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DISPUTE RESOLUTION
ALERT

IN THIS ISSUE >

Executing against immovable property when movable property can satisfy the judgment debt

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Executing against immovable property when movable property can satisfy the judgment debt

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The legal principles relating to execution against movable property are more or less settled, less so the law relating to execution against immovable property. This is mainly because the right to housing is enshrined in s26 of the Constitution and the issue of land has become somewhat emotive and politicised in the recent past.

The execution process is governed by rules 45, 46 and 46A of the Uniform Rules of Court. Rule 45(3) requires that whenever a sheriff is commanded by any process of court to raise a sum of money upon the goods of any person, he must proceed to the dwelling or place of employment of such person and demand satisfaction of the writ, and failing satisfaction, he must demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the writ and failing such pointing out he shall search for such property. According to Rule 46(1), a writ of execution against the immovable property of any judgment debtor must only be issued if:

- a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or
- such immovable property has been declared to be specially executable by the court.

The rules, however, do not address the situation where a judgment debtor, who has sufficient moveable property and immovable property, frustrates the process of the sheriff in executing against the said movable property. The court in *Nkola v Argent Steel Group (Pty) Ltd t/a Phoenix Steel* (2) SA 216 (SCA) had to consider this dilemma. In short, the court had to consider the question of whether a judgment creditor is entitled to have immovable property belonging to the judgment debtor declared specially executable when the movable property of the judgment debtor is alleged to exceed the value of the judgment debt.

The judgment debt arose from a deed of suretyship which the appellant signed in favour of the respondent. The respondent first tried to execute against the appellant's movable property after the respondent had been granted default judgment against the appellant. The movable property was, however, released from attachment as the appellant's wife alleged that it belonged to her. Thereafter, the respondent brought an application to declare the appellant's immovable property specially executable. The appellant had admitted liability to the respondent therefore the court a quo granted the application and declared two of the appellant's properties, both residential, executable.

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Executing against immovable property when movable property can satisfy the judgment debt...*continued*

The SCA held that it is correct that in executing a judgment, a judgment debtor's movable property must be attached and sold to satisfy the judgment debt before the judgment creditor can proceed to execute against immovable property.

The appellant was granted leave to appeal but the full bench dismissed the appeal. The appellant was granted special leave to appeal to the Supreme Court of Appeal (SCA). On appeal, the appellant argued that he had substantial moveable property, largely, of shares in companies he controlled but also motor vehicles. His contention was that the respondent should seek out his movable property and sell it prior to seeking execution in respect of the immovable properties. The appellant further argued that he was under no obligation to make his movable property available for execution.

The SCA held that it is correct that in executing a judgment, a judgment debtor's movable property must be attached and sold to satisfy the judgment debt before the judgment creditor can proceed to execute against immovable property. Only in the event that they are insufficient to fulfil the debt may a judgment creditor proceed against immovable property.

The SCA held that the common law and the Uniform Rules of Court place no obligation on a judgment creditor to execute against movable property where a judgement debtor has failed to point these out and make them available. The court referred with approval to *Silva v Transcape Transport Consultants and Another* 1999(4) SA 556 (W) where Wunsh J considered that because the judgment debtor in the 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 judgment creditor's efforts to obtain payment. Wunsh J was of the view that this was a case where the interests of justice did not dictate that the execution of the judgment should be stayed and a case where execution should proceed against the judgment debtor's immovable properties.

The appellant further advanced contentions relying on the right to housing as entrenched in s26 of the Constitution and that subsequent judgments had changed the common law, reflected in the Silva case. The court was at pains to point out that those judgments deal with a completely different factual matrix and those cases follow on the judgments in the Constitutional Court which deal with the right to housing, which might be jeopardised where execution is permitted in respect of a debtor's primary residence. Those decisions of the Constitutional Court (eg *Jaftha v Schoeman, Van Rooyen v Stoltz & others* [2004] ZACC 25; 2005 (2) SA 140 (CC) and *Gundwana v Steko Development CC & others* 2011 (3) SA 608 (CC)) are confined to execution in respect of a debtor's primary home and bring the law in line with the constitutional right to housing and the objective was to achieve judicial oversight in instances where the right to housing is implicated.

Executing against immovable property when movable property can satisfy the judgment debt...*continued*

The decision of the SCA confirms that a judgment creditor is entitled to have immovable property belonging to a judgment debtor declared specially executable even in circumstance where the judgement debtor has sufficient movable property but is behaving in a tricky manner and deliberately frustrates the judgment creditor's efforts to obtain payment.

The court held that the court a quo took account of the appellant's circumstances including the fact that he had considerable means, and that the debt was due since July 2014, despite the fact that he said he had liquidity problems which would be resolved by the end of that year. The full court did not interfere with discretion of the court a quo. The fact that one of the houses was his primary residence and the other that of his elderly father was of no consequence as he had the means to avert the execution of the judgment debt and chose not to pay the admitted liability.

In any event, the appellant, on his own account, was not the kind of person who qualifies for the protection required by the Constitutional Court above. The appeal was accordingly dismissed with costs.

The decision of the SCA confirms that a judgment creditor is entitled to have immovable property belonging to a judgment debtor declared specially executable even in circumstance where the judgement debtor has sufficient movable property but is behaving in a tricky manner and deliberately frustrates the judgment creditor's efforts to obtain payment.

Vincent Manko and Johanna Lubuma

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Surety by a spouse married in community of property – Do I have to consent?

The Matrimonial Act does not provide free reign and imposes limitations on the exercise of the powers of spouses such as that neither spouse may perform any juristic act with regard to the joint estate without the consent of the other.

Under the Roman Dutch common law, marriages were ordinarily in community of property and the husband was vested with the marital power. This caused the husband to deal with all the assets of the joint estate to the exclusion and without the consent of his wife. The marital power of a husband was abolished by the *Matrimonial Property* Act, No 88 of 1984 (Matrimonial Act).

The effect of the Matrimonial Act meant that spouses, married in community of property, have the same powers regarding the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate and the management of the joint estate. However, the Matrimonial Act does not provide free reign and imposes limitations on the exercise of the powers of spouses such as that neither spouse may perform any juristic act with regard to the joint estate without the consent of the other.

Many debtors have used the limitations provided by the Matrimonial Act and in particular s15(2)(h) to their advantage: a defence to escape the enforceability of suretyships. S15(2)(h) of the Matrimonial Act reads as follows:

> *"(2) Such a spouse shall not without the written consent of the other spouse –*
>
> *(h) bind himself as surety."*

Viewed alone this section is straightforward but s15(6) of the Matrimonial Act sets out a proviso: Should a suretyship be furnished in the ordinary cause of a person's business then such a suretyship is deemed valid even if spousal consent was not given. What then constitutes ordinary course of that spouse's business?

In the case of *Ockie Strydom v Engen Petroleum Limited* (184/2012) [2012] SCA, the Supreme Court of Appeal (SCA) dispelled any doubt on the interpretation of s15(2)(h) read with s15(6) as to when a spouse will be bound to a suretyship even though he/she was unaware of the dealings of his/her spouse. In this case the defence was raised that the Appellant's wife had refused to consent to his signing of the deed of suretyship and therefore the deed was invalid by virtue of the provisions of s15(2)(h).

The SCA held that the question that had to be decided was what constitutes acting in the ordinary course of one's profession, trade or business. To answer the question, the SCA stated that the determination of whether a person acted in the ordinary course of his/her business was a question of fact that must be judged objectively with reference to what was expected of a businessman/businesswoman. For example, signing a suretyship may not be in a surety's ordinary business if they are a mere salaried employee, having no commercial interest in the business' success or failure. However, a person who holds a number of non-executive directorships that are the principal source of their income may well, when executing a deed of suretyship for one of those companies, be acting in the ordinary course of their business.

Surety by a spouse married in community of property – Do I have to consent?*...continued*

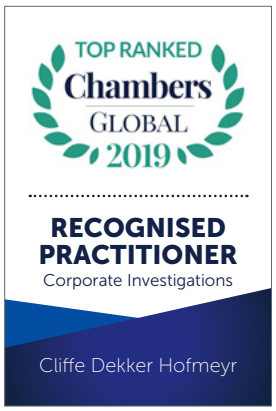
The SCA held that s15(2) does not apply if the act in question is performed in the ordinary course of the spouse's business, trade or profession.

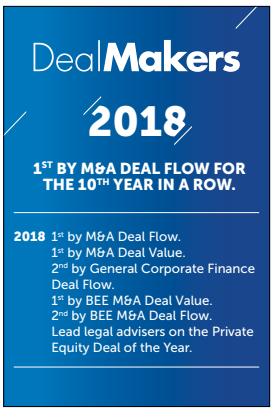
The SCA with reference to the case of *Amalgamated Banks of South Africa Bpk v De Goede & 'n ander* 1997 (4) SA 66 (A) further stated that where a business is carried on through an incorporated vehicle such as a partnership or trust, the question to be answered is whether the surety's involvement in that business is his or her business and whether the execution of the suretyship was in the ordinary course of the surety's business, not the business of the company, close corporation, partnership or trust.

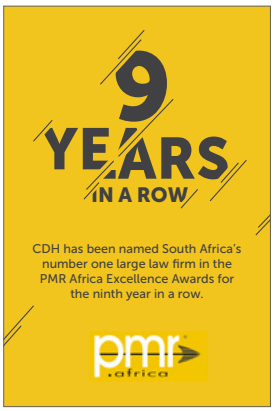
The SCA held that s15(2) does not apply if the act in question is performed in the ordinary course of the spouse's business, trade or profession. Therefore, it is not enough for a person seeking to rely on s15(2)(h) to say that they were married in community of property and that their spouse did not consent to the suretyship.

If you have not consented to a suretyship, it will be insufficient for you to state that your spouse did not inform you that he/she signed a suretyship. A court will dispel such a defence if the court finds that the suretyship was done in the ordinary course of your spouse's business, trade or profession. In such cases, no consent is required to sign a as surety, despite being married in community of property.

Corné Lewis and Neha Dhana







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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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