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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER : 2013/17484

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between

DATE

SIGNATURE

MAISTRY, EDGAR NOEL

First Applicant

MAISTRY, CELESTE

Second Applicant

and

KHEMESE, NINIWE

First Respondent

MABASA, ARTHUR PETRUS

Second Respondent

BBM ATTORNEYS

Third Respondent

JOHANNESBURG METROPOLITAN LOCAL COUNCIL

Fourth Respondent

JUDGMENT

André Gautschi AJ :

- [1] This is an application by a [.....], who purchased a sectional title unit (“the unit”) at a sale in execution, to recover possession thereof from the erstwhile owner (the second respondent) and his tenant (the first respondent). The other two respondents may be ignored for purposes of this judgment.
- [2] The relief sought by the applicants is that the lease agreement between the first and second respondents be declared cancelled, to evict the first respondent and all persons holding occupation through or under him from the unit, and costs on a punitive scale. The applicants also sought payment of rental, levies and municipal rates and taxes from the first and/or second respondents but I was advised that that claim will be pursued by way of a claim for damages at a later stage.
- [3] Although the application for eviction was brought under the PIE Act¹, I was advised at the outset of the argument that the only defence to the eviction was in the form of a counter-application for a stay thereof pending an appeal against a refusal by a magistrate to rescind the default judgment which gave rise to the sale of execution.

¹ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998

- [4] On 26 November 2007, Amari Heights Body Corporate obtained a default judgment against the second respondent. Pursuant thereto, the second respondent's unit, being section 44 in the building known as Amari Heights in Winchester Hills, Johannesburg, was attached and sold to the applicants at a sale in execution on 21 February 2012. Registration of transfer took place on 14 December 2012. Thereafter the applicants requested the first and second respondents to vacate the unit but they refused. The application was launched in May 2013.
- [5] In the answering affidavit, the second respondent made it clear that his defence was based entirely on his attempt to rescind the default judgment and undertook, if that failed, to vacate the premises. At the same time, he brought a counter-application for a stay of the application.
- [6] The second respondent launched an application for rescission in the Johannesburg Magistrate's Court in early March 2012, and alleged that he only became aware of the default judgment on 9 February 2012. On that basis, his application for rescission was brought timeously. However, in his answering affidavit in this application, the second respondent referred to emails between himself and the managing agent of the Amari Heights Body Corporate in order to demonstrate that the body corporate was aware of his whereabouts (which he thought was relevant to another point he was making). These emails show that he was aware of the default judgment by 19 October 2009. When this was raised in the rescission application, he stated, in his replying affidavit, that this letter followed "my discovery of an

unseen and unknown judgment from an ITC summary”, and that “(t)he ITC summary does not contain any information that on its own, would have enabled me to take any steps pursuant to launching a rescission application”. He maintained under oath that he only became aware of the judgment on 9 February 2012. He said that he sought information from the managing agent but they failed and/or refused to provide him with it. Nevertheless, he brought an application for condonation in the Magistrate’s Court for the late delivery of the application for rescission.

- [7] The second respondent’s pretence that he did not know details of the judgment is untruthful. His email to the managing agent dated 19 October 2009 reads as follows :

“Hi Bruce

Following our telephonic conversation, below is the required information.

According to the ITC records, a judgement was obtain on the 26 November 2007, the case number is 163764/07.

As indicated to you, I do not understand how could this happen without me receiving summons and after your attorneys have my attorneys on the same matter on record. We went to court and these was withdrawn the matter at settled out of court. It is a surprise to me how can your attorneys then go and obtain the judgement that which is as a result of the same action.

It is with this background that I request that I am furnished with all the court documents, the sheriffs Return of Service, Application for Judgement, the court room and the name of Magistrate they appeared before. Since these documents are in their office, I will appreciate to receive them by Wednesday 14th October 2009. I can get my driver to collect them at their offices.” (*sic*)

- [8] To this there was a response (also one of the documents attached by the second respondent) by email dated 30 October 2009 from a paralegal at the

body corporate's attorneys, stating :

"Good Day

You may proceed to collect the documents at our reception :

[.....]

At present there is an amount of R72 486-14 outstanding on your levy account.

We are in the process of attaching your unit."

[9] From the foregoing, it is clear that by 19 October 2009 the second respondent knew that a judgment had been obtained against him, by the body corporate, under a particular case number and that it would have been at the same court as other proceedings had taken place between them (the Johannesburg Magistrate's Court). He was offered to collect the documents he asked for, and he was told that the judgment creditor was in the process of attaching his unit. He had all the information he needed to obtain a copy of the court order and to launch a rescission application. He did not do so until after the sale in execution took place.

[10] The magistrate refused the application for condonation and as a result dismissed the application for rescission. I am informed that there is an appeal pending to this court against that decision. Given the foregoing facts, it seems to me that the prospects of success on appeal are slender. In the meantime, the second respondent is presumably collecting rent from his tenant, and the registered owners of the unit are paying levies to the body corporate and rates and taxes to the municipality, without receiving any rental.

- [11] Under those circumstances, I am not inclined to entertain a stay of the eviction application.
- [12] Mr Mkhabela for the first and second respondents submitted that the appeal suspended the operation of the order in terms of rule 49(11). However, rule 49(11) provides that it is the order appealed against that is suspended. That order is an order refusing a rescission, and the suspension of that order is of no use to the respondents. Even if the default judgment could be said to be suspended, that would also not avail the respondents, since the steps taken thereafter (the sale in execution) would remain unaffected until set aside, and would not be affected by any suspension of the default judgment. It was in any event common cause that, if the rescission was successful, a second application would have to be brought in order to set aside the sale in execution.
- [13] Any attack on the sale in execution would also in my view be stillborn, even if the default judgment were rescinded. It is clear from the papers before me that the applicants were unaware of the application for rescission prior to registration of transfer of the unit into their names. The fact that the judgment creditor and its attorneys, who were also the conveyancers, knew of the application for rescission between the date of the sale in execution and the date of registration of transfer, does not impute that knowledge to the applicants. They say that they did not know, and there is nothing to gainsay that. They are accordingly in the position of *bona fide* purchasers without knowledge of defective title, and thus in an unassailable position

even if the default judgment were rescinded (save if it were held to be a nullity, which is not alleged)².

[14] Accordingly, even if I had the power to order a stay of the application, it would serve no purpose because the steps envisaged by the second respondent henceforth will not achieve the purpose which he seeks.

[15] The first and second respondents allege that there is a lease concluded between them. They are coy about the details, and both have refused to recognise the title of the applicants to the unit. The result is that the tenant, the first respondent, has failed to recognise that she owes any obligations under the lease to the new owners of the unit and has failed to make any payments to them. This is a repudiation of the lease agreement, if one existed, which the applicants have accepted and elected to cancel the agreement of lease.

[16] Mr van der Merwe for the applicants urged upon me to order costs on a punitive scale against the first and second respondents. Whilst they have been unsuccessful, and their approach misguided, I do not think that a punitive costs order is warranted.

[17] In the circumstances the applicants are entitled to the relief sought, and I make the following order :

² Knox N.O. v Mofokeng and Others 2013 (4) SA 46 (GSJ); Section 70 of the Magistrates' Courts Act No 32 of 1944

- “ 1. The cancellation of any lease agreement concluded between the first and second respondents pertaining to the property situated at 44 Amari Heights, in the building known as Amari Heights, Kouga Street, Winchester Hills Extension 1, Johannesburg, being sectional title unit number 44 in the sectional scheme registered as SS Amari Heights, Winchester Hills, Johannesburg, Gauteng Province (“the property”), is confirmed.
2. The first and second respondents and all persons holding occupation through and under them of the property are to vacate the property as contemplated by section 4(1) of Act 19 of 1998, within 30 days from the date of service of this order.
3. In the event of the first and second respondents and/or those holding occupation through or under them failing to vacate the property as required in terms of paragraph 2 above, the Sheriff or his deputy is authorised and instructed to give effect to this order, and is furthermore authorised and instructed to elicit the assistance of the South African Police Services and/or a locksmith in order to give effect to this order if such assistance is required.
4. The first and second respondents are ordered to pay the costs of the application jointly and severally.
5. The second respondent’s counter-application is dismissed with costs.”

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH
COURT

Date of hearing : 28 January 2014

Date of judgment : 14 February 2014

Counsel for the applicants : C van der Merwe

Instructed by : Marius Swart Attorneys

Counsel for the first and second respondents : R B Mkhabela

Instructed by : Werksmans Attorneys