IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. yes

8/5/2015
DATE

SIGNATURE

8/5/2015

CASE NO: 20740/13
7580/07
1730/13

SHEPARD TENDAYI CHIURA	1ST APPLICANT
ESTER CHIURA	2ND APPLICANT

AND

ABSA BANK LTD	1ST RESPONDENT
NEDBANK LTD	2nd RESPONDENT
SHLOMO MISHAN	3RD RESPONDENT
MIRIAM MISHAN	4TH RESPONDENT
SHERIFF HALFWAY HOUSE	5TH RESPONDENT
REGISTRAR OF DEEDS, PRETORIA	6th RESPONDENT
JOYSPRING TRADE & INVESTMENT 11 (PTY) LTD	7TH RESPONDENT
RICHARD NGWENYA & PARTNERS	8TH RESPONDENT
WEBBER WENTZEL ATTORNEYS	9TH RESPONDENT

JUDGEMENT

LEDWABA, DEPUTY JUDGE PRESIDENT

[1] On 5 May 2014 the applicants filed an application for leave to appeal and condonation of the late filing thereof mainly against the judgment of Van Der Byl AJ. The application was opposed.

[2] On 17 February 2014 the applicants filed an amended application for leave to appeal and the condonation for the late filing of the application for leave to appeal against the order for Van Der Byl AJ in terms of the court order of Kollapen J dated 11 December 2014.

[3] The court file further shows that in 2013 the applicants further brought various applications which were heard before Tlhapi J, Mphahlele J and Voster AJ which were unsuccessful and punitive costs orders were granted against the applicants.

[4] Voster AJ was not available to heard this application and all the parties had no objection that I could hear this application.

[5] At the first hearing of this application the first applicant appeared in person and since the second applicant, his wife, was not in court, the application had to be postponed so that she could also appear in court. When the matter was postponed I specifically informed the first applicant that due to the complexities and the deficiencies of their application I recommended that they should be legally represented. Both applicants when the matter was before me on the second occasion, stated that they would personally argue the application.

[6] For the proper understanding of the order I am going to make, I will briefly record the background information before this application landed before me.

[6.1] On 17 October 2005, the applicants purchased Erf 2106 Dainfern Extension 19 Township ("the property") and financed the full purchase price thereof by way of a loan in the amount of R2 350 000,00 from the second respondent ("Nedbank"). The property was transferred to the applicants on 15 December 20015 and, as security for the loan, a mortgage bond was registered in favour of Nedbank simultaneously with transfer of the property into the name of the applicants.

[6.2] The applicants fell into arrears with their mortgage payments resulting in Nedbank taking legal action and on the 29th March 2007, Nedbank obtained default judgment in the sum of R2 401 460.05 while the property was also declared executable.

[6.3] The property was sold in execution during or about July 2009 to the third and fourth respondents for the sum of R1 400 000.00 and it was transferred to them in September 2009. The applicants vacated the property in November 2009.

[6.4] The third and fourth respondents thereafter sold the property to the seventh respondent in May 2010 for an amount of R3 325 000.00. The first respondent financed the purchase of the property and a mortgage bond was registered over the property in favour of the first respondent to secure the indebtedness of the seventh respondent.

[6.5] In July 2011, the applicants launched proceedings out of this court in which they sought an order rescinding the judgment obtained by Nedbank, an order setting aside the order declaring the property specially executable, and an order setting aside the sale in execution, as well as an order for the retransfer of the property into their names.

[6.6] The matte came before TUCHTEN J who on the 24th of January 2013 made the following order:

[1] *The claims for the rescission of the default judgment granted on 29 March 2007 and to set aside the order made declaring the property at 2106 Benedict Drive Dainfern Valley ("the property") specially executable are dismissed.*

[2] *The sale in execution of the property held on 28 July 2009 is set aside.*

[3] *It is declared that the purported transfers of the property out of the names of the applicants and further are invalid.*

[4] *The fifth respondent, the Registrar of Deeds, is hereby directed forthwith to cancel, as invalid:*

[4.1] *all deeds of transfer in relation to the property executed after 28 July 2009, including deeds of transfer of the property to or from the second and third respondents (Shliomo and Miriam Misham) and the sixth respondent (Joyspring Trade and Investment 11 (Pty) Ltd);*

[4.2] *all mortgage bond registered over the property after 28 July 2009*

[5] *The Registrar of Deeds is hereby directed forthwith to reinstate, as if never cancelled, mortgage bond no. B191008705 registered over the property in favour of the first respondent (Nedbank Limited).*

[6] *All fees of office, if any, due to the Registrar of Deeds for acting in accordance with this order must be paid, on demand, by Nedbank Limited.*

[7] *Nedbank Limited may not take further steps to execute against the property unless and until it has been authorised to do so in accordance with this order must be paid, on demand, by Nedbank Limited.*

[8] *Nedbank Limited may not take further steps to execute against the property unless and until it has been authorised to do so in accordance with the provisions of the proviso to Rule 46(1)(a)(ii).*

[9] *Any party to this application may approach Tuchten, J or, failing him, any other judge of this Division, in chambers, for directions or a ruling on any matter arising from this order.*

[10] *The order of costs made against the applicants on 1 October 2012 is set aside. All other costs order made in this application will stand. Save as provided in this paragraph, each party will bear his, her or its own costs in relation to the application.*

[6.7] In setting aside the sale in execution TUCHTEN J took the stance that the notice of sale was invalid in that the description of the property in the notice of sale differed materially from the actual description of the property and that this was misleading. He expressed the view in his judgment that the purpose of description was not merely to identify the property but also to inform the public what was being sold in order to attract bidders and thus obtain the highest possible price on auction.

[7] Van Der Byl AJ rescinded the judgment and order of Tuchten J as it was clear that the ASBA Bank Limited was not cited as a party in the proceedings before Tuchten J. Rescission was granted on the basis that the judgment was erroneously granted.

[8] Importantly it is clear that Tuchten J did not rescind Nedbank's default judgment and the order declaring the property especially executable.

[9] The applicants' application for leave to appeal and condonation to appeal does not set out explanation or satisfactory explanation for its being out of time. However, since the applicants acted in person I cannot expect them to prepare a properly compliant application and I think it will not be in the interest of justice to merely dismiss the application because the application for condonation is non-compliant.

[10] In the present application I should carefully consider whether there are reasonable prospects that another court could overturn the judgment and order of Van Der Byl AJ.

[11] The default judgment of Nedbank has not been rescinded and it still stands as a valid judgment. Kollapen J in paragraph 22 of his judgment correctly, in my view, said *"It may well be that the relief the applicants seek by way of leave is unlikely to bring them the relief they desire. In my view and for what it is worth, their remedy may lie elsewhere and they would be well-advised to reconsider the trajectory of their current litigation stance and to obtain legal advice in that regard and they would be well advised to reconsider the trajectory of their current litigation stance and to obtain legal advice in that regard*".

[12] After careful consideration of the history of the matter and the relieves sought by the applicants, I think there are no reasonable prospects that another court might find that Absa was not entitled to the rescission of Tuchten J's order or that the historical background of this matter justifies the granting of the relief sought by the applicants.

[13] In the circumstances, I make the following order

- The applicants' application is dismissed with costs
- The applicants to pay the costs, jointly and severally.

A P LEDWABA

DEPUTY JUDGE PRESIDENT

HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION PRETORIA

HEARD ON	18 FEBRUARY 2015
APPLICANTS APPREARED IN PERSON	
COUNSEL FOR THE 1ST, 7TH, 8TH AND 9TH RESPONDENTS	ADV. G F PORTEOUS
INSTRUCTED BY:	NORTON ROSE FULBRIGHT TTORNEYS
COUNSEL FOR 2ND RESPONDENT	ADV J DANIES (assisted by ADV. C VENTER)
INSTRUCTED BY:	LOUWNDES DLAMINI ATTORNEYS