judgments in the Constitutional Court which deal with the right to housing, which might be jeopardized where execution is permitted in respect of a debtor's primary residence: *Jaftha v Schoeman & others, Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC) and *Gundwana v Steko Development CC & others* 2011 (3) SA 608 (CC). The decisions of the Constitutional Court are confined to execution in respect of a debtor's primary home and bring the law in line with the constitutional right to housing. See in particular *Mkhize v Umvoti Municipality & others* [2011] ZASCA 184; 2012 (1) SA 1 (SCA) para 26 where this court said that the object of judicial oversight is to determine whether rights in terms of s 26 of the Constitution (the right to adequate housing) are implicated.

[15] What the sub-rule requires, as a result of these decisions, is that in all cases where a debtor's home is in issue, a court must look at the circumstances of the debtor and exercise a discretion. Rule 46(1)*(a)*(ii) was amended so as to include a proviso 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'. The proviso reflects the principle that a poor person who runs the risk of losing a home should not be placed in jeopardy without a proper consideration of his or her circumstances.

[16] In exercising her discretion in the court of first instance, Jacobs AJ took into account all Mr Nkola's circumstances as set out in his answering affidavit. These included the fact that he said that he was a person of considerable means and that the debt had been outstanding since July 2014, despite the fact that he said that his liquidity problems would be resolved by the end of that year. Mr Nkola, on his own account, is not the kind of person who qualifies for the protection required by *Gundwana*.

[17] The full court appropriately did not interfere with the exercise of the discretion by the court of first instance. It was exercised after proper consideration was given to Mr Nkola's personal circumstances. The fact that one of the houses was his and his

family's primary residence, and the other that of his elderly father, is of no consequence: he had the means to avert the execution of the judgment debt and chose not to pay his admitted liability. There is no justification in this matter to read the requirements of rule 46(1)*(a)* conjunctively. 'Or' need not be read as 'and' save where a debtor is indigent, has insufficient assets to satisfy the debt and is at risk of losing his or primary residence.

[18] And in any event, the sheriff's return dated 11 October 2013, which preceded the agreement of settlement, made it clear that he had demanded payment of the debt by Mr Nkola who did not make any movable asset available for execution such that there would be satisfaction of the debt. The return met the requirements of rule 46(1)*(a)*i.

[19] There is no justification for interfering with the exercise of her discretion by Jacobs AJ, as the full court rightly found.

[20] Accordingly, the appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	H E de la Rey (Heads of Argument prepared by C A Renaud) Instructed by: Neville, Borman & Botha, Grahamstown Bock Van Es Attorneys, Bloemfontein
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