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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 3835/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

BOTHATELO PEARL MASELOA

First Applicant

MOJALEFA JOSEPH MASELOA

Second Applicant

And

LUCKY MATHEWS NYANDU

First Respondent

MAKHOSAZANE ELIZABETH NYANDU

Second Respondent

THE STANDARD BANK OF SA

Third Respondent

SHERIFF, BLOEMFONTEIN WEST

Fourth Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

Fifth Respondent

HEARD ON: 20 OCTOBER 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 22 March 2023.

[1] The applicants seek an order against the first and the second respondent ("the respondents") for the setting aside of the sale in execution in which the respondents purchased the immovable property number [...] Donegal [...] situate at portion [...] of plot [...], Donegal Smallholdings in the Bloemfontein ("the property") on 2 June 2021.

[2] The applicants also seek: the rescission of the order ("the court order") made by Chesiwe, J on 20 August 2021 in terms of Rule 46A (9)(e) of the Uniform Rules of Court confirming the sale in execution; a declaratory order that their offer to purchase the said property in the amount of R2.1 million from the registered owners Mr and Mrs Tsomela ("the judgment debtors") on 4 May 2021 be declared valid and binding, an order for the transfer of the property into their names and; an interdict prohibiting the transfer of the property to the respondents.

[3] The background facts are generally of common cause: The application arises from the action instituted by the third respondent ("Standard Bank") against the judgment debtors under case number 3791/2019 after they defaulted on the instalments of their mortgage bond held by Standard bank in respect of the property. Standard Bank consequently obtained a judgment against the judgment debtors on 6 November 2019 in the amount of R2 279 020.43 together with interest and costs. On 16 January 2020, the property was declared especially executable in terms of rule 46A, a reserve price was set at R1 953 955.30. A warrant of execution against the property was also authorised and subsequently issued by the Registrar on 4 February 2020.

[4] Following the above, the property was provisionally sold by public auction to the respondents as the highest bidders in the amount of R1.4 million. Having

considered the Sheriff's report as contemplated in Rule 46A(9)(d)¹ Chesiwe, J issued the court order on 20 August 2021 confirming the provisional sale.

[5] It is also common cause that transfer of the property has not taken place.

[6] The application is premised on the grounds that the court order was granted erroneously because, at the time the court made the said order both the Sheriff and the court were not aware of the applicants' offer to purchase the property at a higher amount than the reserve price and the amount the property was ultimately sold in execution otherwise, the Sheriff would have included this fact in his report and brought it to the attention of the court. In turn, the court would not have granted the order authorising the sale at the amount of R1.4 million which is evidently to the detriment of both Standard Bank and the judgment debtors as it leaves a massive shortfall of over R700 000.00 which must still be recovered from the judgment debtors.

[7] The applicants submit that the whole reason for a reserve price is to protect the interests of the bank and judgment debtors that there should be no shortfall which the bank will have to recoup from the judgment debtors accordingly, it would be just and equitable that the sale in execution be set aside and the court order is rescinded.

[8] The applicants further state that they have duly complied with their offer to purchase in that upon the acceptance of the offer by the judgment debtors, the applicants have since paid and guaranteed the full purchase price therefore, their offer to purchase must be declared valid and the ownership of the property must be transferred to the them.

[9] The respondents oppose the application on the grounds that the applicants have no *locus standi* to seek the relief in the notice of motion particularly, an order

¹ "Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within five days of the date of the auction, which report shall contain— (i) the date, time and place at which the auction sale was conducted; (ii) the names, identity numbers and contact details of the persons who participated in the auction; (iii) the highest bid or offer made; and (iv) any other relevant factor which may assist the court in performing its function in paragraph (c).

for the setting aside of the sale in execution and the rescission of the court order essentially as they were not party to the proceedings in which those orders were granted. The applicants are not affected by the orders made in those proceedings therefore they have no direct and substantial legal interest in the attachment, sale in execution, or transfer of the property pursuant to the orders made under case 3791/2019.

[10] The respondents also contend that the application is bad in law in that, the facts relied upon by the applicants as relevant to the hearing of rule 46A (9(6) only arose after the property was auctioned. In any event, the judgment debtors as owners of the property and also as parties affected by the court order did not bring those facts before court nor raise any prejudice. The judgment debtors are also not joined in these proceedings therefore it cannot be said that the court order was granted erroneously.

[11] With regard to the validity of the offer to purchase, the respondents aver that the owners could not have validly concluded a deed of sale of the property as it was already declared especially executable, judicially attached and also sold in execution to satisfy the judgment without having first obtained the release of the property from judicial attachment. The offer to purchase is on that basis unenforceable and the fifth respondent would not permit the transfer of the property to the applicants until the attachment has been uplifted namely, the judgment debt has been satisfied.

[12] The respondents further state that the applicants are not entitled to interfere with or undermine the respondents' real rights to the attached property therefore the relief sought to interdict the transfer of the property to the respondents is unsound. Furthermore, the requirements for a final interdict have also not been made out in the applicants' affidavit.

[13] In the replying affidavit, the applicants insist that they have shown that they have direct and substantial legal interest in the subject matter of the application in the sense that they are prejudicially affected by the court order. The court order was indeed granted erroneously because their offer was not brought to the attention of

the court which would have been a sufficient factor to be considered by the court to protect the interests of both the parties.

[14] Then in argument, the applicants aver that the application is premised on the provisions of rule 42(1) (a). It is also the applicants' case that in the alternative to the orders sought in the notice of motion, the matter should be remitted back to court and the parties be informed that the matter will be heard in terms of rule 46A (9)6).

[15] Thus was in short the submissions made by the respective parties.

[16] In terms of rule 42 (1) (a) any party affected by an order erroneously obtained or granted in their absence may apply to the court for a variation or rescission of the impugned order. The requirements to be met by an applicant who seeks to rescind an order on the basis that it was erroneously granted in their absence were alluded to by Corbett, J reciting the provisions of rule 42(1) (a) in *United Watch & Diamond Co v Disa Hotels*² where he said:

“an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted”.

[17] The principle was recently restated in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*³ as follows:

“[50] ...when a rescission application is brought, a litigant must meet the jurisdictional requirements for rescission, set out in rule 42(1)(a) or the common law, before a court can exercise its discretion to rescind an order.”

² **1972 (4) SA 409** (C) at 414D-G & 415 A-B; *Parkview Properties (Pty) Ltd v Haven Holdings (Pty) Ltd* **1981 (2) SA 52** (T) at 54H-55C; *Minister of Finance v Afribusiness NPC* **2022 (4) SA 362** (CC)

³ **[2021] ZACC 28**

[18] It is common cause that the process in terms of which the property was sold in execution is in line with provisions of rule 46A (1) and (2) which provide thus:

“(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2) (a) A court considering an application under this rule must—

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.”

[19] It is also common cause that the impugned order was granted in the absence of the applicants as they were not parties in the proceedings resulting in both the execution proceedings and the subsequent court order and as concisely pointed out in *Petrus Johannes Bestbier and Others v Nedbank Limited*:⁴

“[18] Simply put, rule 46A was meant to protect indigent debtors who were in danger of losing their homes and give effect to s 26 of the Constitution.

*[20] “The aim of rule 46A is to assist the Court in considering whether the s 26 rights of **the judgment debtor** (my emphasis) would be violated if his/her*

⁴ (case number 150/2021) **[2022] ZASCA 88** (13 June 2022).

house is sold in execution. Rule 46A contains procedural prescripts, not substantive law.

[20] I am unable to perceive how the mere purchase of the property after it was sold in execution for that matter, would render the applicants to be the affected parties as contemplated in rule 42(1)(a)⁵ let alone to have a direct and substantial interest in the subject-matter entitling them to intervene in the application upon which the impugned order was granted.

[21] I am also not persuaded by the applicants' contention that the matter should be remitted back to court and the parties be informed that the matter will be heard in terms of rule 46A(9)(c). For the reason that, the provisions of rule 46A(9)(c) do not entail a new process but a reconsideration of the reserve price set in terms of rule 46A(8)(e). The court merely has to take into account the evidence placed before it by the Sheriff⁶ and the judgment debtors as these are the interested protagonists in these proceedings not a "disinterested" third party. It is also important to note that on the applicants' own submission the Sheriff was also not privy to the offer and the respondents also did not bring it to the attention of the court. For these reasons, the respondents' objection against the applicant's lack of *locus standi* to seek the setting aside of the sale in execution and the rescission of the court order prevails and it is accordingly upheld.

[22] It is indisputable that the applicants' offer to purchase the property was accepted by the judgment debtors on 3 June 2021, a day after the property was sold in execution to the respondents to satisfy a judgment debt.

[23] It is trite that an attachment in execution creates a *pignus judiciale* in that, the control of the property attached passes from the judgment debtor to the officer entrusted with the execution of the writ, the dominium of the debt remaining with the judgment debtors⁷ therefore, as correctly contended by the respondents the judgment debtors could not have validly concluded a sale agreement to sell a

⁵ *Zuma* at para 52.

⁶ Rule 46A(9)(d).

⁷ *Reynders v Rand Bank BPK* **1978 (2) SA 630** (T).

property judicially attached and sold in execution without having first obtained the release of the property from judicial attachment. I accordingly hold that the applicants' offer to purchase the property from the judgment debtors is invalid and unenforceable consequently, absent an underlying *iusta causa* (sale agreement) the applicants are disentitled to the transfer of the property.

[24] Regarding the interdict to prohibit the transfer of the property to the respondents, there is not even an attempt in the applicants' founding affidavit to aver the requirements of a final interdict or any other interdict for that matter.

[25] Having regard to the facts of this matter, I have consequently arrived at the conclusion that the applicants have not made out a case for the relief sought in the notice of motion, the application ought to be dismissed.

Costs

[26] There is no reason why the costs should not follow the result.

[27] In the premises, the following order is issued:

- (1) The application is dismissed with costs.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicants:

Instructed by:

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