IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE:	28-01-2019
SIGNATURE:	[signature]

Case No. 36612/16

In the matter between:

TAU DANIEL MAKHAFOLA	**APPLICANT**
AND	
STANDARD BANK OF SOUTH AFRICA	**FIRST RESPONDENT**
CHIEF REGISTRAR OF DEEDS	**SECOND RESPONDENT**
SHERIFF OF THE HIGH COURT, VEREENIGING	**THIRD RESPONDENT**
ETIENNE NIENABER	**FOURTH RESPONDENT**
E NIENABER VERVOER t/a LOGICS CC	**FIFTH RESPONDENT**

JUDGMENT

MILLAR, A J

1. This application was brought initially by way of urgency in January 2018 by the applicant in order to *inter alia* interdict to transfer of his immovable property pending an application for rescission of a judgment that had been granted against him. The applicant was the registered owner of the property against whom the first respondent, who held a mortgage bond registered against the title deeds of the property as security for a loan, had obtained judgment.

2. The applicant had fallen into arrears with his repayment obligations to the first respondent and it had instituted action against him. The applicant had defended the action and judgment was granted against him on 6 October 2016. Besides the monetary judgment, the court also declared the immovable property specially executable. The applicant subsequently brought an application for leave to appeal the judgment and that application was dismissed.

3. No further steps were taken by the applicant until it was brought to his attention at the beginning of October 2017 that the first respondent intended to execute the judgment and to have the Sheriff sell the property by way of auction.

4. The applicant immediately contacted the first respondent and an agreement was reached on 29 September 2017 in terms whereof the sale in execution, scheduled for 6 October 2017, would be stayed and the applicant would make certain payments to the first respondent. The first respondent for its part gave the third respondent instructions to stay the sale pending the payments by the applicant.

5. The terms of the agreement entered into between the parties on are disputed. I will deal with the parties' contentions as to what the terms of the agreement were in due course, but it suffices to state here that the first respondent thereafter took the view that the applicant had not complied with the agreement (which applicant disputed) and subsequently instructed the third respondent to proceed to sell the property on auction. The property was sold on 30 November 2017 to the fourth and fifth respondents and it was the transfer to them that the applicant sought to interdict as a matter of urgency. Before the urgent application was heard on 9 January 2018, the first respondent gave the following undertaking:

> "*our client undertakes that it will not transfer the property forming the subject matter of the Application to the purchaser thereof, pending finalization of the Application (whichever form that may take). As previously indicated the transfer has not yet been lodged in the deeds office*".

6. There no longer being any urgency, the matter was removed from the roll and the parties at that stage agreed time periods for the delivery of documents, the intention being that the application would then in the ordinary course be enrolled for hearing on the opposed roll of this court.

7. The first respondent complied with its obligations and filed its answering affidavit by 2 February 2018. The applicant failed to file a replying affidavit by 16 February 2018 and so the application was removed from the roll a second time on 13 April 2018.

8. A lengthy period of time passed without the applicant delivering a replying affidavit and the first respondent then enrolled the matter for hearing on 28 January 2018.

9. Once the matter had been enrolled, the applicant then delivered a replying affidavit, with an application for condonation on 9 January 2019, as well as a notice to amend his notice of motion on 17 January 2019. Neither the application for condonation nor the application to amend the notice of motion were opposed by the first respondent and were granted.

10. The relief sought by the applicant in Part A of the Notice of Motion is interdictory in nature and was rendered nugatory by the undertaking given by the first respondent.

11. The relief sought in Part B of the Notice of Motion seeks primarily in paragraph 2, an order for the rescission of the judgment granted by Murphy J on 6 October 2017 and in the alternative, introduced by way of the amendment, for orders that are superfluous in that they are merely a statement of the legal consequences that would follow were the judgment to be rescinded.

12. The applicants counsel conceded at the outset that no case had been made out for rescission. The case for the applicant as it appears from the papers is not that the judgment is impeachable but rather that the execution of that judgment is because of the agreement reached to stay it.

13. The parties are *ad idem* that an agreement was reached and that the sale in execution on 6 October 2017 was stayed. They differ on the terms of the agreement and whether the applicant fulfilled his obligations.

14. On 29 September 2017, the applicant had spoken to a representative of the first respondent – Ms Priscilla Madingwane who had agreed with the applicant that he would make payment of R300 000.00 before 2 October 2017 and would thereafter pay R75 000.00 per month for 6 months, commencing on 15 November 2017 until all the arrears had been settled in order to stay the execution. This was corroborated by contemporaneous notes made by her and also in material respects by an email sent to her by the applicant on 29 September 2017.

15. The only difference between the agreement recorded by Ms Madingwane and that confirmed by the applicant in his email, was that the first payment would be in the sum of R267 144.00 and not R300 000.00 She however, subsequently sent the applicant an email on 2 October 2017 disputing the applicant's contention regarding the amount of the first payment.

16. The first payment made by the applicant was in the sum of R150 000.00 which was made on 4 October 2017. When the applicant failed to make the further payments that had been agreed, the first respondent proceeded to instruct the third respondent to continue the execution process and sell the immovable property on 30 November 2017.

17. When it became apparent to the applicant that the first respondent was intent on proceeding with the sale, he again made a further payment, albeit that he still did not comply with the agreement, even on his own version of it by the time that the sale in execution took place, he had not complied. On applicant's own version, he was to have paid R267 144.00 and R75 000.00 – a total amount of R342 144.00 by 15 November 2017. Instead, by then, all that had been paid by the applicant was R200 000.00, with a further R100 000.00 being paid on 16 November 2017.

18. Even though there is in the circumstances a dispute of fact as to what the terms of the agreement were, on the applicant's own version he failed to comply with the agreement. Even if this were not so, on the papers before the Court, the terms of the agreement contended by the first respondent[1], are as a matter of probability the terms of the agreement that was entered into on 29 September 2017.

19. In the present matter, even if it were to be found that the parties entered into an agreement on the terms contended for by the applicant, his own failure to comply with those terms constituted a breach of the agreement which entitled the first respondent to proceed with execution as it did.

20. The applicant has used every arrow in his proverbial quiver in order to delay and frustrate the execution of the judgment obtained by the first respondent. In the period of almost a year between the dismissal of the application for leave to appeal until the first respondent

---

[1] STELLENBOSCH FARMERS WINERY LTD v STELLENVALE WINERY (PTY) LTD 1957 (4) SA 234 (C) @ 235 E-G; see also PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) @ 623 I to 624 A

first took steps to sell the immovable property, the applicant was content to sit idly by and took no steps to pay the judgment debt or part thereof. Once the property was to be auctioned, the applicant was galvanized into action and entered into the agreement with the first respondent to stay the sale. Having reached an agreement, with the sale having been stayed, he again failed to comply with the agreement until the property was again to be sold on auction. This reactive behavior manifested again after the urgent application was brought and the first respondent gave the undertaking that it did. The applicant had obtained what he wanted which was to prevent the transfer of the property and again sat idly by. It was only after the first respondent again took steps to bring the litigation to a finality by setting the matter down that an application for condonation was brought for the filing of a replying affidavit 168 days out of time. This was also accompanied by an amendment to the notice of motion – both of which occurred two weeks before the hearing.

21. The conduct of the applicant is to be deprecated. He has embarked on a deliberate course of action to frustrate and delay the finalization of the litigation between himself and the first respondent. It is for this reason that I intend to make an award for punitive costs on the scale as between attorney and own client.[2]

22. In the circumstances I make the following order:

22.1 The application is dismissed.

---

[2] De la Guerre v Ronald Bobroff & Partners Incorporated and Others [2013] JOL 30002 (GNP)

22.2 The applicant is ordered to pay the costs of the application and for the application for condonation and to amend the notice of motion on the scale as between attorney and own client.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	28 JANUARY 2019
JUDGMENT DELIVERED ON:	28 JANUARY 2019
COUNSEL FOR THE APPLICANT:	ADV J MOLLER
INSTRUCTED BY:	MAKHAFOLA & VERSTER INC
REFERENCE:	MR S MAKHAFOLA
COUNSEL FOR THE FIRST RESPONDENT:	ADV. RJ GROENEWALD
INSTRUCTED BY:	VAN HULSTEYNS ATTORNEYS
REFERENCE:	MR A LEGG

NO APPEARANCE FOR THE SECOND, THIRD, FOURTH AND FIFTH RESPONDENTS.