



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.

25 June 2019
DATE

[Signature]
SIGNATURE

Case No: 12231/2014

In the matter between:

SEKGALA, RAMMUTLANA BOELIE

Applicant

and

**THE SHERIFF OF THE HIGH COURT
JOHANNESBURG EAST**

First Respondent

NEDBANK LIMITED

Second Respondent

CHRISTOPHER NUNES

Third Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Fourth Respondent

IN RE:

NEDBANK LIMITED

Plaintiff

and

SEKGALA, RAMMUTLANA BOELIE

Defendant

JUDGMENT

HF JACOBS, AJ:

[1] This is an application for the declaring of the judicial attachment by the first respondent (the Sheriff) at the behest of the second respondent (Nedbank) of the applicant's immovable property¹ null and void and further for the setting aside of the sale in execution at which the said property was sold by the Sheriff to the third respondent on 25 January 2018 and for ancillary relief. The applicant appeared in person and the summary of the relief sought has been distilled from the notice of motion he delivered. The present litigation between Nedbank and the applicant commenced during January 2014 when Nedbank instituted proceedings against the applicant claiming payment of an outstanding debt and foreclosure in terms of a mortgage bond in respect of the property mentioned above. This Court granted judgment against the applicant during 2015. That litigation came to an end on 9 May 2019 when the Constitutional Court refused the applicant leave to appeal against the judgments of this Court.²

[2] Application is therefore made as recorded in paragraph 1 above by the applicant conceding that the judgment granted in favour of Nedbank against him is final after he has exhausted all remedies to challenge the judgment. In this application the applicant relies on the following grounds for the relief sought:

¹ Section number 72 described on Sectional Plan No: SS750/1995 in the Sectional Title Scheme known as Wilbur Woods situated at Rembrandt Park Extension 6, Johannesburg.

² See order of the Constitutional Court dated 9 May 2019 under case number CCT56/19 between Rammutlana Boelie Sekgala and Nedbank Limited and case number CCT63/2018 between Rammutlana Boelie Sekgala and Nedbank Limited published under neutral citation *Cloete & Another v S; Sekgala v Nedbank Limited* [2018] ZACC 6 per Theron J decided on 19 February 2019.

- [2.1] that Nedbank failed to comply with the provisions of Rule 46(8)(c) of the Uniform Rules of Court in that the conditions of the sale in execution was not served on him;
- [2.2] that Nedbank and the Sheriff failed to disclose that there existed arrear municipal rates and taxes payable by the applicant in respect of the property to the local authority concerned at the time of the sale in execution and that failure to publish that fact constitutes a material defect in the execution process which renders that process null and void;
- [2.3] that the Sheriff and Nedbank failed to publish, prior to the sale in execution, that the applicant was indebted to the body corporate of the property in respect of arrear levies and that the failure to so publish constitutes a material defect in the execution process which also renders it null and void;
- [2.4] that the Sheriff and Nedbank failed to state prior to and during the sale in execution whether it was to be sold with or without a reserve and that failure to do so constitutes a material defect in the execution process rendering the sale in execution null and void;
- [2.5] that the Sheriff and Nedbank failed to serve a notice of attachment of the property on the applicant;

[2.6] that the sale in execution took place while there was an appeal pending to the Constitutional Court against the judgment against the applicant which was only finalised on or about 9 May 2019; and

[2.7] that there was a general lack of transparency in the execution process for want of disclosure of the arrear levies, rates and taxes and the like information which caused the third respondent to purchase the property at the sale in execution.

[3] When the matter was called the applicant handed up a notice in terms of Rule 30(2)(b) raising a complaint that Nedbank's set down of the application constitutes an irregular step in that:

[3.1] Nedbank's answering affidavit was served out of time;

[3.2] no agreement exists between the parties extending the time-period for the filing of Nedbank's answering affidavit; and

[3.3] Nedbank failed to bring a condonation application or an application in terms of Rule 27(1) for the extension of time to file its answering affidavit.

[4] I will deal with the aspects raised in Rule 30(2)(b) notice of the applicant and postpone discussion of the rescission application to later in this judgment.

[5] The applicant's contention that Nedbank's answering affidavit is out of time is correct. But the applicant's statement that no condonation was sought by Nedbank in its answering affidavit is incorrect. Nedbank's answering affidavit³ contains in paragraphs 29 to 31 under the rubric "CONDONATION" an apology for the late filing of the answering affidavit and record facts and reasons for the late filing of the answering affidavit. The applicant's contention that there is before me no application for condonation is factually incorrect. In addition thereto, the applicant submitted that by reason of the absence of a formal application for condonation there exists no answering affidavit that may be taken into account for purposes of this application and, therefore, the applicant was thus far under no obligation to file a replying affidavit and further that should the answering affidavit of Nedbank be received and the late filing thereof condoned, the applicant would still have the opportunity to file a replying affidavit in response to the belated answering affidavit.

[6] During his address in open Court it became clear to me that Mr Sekgala wilfully withheld his replying affidavit. He was clearly well acquainted with the Rules of Court, Rules of Practice and what was expected from him as a litigant in these proceedings. From the outset Mr Sekgala informed me that he had been advised on matters germane to his application and it was clear from Mr Sekgala's address in open Court that he chose not to file a replying affidavit and therefore decided not to answer to the condonation application of Nedbank taken up in the last paragraphs of its answering affidavit. Under the circumstances I am of the view that Mr Sekgala failed to file a replying affidavit at

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At pp 38-91.

his peril. He did not apply for leave to file a replying affidavit or applied for a postponement to do so. He simply submitted that should the answering affidavit be received and the late filing thereof condoned, he would become entitled to file a reply.

[7] I am of the view that the late filing of Nedbank's answering affidavit should be condoned for the reasons stated in its answering affidavit. I will now return to the application for rescission of the sale in execution.

[8] The chronology gleaned from the papers filed of record is relevant in the present context. The sale in execution took place on 25 January 2018. On 17 November 2017 an amendment of the rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa was published.⁴ In terms of the amendment a new Rule 46 regulating execution of immovable property was introduced as was Rule 46A regulating execution against residential immovable property. In terms of paragraph 8 of the amendment it came into operation on 22 December 2017.

[9] The history of the litigation between the applicant and Nedbank is set out in paragraphs [7]-[12] of the judgment of the Constitutional Court.⁵ I supply a brief summary of that chronology:

[9.1] The applicant obtained a home loan secured by a mortgage bond from Nedbank and defaulted on repayments;

⁴ See Government Gazette No: 41257 of 17 November 2017.

⁵ See footnote 2 above.

- [9.2] In 2011 Nedbank obtained default judgment against the applicant for arrear payments. The applicant applied for, and was granted, interim interdictory relief staying a warrant of execution which had been obtained by Nedbank for the applicant's default;
- [9.3] The applicant then applied for rescission of the default judgment;
- [9.4] In 2014 Nedbank instituted new proceedings under the present case number, 12231/2014 in this Court and filed a notice of withdrawal in the case instituted against the applicant during 2011;
- [9.5] On 15 September 2015 Makume J gave judgment in favour of Nedbank against the applicant and dismissed his application for rescission. Leave to appeal was also refused;
- [9.6] The applicant then unsuccessfully petitioned the Supreme Court of Appeal for leave to appeal;
- [9.7] The applicant then made application to the President of the Supreme Court of Appeal in terms of section 17(2)(f) of the Superior Courts Act of 2013. The application was based on the allegation that exceptional circumstances exist. That

application to the President of the Supreme Court of Appeal was dismissed on 27 February 2018;

[9.8] On 19 February 2019 the Constitutional Court dismissed the applicant's application for leave to appeal.

[10] Section 18 of the Superior Courts Act, 10 of 2013 provides that, absent an order of court, the operation and execution of an order is suspended pending an application for leave to appeal or an appeal. An application for reconsideration of the refusal of leave to appeal by the Supreme Court of Appeal in terms of section 17(2)(b) takes place in terms of section 17(2)(f). The power of the President of the Supreme Court of Appeal is stated in paragraph 30 of *Cloete*.⁶ On 15 December the applicant applied to the President of the Supreme Court of Appeal to "refer" the decision of the other two judges dismissing his application for leave to appeal "to the Court" for reconsideration or variation. The application to the President of the Supreme Court of Appeal is not a decision to grant or refuse leave to appeal. It is part of the appeal process.⁷ Under the circumstances it follows that the application of the applicant to the President of the Supreme Court of Appeal in terms of section 17(2)(f) on 15 December 2017 suspended execution and Nedbank was not entitled to proceed with execution and the sale of execution is for that reason void. Under the circumstances it is not necessary to consider the other grounds relied on by the applicant in his challenge of the validity of the sale in execution.

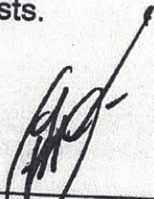
⁶ *Cloete & Another v S; Sekgala v Nedbank Limited* [2018] ZACC 6 per Theron J decided on 19 February 2019.

⁷ *Cloete & Another v S* par [33]; *Sekgala v Nedbank Limited* [2018] ZACC 6 per Theron J decided on 19 February 2019; *Liesching v S* 2017 (4) BCLR 454 (CC).

[11] The applicant appeared in person. His exposure to costs in this application is minimal. Under the circumstances and having regard to the technical nature of the applicant's challenge I am not inclined to make any order of costs in these proceedings.

I make the following order:

1. The judicial attachment and sale in execution of the property known as Section number 72 described on Sectional Plan No: SS750/1995 in the Sectional Title Scheme known as Wilbur Woods situated at Rembrandt Park Extension 6, Johannesburg on 25 January 2018 is set aside; and
2. There will be no order as to costs.



H F JACOBS
ACTING JUDGE OF THE HIGH COURT
PRETORIA