

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

Case No. : 6686/2007

In the matter between:-

MICHIEL DANIËL BESTER

APPLICANT

and

EVERT BAKKES CLAASEN

1st RESPONDENT

**THE SHERIFF OF THE HIGH COURT
DISTRICT OF HEILBRON**

2nd RESPONDENT

CORAM: NAIDOO, J

JUDGMENT BY: NAIDOO, J

HEARD ON: 4 DECEMBER 2014

DELIVERED ON: 5 MARCH 2015

NAIDOO J

- [1] The applicant seeks an order setting aside a warrant of execution, issued out of this court on 27 September 2012, against his right, title and interest derived as a result of a

written agreement, as well as the setting aside of the resultant attachment of such rights. He furthermore seeks the setting aside of the sale in execution held on 5 December 2012, at which such right, title and interest was sold. The applicant also seeks an order for costs against the respondent. The Sheriff of the High Court for the district Heilbron was joined as the second respondent and has not opposed this application. It is not clear whether the applicant also seeks a costs order against the second respondent, as he asks for costs of the application against "*die respondent*". Mr N Snellenburg appeared for the applicant and Mr S Grobler for the respondent.

- [2] The applicant and first respondent entered into a written agreement on 26 September 2001, in terms of which the applicant sold to the first respondent a farm called Inloop, situated in Heilbron in the Free State. Certain special conditions, in favour of the applicant, were agreed upon and included in the agreement. By virtue of such special conditions, the applicant acquired, inter alia:
- 2.1 the right to occupy the homestead and immediate yard or vicinity thereof, for the duration of his life;
 - 2.2 the right to the use of an agreed and identified portion of the property, inter alia, for the purposes of renting it out to weekend visitors and/or for hiring out fishing facilities to outsiders; and
 - 2.3 the right to keep livestock on the property.

It was agreed that the applicant would not pay any consideration to the first respondent for such rights and it was specifically agreed that the right to occupation was created only for the applicant and was not transferable. In return the applicant was obliged to maintain the building, yard and the identified portion of the premises (over which he had rights) in a clean, neat and tidy condition.

- [3] During 2007 a civil action arose between the applicant and first respondent which, after it came before the Supreme Court of Appeal, resulted in judgment being granted in favour of the first respondent, including an order for costs against the applicant. After taxation of the first respondent's costs, the applicant failed to pay such costs, as a result of which, the first respondent obtained a warrant of execution against the applicant and attached the latter's right, title and interest in the lifelong occupation right set out above. A Sale in Execution of such right took place on 5 December 2012, at which the first respondent bought the right of the applicant, which he had attached, for an amount of R20 000.00.
- [4] The applicant alleges that the issuing of the warrant of execution and the resultant sale of his right title and interest in the rights I have mentioned above, are unlawful or invalid in that the rights he enjoyed are of such a personal nature that they cannot be attached and sold in execution. Such rights were not transferable, could not be alienated or inherited by others. He was not entitled to alienate or encumber such rights, which were created only for him and

would lapse on his death. The applicant alleges, therefore, that the attachment and resultant sale of his rights were void *ab initio* and fell to be set aside.

- [5] The case of the first respondent is that there is no legal basis for the assertions of the applicant with regard to the attachment and sale of his rights. His view is that the parties are in agreement that the applicant held a personal incorporeal right, which was not registered against the title deed to the property. The first respondent alleges, as a result, that the personal right held by the applicant was never converted to a real right. It is also his contention that a debtor's right, title and interest in something is capable of being attached and sold in execution. He was, therefore, entitled to attach such rights and sell them in execution.
- [6] The applicant, in his Founding Affidavit, refers to the right he acquired as an incorporeal personal right (paragraph 17), which the first respondent obviously agrees with. In the Heads of Argument filed on behalf of the applicant, it is submitted that the rights conferred on the applicant can be regarded as personal or real rights and Mr Snellenburg (in the Heads) proceeds to discuss the test to determine if it is a real or personal right and also discusses at length the legal position regarding personal rights and personal servitudes with reference to rights such as *habitatio*, *usus* and *usufruct*. He asserted, in respect of the rights acquired in terms of the agreement between the parties, that the applicant's lifelong right of occupation placed a burden on the *dominium* (in

respect of the property) of the first respondent and as a result was a common law real right of *habitatio*, alternatively *usus*. The right to hire out the property to weekend visitors and/or fishing facilities to outsiders similarly limits the *dominium* of the first respondent and is therefore a common law real right of usufruct. The applicant's right to keep livestock on the property, which also limits the first respondent's *dominium*, is a common law right of *usus*. Mr Snellenburg further submitted in the applicant's Heads that the servitude-creating agreement between the applicant and first respondent is enforceable between them as well as against third parties who had notice or knowledge thereof, as if it were a registered personal servitude. These submissions are not reconcilable with the case of the applicant in the Founding Affidavit where he alleges that the right of occupation he acquired under the agreement with the first respondent is an incorporeal personal right. It is trite that such a right is a lesser right than a real right; a personal right concerns the relationship between the parties to a contract, whereas a real right creates an almost direct relationship between the holder of the right and the property and is enforceable against third parties. A personal right affords a claim only against the particular person who is party to the agreement and obliges that person to render a particular performance, the performance itself being the object of the right (**See Wille's Principles of South African Law 9th Edition, page 427 and 429**)

- [7] In my view, the issue was not whether the right is a real or personal right, as it appears to me that the applicant accepts that his right is a personal right, but one which is of such a personal nature that it cannot be alienated by him. As a result, this necessarily means that it can also not be attached and sold. It was not the appellant's case that the parties had intended to register the rights of the appellant against the title deed of the property. In fact it appears from the agreement between the parties that this was not their intention. It is also clear from the agreement that certain obligations (namely, to maintain the homestead and property in a neat and tidy state) were specifically placed upon the applicant.
- [8] The issue that this court need concern itself with, therefore, is whether the applicant's right was capable of being attached and sold in execution. In the agreement, the parties agree that the applicant's right of occupation was created only for the applicant and could not be transferred. The first respondent alleges that this provision was intended solely for his benefit so that the applicant would not transfer the right to "*any unworthy or untoward person*". Although the applicant counters that this assertion by the respondent is opportunistic, in my view this would make sense, as the applicant acquired the benefit of the right while the benefit for the first respondent would be the imposition of the condition to limit and/or define the exercise of the personal right. The intention behind section 66 of the Deeds Registries Act 47 of 1937, which provides that a personal servitude (of

usufruct, habitatio or usus) may not be ceded to anyone other than the owner of the property, is aimed at achieving a similar result, namely, to prevent a cession of the personal right being made by the holder of the right to a person that the owner of the property did not approve of.

- [9] The right therefore attaches to the applicant personally and cannot be transferred, alienated or bequeathed by him to another. He also enjoys the use of the fruits of the property in that he is able to hire out the property and or fishing rights, and keep livestock, which rights are intrinsically linked to his right of occupation, being a personal right enforceable only against the first respondent.

The latter's performance in terms of the agreement entails affording the applicant unhindered right of occupation and use of the property as defined in the agreement. Failure to do so would entitle the applicant to legally enforce the rights against him. Such rights, not being registered against the owner's (first respondent's) title, would make them unenforceable against third parties. The applicant's right to, title and interest in such rights would make them capable of being attached and sold.

- [10] It is accepted in South African law that a debtor's right to, title and interest in incorporeal things is capable of being attached and sold. See **Brummer v Gorfil Bros Investments (Pty) Ltd en Andere 1999(3) SA 389 (SCA)**, and **Stratgro Capital SA Ltd v Lombard N.O. and Others 2010(2) SA 530 (SCA)**. In these two cases the

debtor failed to pay the costs of the creditor in legal actions between them. The creditor attached the debtors' right, title and interest in and to the debtor's claims against another and sold same in execution. The court in each case held that the creditor was entitled to do so, although in *Stratgro*, the sale was set aside because of non-compliance with the Rules of Court in the execution process, and not because it was impermissible for the creditor to attach and sell the right. In the present case, my view therefore is that the applicant's right of occupation is capable of being attached and sold in execution. The practical implication of this would be that the buyer of such a right would be entitled to that right only for the duration of the applicant's life because the right would be extinguished upon the applicant's death.

- [11] The applicant alleged that the purchase by the first respondent of his right at the sale in execution was improper. He provided no substantiation for this assertion. He was well aware of the attachment and subsequent sale, as proper notice was served on him. He did not react to the sale. The explanation in his Replying Affidavit, in reaction to the first respondent's criticism that the current application was brought two years after the sale in execution, is that he did not have funds to engage in litigation. It seems, however, that during the period that the sale in execution was finalised, he had already engaged the services of an attorney. No explanation is given for why steps were not taken, prior to the sale, to halt or suspend the sale. I do not, in any event, agree with the assertion that the attachment of the right, title and

interest of the appellant and the consequent sale were invalid, unlawful or void *ab initio*, or that the first respondent acted improperly in purchasing the right of the appellant at the sale in execution. The applicant also seeks the setting aside of the warrant of execution issued on 27 September 2012. It is not in dispute that the warrant was validly issued in terms of the Rules of Court, in pursuance of a taxed order for costs, which remained unpaid by the applicant. No case has been made out in the papers for setting aside of the warrant of execution.

[12] In the circumstances, I make the following order:

12.1 the application is dismissed with costs



S. NAIDOO, J

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