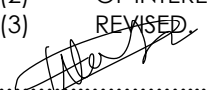


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2014/02868

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
	14 January 2022
..... SIGNATURE	 DATE

In the matter between: -

ALAN GORDON AGLIOTTI N.O.
ROSE-MARIE DOS SANTOS N.O.
MARK JEFFREY FUHR N.O.

First Respondent
Second Respondent
Third Respondent

And

NEDBANK LIMITED
SHERIFF OF THE HIGH COURT, SANDTON NORTH

Execution Creditor
Second Respondent

In re:

NEDBANK LIMITED

Execution Creditor

And

DANICA AGLIOTTI N.O.	First Execution Debtor
ROSE-MARIE DOS SANTOS N.O.	Second Execution Debtor
MARK JEFFREY FIJHR N.O.	Third Execution Debtor
DANICA AGLIOTTI	Fourth Execution Debtor
ROSE-MARIE DOS SANTOS	Fifth Execution Debtor

Delivered: *This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email, and by uploading same onto CaseLines. The date and time for hand-down is deemed to be have been on 14 January 2022.*

JUDGMENT

MATOJANE J

Introduction

[1] This is an opposed motion whereby the applicants seek an order for costs on an attorney and client scale in that the relief initially sought by the applicants on an urgent basis has been rendered moot due to the court having granted an order by agreement on the same.

[2] the issue to be determined in this application is whether the first respondent's conduct in refusing to cancel the sale in execution and purchasing the immovable property at the sale warrants an adverse costs order against the first respondent.

Background facts

[3] It is common cause that the Trust loaned money from the first respondent against the security of a mortgage bond registered on the property. The Trust fell into arrears in respect of the loan repayments to the first respondent.

[4] The first respondent obtained a judgment against the Trust and the second applicant in his capacity as surety in an amount of R1 826 283.25 plus interest and costs. The first respondent foreclosed on the immovable property and set the sale in execution to proceed on 1 December 2020.

[5] The Sheriff of the Court served a "Notice of Sale in Execution" ("Notice") in terms of Rule 46(7)(b) on the applicants on 2 November 2020. This, according to the Trust, is less than 45 days before the date of the sale in execution as required by Rule 46(7)(b).

[6] On 2 December 2020, the applicants who are trustees of the Cokaloka Family Trust ("the Trust") instituted an application on an urgent basis in terms of which the Trust sought an order cancelling the sale of the immovable property described as Erf 22 Lonehill township ("the immovable property") by the second respondent to the first respondent at the sale in execution held on 1 December 2020.

[7] The first respondent delivered its notice of opposition on 3 December 2020. On the same day, the Trust delivered a supplementary affidavit confirming that the Trust had and was able to deliver guarantees for the full amount of R3 561 052.83 on 3 December 2020.

[8] On 4 December 2020 and by agreement between the Trust and the first respondent, the court handed down an order stating that:

- 8.1 the sale in execution held in respect of the immovable property on 1 December 2020 was cancelled.
- 8.2 the immovable property would be transferred to the purchasers in accordance with the agreement of sale concluded on 4 October 2020;
- 8.3 the transfer of the immovable property would be finalised within 90 days; and
- 8.4 that the costs of the urgent application would be reserved.

[9] The Trust contends that it is entitled to an order against the first responding that it pay the Trust's costs on an attorney and client scale for the following four distinct grounds;

- 9.1 Firstly, the first respondent failed to comply with the provisions of Rule 46(7)(a) in that the Trust was not afforded one calendar month notice of the intended sale in execution. The notice was served on the Trust on 2 December 2020 for sale scheduled for 1 December 2020.
- 9.2 Secondly, the first respondent's failure to describe the property accurately and adequately in the notice in terms of Rule 46(7)(a) of the Rules of the court "renders the sale in execution of 1 December 2020 invalid. In the notice, the property is described as comprising two bathrooms when the property has three bathrooms.
- 9.3 Thirdly, the street address of the immovable property was incorrectly advertised in terms of the notice by recording that the immovable property is located at 16 Aftonwold road, Lonehill, when the property is actually situated at 22 Aftonwold Road, Lonehill.
- 9.4 Lastly, the first respondent took all the steps required as a mortgagor to further the sale between the Trust and the private purchasers. The purchasers were advised accordingly, and the first respondent failed to cancel the sale in execution.

[10] The Trust points to the alleged obstructive and unreasonable manner in which the first respondent insisting on receiving guarantees for the entire purchase price before 1 December 2020 in circumstances where it has caused the delay in getting the same guarantees; in failing to make any reasonable counter-offer when it was self-evident in conveyancing practice that the guarantees would not be available on or before 1 December 2020 and insisting on proceeding with the pointless and malicious sale in execution when it was self-evident that the sale agreement will proceed.

The law

[11] It is trite that normally costs are awarded on a party and party basis. In exceptional cases, the court may conclude that the successful party should not be out of pocket as the result of the litigation and may then award attorney and client costs¹. Such an order may be made where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of the court process².

[12] The Constitutional in the South African Reserve Bank³ referred to *Plastic Converters Association of SA*, in which the Labour Appeal Court stated:

"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

[13] I turn to deal with the grounds the Trust premised its grounds for the first respondent to pay the costs on the punitive scale.

Non-compliance with Rule 46(7)(a) of the Rules of Court

[14] The first respondent states that the immovable property was under lawful attachment since 2014. As such, Rule 46(7) of the Rules of the court were complied with when the Notice of Sale in execution in terms of Rule 46(7)(b)⁴ was served on the first applicant on 2 November 2020.

[15] The first applicant disputed the allegation that the immovable property was already under attachment by 2 November 2020, yet agreed that an interdict registered against the property had to be uplifted as part of the transfer process. If indeed the property was not under lawful attachment, the Trust would have raised this material

¹ See *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597

² *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 8.

³ Footnote 2 supra

⁴ "The execution creditor shall, after consultation with the Sheriff, prepare a notice of sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the Sheriff, and he shall furnish the Sheriff with as many copies of the notice as the latter may require."

failure before the institution of the application on 2 December 2020, and the first respondent would not have scheduled the sale in execution for 1 December 2020. It follows, in my view, that the property was under lawful attachment, and the delivery of the notice of the sale in execution in terms of Rule 46(7)(b) on the first applicant on 2 December 2020 was compliant with Rule 46(7)(a). This ground falls to be dismissed.

Incorrect description of the immovable property

[16] The requirement for the description in the advertisement is prescribed by Rule 46(7)(b) provides as follows:

"The execution creditor shall, after consultation with the sheriff, prepare a notice of sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the deputy sheriff, and he shall furnish the deputy sheriff with as many copies of the notice as the latter may require."

[17] In the notice, the main building of the property is described as comprising "4 X BEDROOMS, 2 X BATHROOMS, LOUNGE, KITCHEN, 6 OTHER ROOMS" The Trust submitted that the omission to mention that the property has three bathrooms, not two meant that the provisions of Rule 46(7)(b) were not complied with.

[18] In my view the advertisement substantially complies with the provisions of the rule as the description is short as required; it states the main characteristics of the property; that there are buildings and improvements on the land and 6 other rooms, this is sufficient to reasonably attract the interest of potential purchases⁵. It cannot be said that the increase in the number of bathrooms in the advertisement while enhancing the attribute of the property would not have increased the number of bidders. This ground falls to the dismissed.

Street address of the immovable property

[19] In the notice, it is stated that the property is situated at 16 Aftonworld in the Magisterial District of Johannesburg North. In a letter dated 24 November 2020

⁵ see *Cummins v Bartlett NO and another*, at 141D, *Chasfre Investments (Pty) Ltd v Majavie and others* 1971 (2) SA 219 (C). *Pillay v Messenger of the Magistrate's Court, Durban* 1951 (1) SA at 264. *Rossiter v Rand Natal Trust Co.* 1984(1) SA 385 (N) at 388.

addressed the first respondent's attorneys, the Trust attorneys confirm that the property is located at 16 Aftonwold Road, Lonehill and not 22 Aftonwold Road, Lonehill.

[20] The windeed conversion report, which reflects the registration in the offices of the Registrar of Deeds confirms that the Erf number of the property is 22 Lonehill and the street address is 16 Aftonwold Lonehill.

[21] The first respondent has complied with the Rules of Court in scheduling the sale in execution. This ground falls to be dismissed.

Settlement

[22] The Trust argues that the first respondent's conduct in refusing to cancel the sale in execution after reaching settlement with the Trust prior to the sale in execution on 1 December 2020 and purchasing the property up for sale from the sheriff warranted a punitive cost order against the first respondent.

[23] In para 32.3 of the replying affidavit, the Trust states that the

"first respondent had already obtained a judgment against the Trust. Communications between the legal representatives were then exchanged initially to see if the respondent would accept the property sale to the purchasers and, after that, accept the purchase price proceeds arising from such sale.

[24] These facts confirm that the Trust and the first respondent genuinely attempted to settle and avoid the sale in execution from proceedings on 1 December 2020. The communications do not show that the first respondent was willing to waive any of its rights to proceed with the sale in an execution scheduled for 1 December 2020 before receipt of the guarantees for the total amount. The guarantees for the full amount was received three days after the sale in execution. This ground must also fail.

[25] On the conspectus of all the evidence, I am not persuaded that the first respondent's conduct was pointless and malicious as to warrant a punitive costs order. It would not be fair under the circumstances to saddle the first respondent with the costs of the application.

[26] In the result, I make the following order:

Order

1. The application is dismissed.

2. Each party to pay its own costs of the application.



K.E MATOJANE

Judge of the High Court

Gauteng Local Division, Johannesburg.

Judgment

14 January 2021

For the applicant

Advocate Anthony Bishop

Instructed by

DEWEY HERTZB ERG LEVY INC

Ref: A23339/S Dewey

stan@dhlattorneys.co.za

helen@dhlattorneys.co.za

For the firsts respondent

Advocate Leander van Tonder

Instructed by

LOWNDES DLAMINI INC.

nthabiseng@lowndes.co.za

refilwe@lowndes.co.za

franie@lowndes.co.za

Ref: MS M Cowley/jm/MAT12059

