

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
CASE NUMBER: 21389/2010	(2) OF INTEREST TO OTHER JUDGES: YES /NO.
(3) REVISED .	
7 October 2010	<i>[Signature]</i>
DATE	SIGNATURE

In the matter between:

SARAH MAPALWENI

APPLICANT

And

NEDBANK LIMITED

1ST RESPONDENT

(REG NO. 51/000009/06)

OUPA TSHABALALA

2ND RESPONDENT

THE SHERRIFF: WONDERBOOM

3RD RESPONDENT

REGISTRAR OF DEEDS, PRETORIA

4TH RESPONDENT

Reasons For

JUDGMENT

TLHAPI J.

- [1] This was an application for a rescission of judgement and setting aside of the sale in execution of the property of the applicant, Erf 17080, Mamelodi East. The first respondent agreed to the rescission and to the setting aside of the sale in execution. The issue that remained to be determined was that of costs. The second to the fourth

respondent did not oppose the application.

The following order was granted and reasons were reserved:

1. The application for condonation is granted;
2. Default judgment obtained on the 16 October 2009 under case number 28003/2009 is set aside;
3. The order of the 16 October 2009 under case number 28003/2009 declaring the immovable property executable is set aside;
4. Costs reserved; "

[3] The applicant owns property, Erf 17080 Mamelodi Township, Registration Division J.R. Province of Gauteng and since the passing of her husband during 1997, she had lived on such property with her children Dorcas Mapalweni, Willie Mapalweni and Richard Mapalweni. She was also employed as a sleep-in domestic worker from Mondays to Fridays. The applicant denied ever having applied for a loan from the first respondent, furthermore, that she never consented to a bond being passed over her property. The summons was served on her son Richard during May 2009. Her daughter Dorcas undertook to sort the matter out because summons was meant for her and not the applicant. According to the applicant, her daughter had informed her that she was the one who had an account with the first respondent and, that she was aware that the bank had erroneously allocated the same account number to two individuals who had similar residential addresses, though in different areas, the one in Mamelodi East and the other in Bronkhorstspuit.

[4] The applicant averred that not Writ of Attachment was served on her and that she came to know of the auction through the second respondent who finally bought her

property at an auction, conducted by the third respondent on the 15 January 2010. Her son Willie investigated the circumstances surrounding the judgement. She saw copies of the loan agreement which was the subject of the action instituted against her, for the first time, on the 12 February 2010. The applicant averred that the purported signatures on the loan application and bond documents were not hers and that these had been forged.

[5] Prior to the launch of this application and from the 16 March 2010 attorneys for the applicant took up the issue of the forgery with the attorneys for the first respondent and the latter disputed the forgery claims. The forgery was confirmed in a report by a handwriting expert commissioned on behalf of the applicant which report was annexed to the application. In my view, it is not necessary for purpose of this application to give detailed account of the report.

[6] According to the first respondent the loan application was signed by the applicant and that her daughter Dorcas signed as surety for her. The first respondent conducted a forensic investigation which concluded that the proceeds of the bond had been paid out to the applicant's daughter, Dorcas. Furthermore, the applicant was agreeable to the setting aside of the judgment and sale in execution and that the applicant be granted leave to defend the matter as there was a dispute of facts.

[7] The parties prayed for costs in the following manner:

1. The applicant prayed that the costs of this application be paid by the first respondent on an attorney and client scale, alternatively that in the event that the application was opposed by the rest of the respondents, that the said

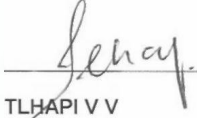
respondents pay the costs of the application jointly and severally.

2. The first respondent prayed that applicant be responsible for payment of costs of the application and commission due to the third respondent in the amount of R8050.00 plus VAT or, that in the first alternative, that the second respondent pay the commission due to the third respondent or, in the second alternative that the issue of costs and commission be reserved until trial.

- [8] It is trite that the discretion for the award of costs lies with the court and that such discretion must be exercised judicially and not arbitrarily. Furthermore, ordinarily and depending on the circumstances of the case and the issues involved, costs would be awarded to the successful party. It was submitted for the applicant that the first respondent had been unreasonable in its conduct towards the applicant before the application was launched, virtually forcing applicant's hand in bringing this application and that the issues could have been resolved without going to court.
- [9] The facts and the reason for awarding costs in *De Wet NO v Minister van Veiligheid & Sekuriteit* 2008 (5) SA 418 (C) were distinguishable. While I do have regard to the personal circumstances of the applicant, they are not in my view extraordinary. In this matter it can not be said that the applicant was the successful party. There was no confirmatory affidavit from the applicant's daughter regarding the summons and, there was no explanation why it took applicant and her children many months before engaging the first respondent or approaching the courts for an appropriate remedy. On the other hand there was no admission by the first respondent to the allegation of the forgery or to the questionable circumstances (as alleged by the applicant) under which the loan was granted and, consent to rescission and setting aside of the sale in execution was granted in order for the applicant to defend the matter because a

dispute of fact had arisen. The grant of the application in my view, did not put an end to the matter. At trial the parties would then be subjected to cross-examination to establish the facts that resulted in the action against the applicant.

Furthermore, it would be inappropriate to deal with the issue of the commission due to third respondent until such time that the main action is finalized and it would then be an issue between the first second and third respondents.



TLHAPI V V

JUDGE OF THE HIGH COURT