

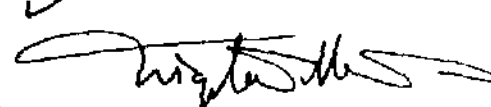
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IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 27624/05

DATE: 2007/02/15

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 DATE 3 APRIL 2007 SIGNATURE	

In the matter between

ABSA BANK LIMITED

Applicant

and

MOSALA SEKWATI BENNET

First Respondent

MOSALA GLORIA ANGEL

Second Respondent

JUDGMENT

WILLIS, J: The applicant seeks an order that certain immovable properties be declared executable. The first and second respondents are married to each other in community of property. The first respondent in this application agreed to stand as surety for the debts of the first defendant in the main action. Summary judgment proceedings were brought in that main action, and summary judgment was granted as against the first and second defendants in that action, for the sum of R466 687.48. The applicant obtained a *nulla bona* return of service

against the moveable property of the first respondent.

The current application was launched to execute against the properties of the first respondent, both of which are residential in nature. The first and second respondents reside at Erf 715 Finsbury Township (referred to as the "Finsbury Property"), which property forms part of the subject matter of this particular application.

The respondents allege that the eldest school-going child of theirs resides at the Dobsonville property "the Dobsonville property", which is Erf 11237 Dobsonville township, which is the other property which forms part of the subject matter of these proceedings. This property, it is alleged, is close to the school which that child was attending at the time of the bringing of this application.

The Finsbury property was purchased by the second respondent, who is employed by the Lerathong Hospital, which is managed and controlled by the Gauteng Provincial Government. The second respondent receives a housing subsidy in an amount of R346 per month. The Finsbury property apparently currently has a bond registered over it in favour of the Standard Bank, whereas the Dobsonville property is bond free.

Neither of the properties were acquired with monies loaned by the applicant to the first respondent. The monies were loaned for the purposes of a business venture, which the first respondent engaged in with other parties, being the first defendant in the main action.

Unsurprisingly counsel for the respondents has relied on the cases of *Nedbank Limited v Mashiya and another* 2006 (4) SA 422 (T) and *Jaffha v Schoeman and Others* 2005 (2) SA 140 (CC). Equally unsurprisingly the

applicants have relied on the cases of *Nedbank Limited v Mortinson* 2005 (6) SA 462 and *Standard Bank v Saunderson* 2006 (2) 264 (SCA).

Of course, the declaration of the properties as executable will visit hardship upon the respondents but I do not understand it to be the law that the mere existence of hardship or "hard luck stories" justifies the prevention of an order being made declaring the property executable.

The amount that is owing in respect of the judgment debt can hardly be described as trivial. There is nothing in the papers to suggest that some other less burdensome method of liquidating the debt is reasonably available. There has been no tender and no indication that for example, the debt could be liquidated swiftly in a matter of a few months, out of income which either of the parties may earn or generate.

In my view to refuse to grant the order in the circumstances would undermine the entire system of property ownership and the related issue of "collateral" which may arise from property ownership, which is extremely important. It is important not merely to look at the hardship which inevitably, and indeed as almost always will result from a residential property being declared executable. One must also consider the wider policy issues. As I understand it, throughout the world one of the reasons why home ownership is encouraged across all classes is precisely because of the collateral value that it provides. It is the collateral value of property which enables person to borrow money to start businesses, which will enable them in turn to increase their standard of living and their general level of affluence. It can often be that the collateral value of immovable property can redound to the benefit of families who could not otherwise afford to send children to university. Money

can be borrowed against the security of that immovable property.

Even if mortgage bonds are not registered over immovable property, specifically with the view to the granting of loan finance for the particular venture in question, the fact remains that deeds office searches can give banks a reliable indication as to the nett worth of individuals, and in turn their financial strengths in the event that they are unable to meet debts in respect of which they have incurred obligations.

In my opinion the wider issues which touch upon this case deserve to be considered, and balancing these out I can see no reason to undermine the entire system of the registration of immovable property, and the consequences that attach thereto, both positive and negative.

Accordingly I am satisfied that having regard to all the circumstances of this particular case the applicant should succeed in the relief which it seeks. Accordingly an order is made in terms of paragraph 1 (including sub-paragraphs 1.1 and 1.2), 2 and 3 of the notice of motion dated 19 June 2006.

COURT ADJOURNS