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REPUBLIC OF SOUTH AFRICA



OFFICE OF THE CHIEF JUSTICE

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

CASE NO: 2009/012211

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

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DATE

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SIGNATURE

In the matter between:

KRUGER, WYNAND

Applicant

And

SHARPE, KENNETH RAYDON

Respondent

J U D G M E N T

MBONGWE AJ:

INTRODUCTION

- [1] This is an application for an order declaring the respondent's undivided half share in an immovable property described as a unit consisting of (a) Section No. 6 which is more fully described on S P N. S, in the scheme known as C T in respect of the land and building or buildings situated at M G, Cape Town, measuring 106 square metres in extent;; (b) together with an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held under Deed of Transfer ST which property is situated on the corner of C B and R R, C C, M G, Cape Town being Erf 6 M G, C T, in the Province of the Western Cape, specially executable.

FACTS

- [2] The background facts in this matter are that the applicant instituted action proceedings against the respondent for payment of a balance sum of R 416 838-00 due and owing to him in terms of a written agreement concluded by and between the parties in February 2009. The respondent brought a counterclaim in the sum of R 420 000-00 arising out of an alleged breach of warranty and consequent damages.

- [3] The matter was set down for hearing on the 23rd of February 2012, on which day only the applicant's claim was proceeded with. Judgment was given in favour of the applicant for payment of the sum of R 416 838-00 together with interest and costs and the respondent's counterclaim was postponed *sine die*. The Court, however, suspended the execution of the order in favour of the applicant pending the determination of the respondent's counterclaim.

COSTS

- [4] Prior to the trial of 23 February 2012, there had been successful interlocutory applications brought by the applicant against the respondent. The costs orders were all in favour of the applicant and amounted in total, as taxed, in the amount of R 118 826-77.

RESPONDENT'S INACTION - COUNTERCLAIM

- [5] Since the granting of the judgment in favour of the applicant on 23 February 2012 and the suspension of its execution pending the determination of the respondent's counterclaim, the respondent made no effort to have his claim prosecuted and occasioned a number of postponements when the applicant had set the matter down for hearing. At some stage the respondent even brought an application purportedly seeking an order directing the applicant to furnish security for costs. This despite the applicant being a South African and having already obtained a judgement and costs against the respondent. Nothing, however, came

out of that application which the respondent eventually withdrew and tendered costs.

EXECUTION OF COUNTERCLAIM FOR COSTS OWED

[6] The applicant eventually attached the respondent's counterclaim to recover the taxed costs. This after the respondent had failed to pay the costs and neither him nor his attorneys could point out movable assets belonging to the respondent which could be attached.

HEARING OF COUNTERCLAIM

[7] The sale of the respondent's counterclaim occurred a few days after evidence in the respondent's counterclaim had been heard, and judgment reserved. The counterclaim was sold by the deputy sheriff to the law firm Thomson Wilkis Inc. for an amount of R 79 000-00. A sum of R 71 002-50 was paid to the applicant.

PURPOSE OF THIS APPLICATION

[8] In this application the applicant seeks an order, in the absence of or the reluctance of the respondent or his attorneys to disclose the whereabouts of the respondent's movable assets, declaring the undivided share of the respondent in an immovable property in Cape Town executable. The application is opposed.

ISSUES FOR DETERMINATION

[9] The issues for determination in this application, taking into consideration the respondent's basis for opposition, are the following:

9.1 whether the suspensive conditions placed on the executability of the judgment and orders of the 23rd of February 2012 remain extant;

9.2 whether the respondent's co-owner and mortgagee of the property in which the respondent's interest is sought to be attached should have been joined as necessary parties. It is noted that this aspect was not raised in the respondent's papers, but raised by his counsel from the bar as a point in limine;

9.3 whether the applicant is precluded from seeking leave to execute against the immovable property the taxed costs due to him. The total costs at this stage amount to R 234 835-72 and remains unpaid.

. SUSPENSIVE CONDITIONS

[10] It is common cause that the suspension of the execution of the judgement and orders granted in favour of the applicant was ordered to safeguard the interests of the respondent in the event that he succeeded in turn in his counterclaim against the applicant. The fact that his counterclaim was attached and sold by the deputy sheriff invariably means that the respondent no longer has a counterclaim. The effect of this, in my view and finding, is that the sale of the counterclaim marked the automatic

upliftment of the suspensive conditions. Thus I find that nothing in law precludes the applicant from executing the order of 23rd February 2012 against the respondent. The respondent's contention otherwise stands to be rejected.

CITATION OF RESPONDENT'S CO-OWNER AND MORTGAGEE

[11] I have read the heads of arguments of both parties and heard their submissions. I agree fully with the legal basis for the arguments and submissions made on behalf of the applicant which gives a comprehensive exposition of the law and principles applicable in the determination of whether it was necessary for the applicant to cite the respondent's co-owner of the property sought to be attached as well as the mortgagee thereof. I quote extensively, as part of this judgment from the heads of argument submitted by the applicant's counsel:

11.(1) Before a party has to be joined as of necessity, it must be shown that such a party has an interest in the right which is the subject matter of the litigation and not merely a financial or an indirect interest in such litigation (See *Strydom v Engen Petroleum Limited* 2013 (2) SA 187 (SCA) at par 23 and 24). I find that neither the respondent's co- owner nor the mortgagee, if any, of the property concerned have an interest in the present proceedings against the respondent and that, therefore, their citation was not necessary. The Applicant simply seeks leave to

execute against the Respondent's undivided half share and such order will have no effect upon the remaining undivided half share owned by the co-owner. It is well established law that a co-owner can encumber his undivided half-share, even in the absence of knowledge or consent of the other co-owners, and, subject to a specific agreement between the co-owners, every co-owner has a right to freely alienate his/her share of the property without reference to the other co-owners (See *Bonheur 76 General Trading (Pty) Ltd v Caribbean Estates (Pty) Ltd* 2011 JDR 0182 (SCA) at par 13). Since the application concerns solely the Respondent's undivided half share in the immovable property, the joint owner merely has a financial interest in the outcome of the execution against respondent's half share and is entitled to bid for that share. His joinder is, therefore not necessary.

11. (2) The joinder of the bondholder is also not necessary since Uniform Rule 46(5) expressly provides that no immovable property which is subject to any preference shall be sold in execution unless the executing creditor had advised the preferent creditor in writing of the intended sale and the latter has been afforded an opportunity to agree to a sale with a reasonable reserve price or a sale without reserve. The bondholder's position is therefore secured without any necessity to be jointed in the proceedings.

[12] In light of the findings in this judgement, I conclude that the applicant is legally entitled to execute against the respondent's estate in respect of both the judgement of the 23 February 2012 and the various cost orders he has been granted.

[13] I, therefore, make the following order:

1. The respondent's undivided share in the property described in paragraph 1 of this judgment is declared especially executable.
2. The Registrar of this court is directed and authorised to issue a warrant of execution in terms of Rule 46 in respect of the Respondent's half share in the property concerned in favour of the applicant.
3. The respondent is ordered to pay the costs of this application on the scale as between attorney and own client.

M. MBONGWE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTEN LOCAL DIVISION

DATE OF HEARING	09 MARCH 2016
DATE OF JUDGMENT	25 MAY 2016
COUNSEL FOR THE APPLICANT	MW VERSTER
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