

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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised :

Date: 15/03/2024

A Maier-Frawley



CASE NO: 2017/22836

In the matter between:

TEBOGO ISAAC DUBE

Applicant

and

**THE SHERRIFF, PALM RIDGE
GOLIWOOD PROPERTIES CC
THE REGISTRAR OF DEEDS**

First Respondent
Second Respondent
Third Respondent

J U D G M E N T

MAIER-FRAWLEY J:

1. The applicant is the previous owner of erf 1222, Alberton, a residential property. He presently still occupies the property notwithstanding that the property was purchased by the second respondent pursuant to a sale in execution conducted by the first respondent.
2. The applicant seeks an order:

- (i) declaring transfer of the property to the second respondent null and void and setting the transfer aside;
 - (ii) re-registration of the property into the name of the applicant by the registrar of deeds (third respondent) upon payment of the required fees for re-registration, if any
 - (iii) that the second respondent be refunded the purchase price it paid for the property;
 - (iv) Costs in the event of opposition.
- 3. Only the second respondent, being the registered owner of the property, opposed the application. At the hearing of the matter, there was no appearance by or on behalf of the applicant. In consequence, the second respondent sought the dismissal of the application with costs.
- 4. The applicant purchased the property after obtaining a home loan from First Rand Bank Ltd. As security for the repayment of the debt, the bank caused a mortgage bond to be registered over the property. When the applicant defaulted on his payment obligations, the bank foreclosed on the property and obtained an order on 7 August 2017 declaring the property specially executable. On 10 February 2021, the property was sold on auction to the second respondent for an amount of R1.4million. The purchaser had signed the written conditions of sale.
- 5. The applicant then launched an application to interdict transfer of the property into the name of the second respondent to enable him to settle the arrears. It appears that the applicant thereafter made attempts to pay the arrears, although, on his own version, he was unable to extinguish the arrears in full.

6. The purchase price in respect of the sale of the property was payable by way of a deposit of 10% of the purchase price immediately on the fall of the hammer, whilst the balance, which had to be secured by a guarantee issued by a financial institution approved by the execution creditor and which had to be furnished to the sheriff within 21 days of the date of sale, was payable against transfer in terms of clause 4.3 of the conditions of sale. In terms of clause 10. 2 of the conditions, if the transfer was delayed by the purchaser's failure to comply, inter alia, with the provisions of clause 4 within the stipulated time frame, the purchaser would be liable to pay interest on the purchase price at the rate stipulated in that clause, as from the date of the delay.
7. The deposit was duly paid but the required guarantee was not provided within the stipulated period. The second respondent states that before the expiry of the 21 day period within which to furnish a guarantee, the applicant launched proceedings to interdict the transfer of the property to the second respondent. This had the effect that compliance with the conditions of sale could not proceed. In the meantime, the applicant had refused access to the property for the second respondent's financiers to assess the property. Realising that it could not comply with the time period for the furnishing of the guarantee by virtue of the foregoing, the second respondent made a request to the execution creditor, being First Rand Bank Ltd, that the matter be stayed pending the outcome of the interdict proceedings. In response, the execution creditor advised that it had accepted a payment proposal from the applicant and that should it receive a payment from the Applicant on the 30th of June 2021, the sale of the property would have to be set aside.

8. The second respondent learnt later that the applicant had failed abide by the settlement agreement by failing to make payment of the full amount required in terms thereof by 30 June 2021. Ultimately, the applicant had failed to extinguish his arrears and had failed to abide by the terms of the settlement agreement. The interdict proceedings were withdrawn by the applicant during October 2021 with a tender to pay costs on an attorney and client scale.
9. The interdict application had put the sale to a halt and the conclusion of a settlement agreement between the applicant and the bank had resulted in the sale process being stayed. The withdrawal of the interdict process allowed the sale process to resume.
10. During March 2022, the sheriff launched proceedings in terms of rule 46(11) for the cancellation of the sale in execution. The application was set down for hearing on 9 June 2022. The applicant, who received notice of the proceedings, alleges that for reasons unknown to him, such application was 'reversed' or abandoned by the sheriff.
11. According to the second respondent, the application did not proceed to court as the Second Respondent had complied with the conditions of sale and had, since the 17th of February 2022, obtained an offer of a mortgage bond from Absa Bank. The matter had also prematurely been set down for hearing for reasons not relevant herein.
12. On 27 July 2022, the property was transferred and registered into the name of the Second Respondent under title deed number T28745/2022. The second respondent avers that nothing about the transfer of the property was irregular and/or disreputable and that the sale of the

property into the name of the Second Respondent remains binding and has to date not been set aside by an order of Court. The Second Respondent was thus entitled to take transfer of the immovable property into its name.

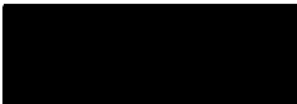
13. The applicant baldly avers that the sheriff acted in violation of the conditions of sale and that the registration of transfer occurred without compliance by the second respondent with the conditions of sale. The sale is therefore null and void. Apart from the fact that these are far reaching conclusions devoid of primary facts, they remain entirely unsubstantiated by evidence and amount to no more than speculation on the part of the applicant. In any event, they were effectively refuted by the second respondent in its answering affidavit.
14. The relief sought by the applicant in these proceedings is unsustainable in fact or law in that neither the sale in execution to the second respondent nor the order of court authorizing such sale, are sought to be set aside. The cancellation of the registration of the immovable property from the names of the Second Respondent does not result in the cancellation of the court order authorising the sale in execution by the sheriff, nor does it establish an entitlement to have re-registration of the property into the name of the applicant. On the contrary, the court order of 7 August 2017 remains binding and First Rand Bank Limited retains its status as the judgment creditor. Since the sale of the property to the Second Respondent has not been set aside by order of court, and since the conditions of sale were indeed ultimately fulfilled, the sale remains valid and binding and ownership in and to the property passed to the second respondent by registration of transfer. The basis for the relief sought by the applicant, namely, cancellation of the registration of transfer to the

second respondent and re-registration of the property into the name of the applicant, simply does not exist on the case made out by the applicant. See in this regard: *Kgole and Another v FirstRand Bank Limited and Others* (2012/28961) [2021] ZAGPJHC 656 (9 November 2021), paras 27.3; 28; & 30-32 and the authorities of higher courts cited in that judgment.

15. No case has been made out by the applicant to the effect that the second respondent's failure to timeously comply with the furnishing of a guarantee acceptable to the execution creditor, went to the root of the matter, especially in circumstances where the failure was caused by the applicant's own conduct. The facts alleged in the answering affidavit, which are unrefuted, given that no replying affidavit was filed in this matter, must be accepted as correct. In that regard, it is plain that the applicant has sought to evade the consequences of his own default in repaying the loan to the bank or settling his arrears in full. His own conduct impeded the timeous fulfilment of the relevant sale condition.
16. The second respondent also raises the non-joinder of First Rand Bank, being a necessary party, as a defect in the application.
17. As regards the issue of material non-joinder, First Rand Bank Limited was the execution creditor at whose behest the court order of 7 August 2017 declaring property specially executable, was obtained. It was the execution creditor who instructed the First Respondent (Sheriff) to proceed with the execution of the court order which resulted in the immovable property being purchased by the Second Respondent. It is further indisputable that the purchase price of the immovable property, namely, R1 400 000.00 (one million four hundred thousand rand) accrued

to the execution creditor, and since relief is sought in this application to refund the purchaser, it is First Rand Bank Limited that would have to effect the refund.

18. Notwithstanding that first Rand bank has not been joined and is in my view a party having a material interest in these proceedings, I am of the view that the relief sought in these proceedings is, as a matter of law, incompetent. It would not serve the interests of justice to proceed with an application that was obviously misguided by staying the proceedings so that the bank can be joined. It will result not only in the incurrence of unnecessary costs for all parties concerned, and will not affect the clear legal position upon which this matter can be and has been decided.
19. As regards costs, the general rule applies, namely, that the successful party is entitled to its costs.
20. Accordingly, the application is dismissed with costs.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 11 March 2024
Judgment delivered 15 March 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 15 March 2024.

APPEARANCES:

Counsel for Applicants: None

Counsel for Second Respondent: Adv D Ndlovu
Instructed by: Precious Muleya Incorporated Attorneys