IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2215/ 2017
Date heard: 26 June 2018
Date delivered: 31 July 2018

In the matter between

NOMAVA MLALANDLE Applicant

And

NEDBANK LIMITED First Respondent

Mc WILLIAMS & ELLIOT INC. Second Respondent

VIVIAN BRICKHILL Third Respondent

CHRIS DIEDERICKS Fourth Respondent

MICHAEL BOSCH Fifth Respondent

LP SHARP SHERIFF PORT ELIZABETH Sixth Respondent

JUDGMENT

GOOSEN, J.

[1] The applicant seeks to set aside a sale, by auction, of an immovable property sold in the execution of a judgment granted by this Court 7 February 2017. The applicant founds her case upon the allegation that the sale in execution proceeded in breach of an agreement concluded between the applicant and the first respondent. It is alleged that it was agreed that the applicant would make

payment of 50% of the arrears due by her in terms of the credit agreement by 12h00 noon on the day of the auction and the balance over a period of 6 months.

[2] The application is opposed. The first respondent alleges that no agreement, as alleged by the applicant, was concluded. The first respondent alleges that it was prepared to accept payment of an amount of R35 000 before 12h00 on the day of the auction, in order to accommodate applicant, and that the applicant failed to make such payment. The first respondent contends, therefore, that it was entitled to proceed with the sale in execution.

[3] It is common cause that the applicant and the first respondent entered into a loan agreement 21 February 2012 in terms of which the first respondent advanced to the applicant the sum of R475 000.00 for the purchase of an immovable property. The loan was secured by a mortgage bond registered against the property in an amount of R545 700.00. The first respondent instituted action proceedings against the applicant in consequence of breaches under case number 4008/2016. On 7 February 2017 Chetty J granted an order by default against the applicant for payment of an amount of R466 994.84, together with interest thereon. A further order was granted declaring Erf […] Algoa Park, in the division of Port Elizabeth (hereinafter "the subject property") executable. It is unnecessary to set out the nature of the applicant's breaches of the credit agreement or to recount the background giving rise to the order granted by Chetty J, since that Order and the antecedent conduct of the applicant giving rise thereto is not in issue in these proceedings.

[4] On 16 February 2017 a warrant of attachment of the subject property was issued. The warrant was served on the applicant by the Sheriff on 4 March 2017. On 8 March 2017 the applicant contacted the third respondent, an employee of the first respondent's attorney of record, who is cited as the second respondent. I shall, later in this judgment, deal with the joinder of these parties to the application. The applicant informed the third respondent that she is unemployed and unable to make any arrangement to settle the account. She informed the third respondent that her boyfriend would assist her.

[5] On 3 April 2017 the applicant again contacted the third respondent and enquired as to the minimum amount she would be required to pay to avoid a sale in execution. After obtaining instructions from

the first respondent, the third respondent advised the applicant telephonically, on 10 April 2017, that payment of 50% of the arrears, which then stood at R67 521.74, would need to be paid and that the balance would need to be paid in six equal monthly instalments in addition to the normal monthly instalments due in terms of the agreement. This proposal was confirmed in an email addressed to the applicant.

[6] A notice of sale in execution was served on the applicant on 13 April 2017. The scheduled date of the sale was 26 May 2017 at 12h00. On 2 May 2017 the third respondent contacted the applicant telephonically advising her that she must make an arrangement in respect of payment of the outstanding arrears prior to the auction date, failing which the auction would proceed. This is admitted by the applicant.

[7] The first respondent states that on 4 May 2017 the applicant advised it via its attorneys of record that she could possibly raise an amount of R33 000.00 by 15 May 2017. No arrangement was however made regarding any further payment.

[8] On 24 May 2017, at 15h51, the third respondent contacted applicant telephonically to remind her that the sale in execution was scheduled to proceed on 26 may at 12h00 and that no payment arrangements had been made. The applicant advised that her boyfriend would make the required payment.

[9] The events of 25 and 26 May 2017 lie at the heart of the dispute in this application. The applicant states that during the course of May she consulted the third respondent and offered to make payment of R33 000.00 and the balance of the arrears over 6 months, together with payment of the regular instalment. She states that a friend from Pretoria would assist her to make these payments. According to the applicant she was told by the third respondent that the first respondent would not accept the offer since there was a third party involved. In answer to these allegations the first respondent confirms that an offer was made by the applicant to pay R33 000.00 but stated that no agreement was concluded in relation to such or any further payments.

[10] The first respondent alleges that on 25 May the applicant was again advised telephonically that the sale in execution would proceed unless payment of an agreed amount was received and an arrangement made in respect of the balance and further payments. The applicant was informed that the arrears stood at R83 856.50. The applicant does not admit this conversation. She states that she was only appraised of the arrears by email which she received on 26 May 2017.

[11] The first respondent also states that on 25 May 2017 at 16h30 a person called Gideon, who indicated that he was the applicant's boyfriend, contacted the third respondent. He informed her that he had secured loan but that the funds were not yet available. He stated that he would be able to pay R35 000.00. The third respondent informed Gideon that no arrangement had been made and, since he was a third party, the matter could not be discussed with him. It appears that later that day the applicant called the third respondent and enquired whether she could make payment of R30 000.00 and offered that her boyfriend sign as surety. The applicant does not dispute this conversation.

[12] In regard to the events of 26 May 2017, the applicant states that she had made arrangements with a friend to assist her in repaying the arrears. She had managed to raise R33 000 to cover the arrears. She went to the branch office of the first respondent to pay the amount into the account. She also arranged for her boyfriend, Gideon Phiri, to make payment of the "balance" at a Pretoria branch office of the first respondent. When at the bank, she noted that she had received an email which had been sent to her the previous day, advising that the arrears were R83 856.50. She was shocked by this and spoke to a lady at the information desk. She then telephoned the third respondent to inform her that she was at the bank having arranged to make payment of R33 000.00. The third respondent advised her that the first respondent required immediate payment of an amount of R50 000 and upon proof thereof would stop the sale in execution.

[13] The applicant alleges that, after further telephonic discussions with the first respondent's legal department, it was agreed that the applicant could pay R35 000.00 immediately and a further R15 000.00 on the following Monday. She made payment of R13 000.00 and a friend in Pretoria also made payment. She could not obtain proof of this payment, however, and the sale went ahead. She

was informed that the house been sold and therefore immediately stopped any further payments which she had arranged.

[14] The applicant's version of what transpired on that day is denied by the first respondent. The first respondent alleges that following the exchanges which occurred on 25 May, it decided, at 08h40 on 26 May 2017, that the sale in execution could be cancelled provided the applicant pay an amount of R50 000.00 prior to the sale which was scheduled for 12h00. At 08h44 the third respondent contacted the applicant and advised her of the decision. At 09h08 the third respondent received a call from Gideon enquiring whether the first respondent would consider payment of R25 000.00 on 26 May and payment of a further R25 000.00 within 7 days. Gideon was informed that the first respondent's instructions were clear and that it required payment of R50 000 prior to the sale. These allegations are admitted by the applicant. It should be noted here that this admission flies puts paid to the allegation by applicant that she was acting upon a prior agreement to pay R33 000.00.

[15] The first respondent states that at 10h23 a further call was received from Gideon enquiring as to the time when payment should be made. This is also admitted by the applicant.

[16] According to the first respondent the applicant contacted the first respondent at 11h19 to advise her that she had R35 000.00 available for immediate payment. The applicant enquired whether the sale could be cancelled upon her undertaking to pay any further R15 000.00 on the following Monday. The third respondent advised the applicant that the first respondent required payment of R50 000.00. The second respondent however obtained further instructions from the first respondent, who agreed that the sale could be stopped, provided that payment of an amount of R35 000.00 was made immediately. This was conveyed to the applicant by the third respondent at 11h28.

[17] At 11h56 third respondent again contacted the applicant to enquire whether the payment had been made. The third respondent spoke to the bank teller who was dealing with the applicant at the time. She was informed that the applicant was making payment of an amount of R13 000.00. The applicant was informed that proof of payment of an amount of R35 000.00 was required. The sheriff was instructed to delay commencement of the sale to allow for proof of payment to be furnished. When this was not provided the sale proceeded and the property was sold to the fourth and fifth

respondents. It is common cause that prior to 12h00 payment of only R13 000.00 was affected. Two further payments of R11 000.00 and R2 000.00 were made after the sale had occurred.

[18] As indicated at the outset the applicant founds her claim for the relief sought on the basis of an agreement that the first respondent would stay the sale in execution upon payment of half of the arrears then owed by the applicant. She claims that the first respondent was accordingly not entitled to proceed with the auction sale and that the resulting sale should therefore be set aside.

[19] The applicant seeks final relief in application proceedings. Accordingly the facts upon which the court must determine the application are those alleged by the first respondent together with those alleged by the applicant which the first respondent cannot place in dispute (*Plascon-Evans Paints Pty Ltd v Van Riebeeck Paints Pty Ltd* 1984 (3) SA 623 (A)).

[20] Consideration of the factual averments of the parties, set out in detail above, indicates that there are no significant or material disputes of fact. Such disputes as there are relate principally to the events of 26 May 2017. Such disputes are to be resolved by application of the principles set out above.

[21] What is immediately apparent from the facts set out above is that the agreement upon which the applicant relies on the papers, i.e. the payment of 50% of the arrears prior to the sale and the balance over a period of 6 months is, on the applicant's own version, not established. There is accordingly no basis to find that it was agreed by the parties that upon payment of an amount of R33 000.00 prior to the sale on 26 May 2017, the sale would be stopped. In any event upon the applicant's own version, indeed on the common cause facts, the applicant did not affect payment of this amount prior to the time of the sale.

[22] At best for the applicant, the first respondent had undertaken to stay the sale upon payment of an amount of R35 000.00 prior to the sale and upon proof of payment being furnished. This, it must be accepted on the facts, arose consequent upon a last-minute compromise by the first respondent to accommodate the applicant. Yet, even this arrangement, was not complied with by the applicant.

[23] In the circumstances the applicant has failed to establish a factual basis for setting aside the sale in execution. In her application papers, the applicant tenders payment of the arrears and legal costs, and on this basis too, seeks the setting aside of the sale. This tender, however, cannot avail the applicant since it cannot revive or reinstate the credit agreement.

[24] Section 129 (3) of the National Credit Act provides that:

> Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement, up to the time the default was remedied.

[25] Subsection (4) in turn provides that:

> A credit provider may not reinstate or revive a credit agreement after:
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> (a) the sale of any property, pursuant to:
>
> (i) an attachment order; or
>
> (ii) surrender of property in terms of section 127;
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> (b) the execution of any other court order enforcing that agreement; or
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> (c) the termination thereof in accordance with section 123.

[26] In *Nkata v Firstrand Bank Ltd and Others* 2016 (4) SA 257 (CC) at par 131, it was held that the barrier to revival of the credit agreement applies only when the proceeds from the sale in execution have been realised. That is the case in the present matter. Accordingly, "revival" of the credit agreement would be of no utility to either party at this stage. In these circumstances the tender does not assist the applicant.

[27] I indicated earlier in the judgment that I would address the joinder of parties. It is to this that I now turn. The applicant joined the first respondent's legal representative, McWilliams and Elliott Inc, as the second respondent. She also joined Mrs Vivian Brickhill, who is the professional assistant to Mr Murray, the first respondent's attorney of record. Mrs Brickhill was joined as the third respondent. The notice of motion however claims no substantive relief against either the second or the third respondent.

[28] The application papers offer no justification for the joinder of these parties as parties in their own right. It is apparent that Mr Murray of the second respondent operated throughout the conduct of case number 4008/2016 as the first respondent's duly instructed attorney. It is also apparent from the applicant's papers and those filed by the second and third respondent, that the third respondent, as the professional assistant to Mr Murray, was the point of communication between the first respondent and the applicant during the execution process.

[29] When asked why these respondents were joined, Mr Crompton, on behalf of the applicant, suggested that the third respondent "had entered into the agreement with the applicant". This submission was quickly abandoned when it was pointed out that any such "agreement" could only be between the applicant and the first respondent duly represented and that this provided no justification for the joinder of the representative.

[30] The joinder of a party's legal representative, or an employee of a legal representative for that matter, in circumstances such as this is a most unusual step. It is one to be deprecated because of its oppressive nature. This step, it is to be emphasised, was taken by the applicant who was herself represented by a legal practitioner of many years' standing. The joinder of these parties clearly occasioned additional costs. Such unwarranted misjoinder of parties, with the attendant escalation of costs occasioned thereby, may very well persuade a court to make a cost order against a legal representative in his or her personal capacity precisely because of its oppressive and potentially chilling effect on the ordinary conduct of litigation by parties. Although I considered such an order I have come to the conclusion that in this instance a costs order which follows the result will meet the exigencies of the case.

[31] In the circumstance I make the following order:

The application is dismissed with costs.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:	For the Applicant Adv. Crompton Instructed by Stuart Laubscher Inc.
	For the First, Second & Third Respondents Adv. I. Bands Instructed by McWilliams & Elliot Inc.
	For the Fourth, Fifth & Sixth Respondents No appearance