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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHERS JUDGES:
(3)	REVISED
_____	_____
DATE	SIGNATURE

Case number: 18249/2008

In the matter between:

SHABALALA, ELIZABETH BUSISIWE

Applicant

AND

UDUMO TRADING 77 CC

First Respondent

THAGE, JOHANNES SELLO

Second Respondent

THAGE, PRISCILLA BUKELWA

Third Respondent

FIRSTRAND BANK LIMITED

Fourth Respondent

JUDGMENT

Molahlehi J

Introduction

[1] During April 2015 the applicant instituted proceedings to rescind the default judgment which had been granted against her on 29 July 2008, in favour of the first respondent. In the application the applicant sought the following order:

"1.1 Rescission of the default judgment which was granted by this Honorable Court, on 29 July 2008, in favour of the first respondent;

1.2 Setting aside of the sale and execution of the "property arising from the Judgment";

1.3 Cancellation of the "Deed of transfer and with number T.11535/2015 registered in favour of the second and the third respondents" and;

1.4 Reinstatement of the "Deed of transfer T.19632/1998" in the name of the applicant."

[2] The fourth respondent, the Firstrand Bank, successfully applied to intervene as a respondent. The leave to intervene was granted on 8 September 2015. The applicant in her rescission application failed to join the following parties; the Registrar of Deeds and the Sheriff of Brakpan Anton Rademeyer and Lucas Musondo Mahlangu.

Background Facts

- [3] As stated earlier in this judgment a default judgment was granted against the applicant in favour of the first respondent.
- [4] The applicant alleged in her founding affidavit that she was in 1996/7 allocated a government-subsidised house number [...] Tsakane Extension 11 (the property).
- [5] She further stated that she was never given a title deed but received the document attached to the founding affidavit titled "APPLICATION DETAILS: APPLICATION INFORMATION". The document contains her particulars of the applicant and the recording that her application for the subsidy was approved in the sum of R17 250.00.
- [6] The prayers to have the sale in execution and the deed of transfer cancelled are based on the allegation that the default judgment was fraudulently obtained.
- [7] After receipt of the document she later received an application seeking to evict her from the property.
- [8] She disputed ever taking a mortgage bond as reflected in the Title Deed, which she seemed to have subsequently received after a search at the Deeds office. She stated that there was no need for her to take a loan because the value of the property was R12 000.00 and the subsidy she received from the government was

more than that, being R17 250.00.

- [9] The second and third respondents' version is that the property was purchased by one Anton Radermeyer in the sale for execution from the first respondent for R 31,000.00. Radermeyer then sold the property in the sum of R117 00.00 to Lucas Masondo Masinga who took out a loan with the fourth respondent to finance the purchase during 2009 and the mortgage bond was secured in favour of the fourth respondent in the sum of R120 000.00
- [10] Masondo subsequently fell in arrears and the fourth respondent accordingly instituted proceedings against him, claiming payment in the sum of R136 782.00.
- [11] On 26 July 2012, the court granted judgment in favour of the fourth respondent for the payment of the said amount. The execution of the property was effected after attempts at executing the immovable property yielded no results. The execution of the property was issued on 23 October 2012.
- [12] The property was sold at an auction for a simple R1000,00 in terms of rule 46 (12) of the Uniform Rules of the High Courts.
- [13] In opposition to the rescission application, the second and third respondents raised a point *in limine* concerning the non-joinder of Rademeyer and Mahlangu as previous owners of the property. The non-joinder point was also based on the failure by the applicant to join the Sheriff; Brakpan.

[14] The preliminary point was upheld by Kathree-Setiloane J on 3 November 2016.

The order made by the Court in that regard reads as follows:

"The application is postponed *sine die*;

The applicant is precluded from enrolling the application until notice of joinder was served on the following:

Register of Deeds,

the Sheriff,

Anton Rodemeyer and

Lucas Masondo

The joinder shall be served on or before 31 January 2017,

Failing compliance with either 2 or 3 above, the second and third respondents are entitled to enrol the application for hearing with costs reserved."

[15] The applicant having failed to comply with the above order in that she did not join the parties mentioned therein, the fourth respondent enrolled the matter for a hearing on 14, August 2017.

[16] The matter came before the court on 8 August 2017 and on that day the applicant applied for a postponement which was opposed by the respondents. The postponement was, however, granted by Francis AJ who attached very stringent conditions on what the applicant was supposed to do to progress the matter further. The order made by the learned judge reads as follows:

"1. The application is postponed *sine die*

2. This is the final postponement which shall be awarded to the applicant;

3. The applicant is to effect her joinder application, joining the Registrar of Deeds and the Sheriff Brakpan by no later than 6 September 2017;
4. The applicant is to enrol her application for substituted service in respect of service of the joinder application of Anton Rademeyer and Lucas Masando Mahlangu by no later than 6 September 2017;
5. The applicant is to effect service of the joinder application in respect of Anton Rademeyer and Lucas Masando Mahlangu by no later than 2 October 2017;
6. The applicant is precluded from enrolling the application until she has complied with 3 and 4 above and any directions that the Court hearing the application for substituted service may direct;
7. Failure by the applicant to act in accordance with 3, 4 or 5 above shall entitle the second, third and fourth respondents to set the application down for hearing.
8. The applicant to pay the second, third and fourth respondent's wasted costs occasioned by the postponement on an attorney-client scale."

[17] The matter was again set down and came before this court on 11 November 2017. The applicant has again failed to comply with the above order.

[18] Mr. Beyana, for the applicant, contended initially that the matter was not ripe for hearing and that the applicant should be given the opportunity to comply with Francis AJ's order. He, however, conceded that there had been non-compliance with the above court order and that the applicant did nothing to comply. He then made the application for non-compliance with the order from the bar.

- [19] During the debate, it was raised with Counsel as to why no condonation for non-compliance with the court order was made earlier. He could not provide any reason in that regard.
- [20] In my view, the approach adopted by the applicant is based on an attitude of total disregard of the interest of the respondents and the prejudice they suffer as a result thereof.
- [21] This painful and expensive process that the respondent had to endure could have been avoided had the applicant acted promptly in exercising her right. She states in her founding affidavit that she became aware of the sale in execution two days before the sale took place. She could have interdicted the sale but waited for almost seven years to institute the proceedings and after that delayed the finalization thereof by a total disregard of the court orders that had directed her to join the other interested parties.
- [22] In my view, granting condonation for noncompliance with Francis AJ's order would be to ignore the manner in which the applicant has dealt with the matter and the prejudice that would be suffered by the respondent. It is in the interest of justice that the application for condonation should be refused.
- [23] It is trite that in an application for condonation one of the factors to consider is prospects of success. Although Counsel did not address this issue in his

application from the bar, the applicant has in her founding affidavit alleged that the sale and the transfer of the property was a consequent of fraud. She does not, however, make an allegation in her papers that the respondents knew about her allegation.

[24] As stated earlier, the property was purchased by Radermeyer in November 2008 and thereafter it was sold and transferred to Mahlangu who lost ownership when the second respondent purchased it at the sale in execution during March 2015. It is thus clear from the above analysis that the parties who previously acquired the property did so as *bona fide* purchasers and were not aware of the allegations made by the applicant. There is no case made that there are prospects of success in the claim that there was lack of consensus regarding the passing of the ownership of the property.¹ In light of the above, the applicant's application stands to fail.

Order

[25] The applicant's application is dismissed with costs.

¹ See *Meintjies v Coetzee* N.O 2010, [5] SA186 (SCA).

E Molahlehi
Judge of the High Court;
Johannesburg

Representations:

Counsel For the Applicant: Mr. LM Biyana

Instructed by: Benoni Justice Centre

Counsel For the Respondent: Adv. J Lourens

Instructed by: AG Smuts & Partners

Heard on: 22 November 2017

Delivered on: 16 February 2018