

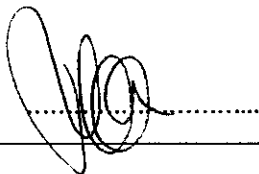
REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT
PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 50537/2012

17/5/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
17/05/2013	
	

In the matter between:

FREDERICK CHRISTOFF GROENEWALD
DREYER

APPLICANT

AND

THE REGISTRAR OF DEEDS, PRETORIA
THE MASTER OF THE NORTH GAUTENG
HIGH COURT, PRETORIA
THE SHERIFF OF THE HIGH COURT,
POTCHEFSTROOM

FIRST RESPONDENT
SECOND RESPONDENT

THIRD RESPONDENT

NICOLAAS HJOHANNES BOSCH
K. VAN DER WESTHUIZEN NO.
K. VAN NIEKERK NO.

FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT

JUDGMENT

MAKUME J

[1] In this matter Applicant seeks a declaratory order that he is the lawful owner of immovable property described as portion 25 (a portion of portion 1) of the farm Kopjeskraal 517 in the province of Northwest(the property). The forth Respondent is the only party who is opposing the granting of the order.

[2] The background history leading to this application is set out hereunder:

2.1. On the 8th September 2011 the Applicant purchased the property at a public auction conducted by third respondent pursuant to a judgment obtained by ABSA Bank Limited against one Ernest Jacobus Marais(Marais) under case number 24195/2008.

2.2. The applicant paid an amount of R1020 000.00 (one million twenty thousand rand) for the property.

2.3. On the 27th September 2011 the estate of Marais was placed under provisional sequestration and on the 2nd November 2011 Marais was finally sequestrated. The applicant in the sequestration of Marais was the Fourth Respondent who was one of Marais' creditors.

2.4. On the 17th November 2011 the First Respondent effected transfer of the property into the name of the Applicant at the instance of the Third Respondent.

2.5. On the 29th November 2011 the Fourth Respondent brought an urgent application in this court under case number 66570/2011 for an order interdicting the Applicant from alienating or encumbering or effecting improvements to the property pending the setting aside of the transfer of the property.

2.6. The urgent application was settled when a Draft Order was made an order of court which Court Order read as follows;

- (a) It is recorded that First Respondent does not concede that applicant has the necessary locus standi to bring this application.
- (b) First Respondent is interdicted from encumbering, alienating or registering any transfer of ownership of his rights, title and interest in the immovable property known as Gedeelte 25(GVGI) van die plaas Kopjeskraal 517. IQ (the immovable property) pending the appointment of a trustee by the Fourth Respondent in the insolvent estate of Ernest Jacobus Marais and the making of a decision by the said trustees in respect of the appropriate action to be taken with regard to the immovable property.
- (c) The Third Respondent is interdicted from registering any transfer of ownership encumbrance or alienation of any right title and interest in the immovable property known as Gedeelte 25 (GVGI) van die plaas Kopjeskraal 517 IQ pending the appointment of a trustee by the Fourth Respondent in the insolvent estate of Ernest Jacobus Marais and the making of a decision by the said trustee in respect of the appropriate action to be taken with regard to the immovable property.
- (d) The costs of the application be costs in the sequestration of Ernest Jacobus Marais.

2.7. On the 15th February 2012 the Second Respondent appointed the Fifth and the Sixth Respondents as joint provisional trustees in the insolvent estate of Marais.

2.8. On the 1st August 2012 the Fifth and Sixth Respondents made a decision in respect of an appropriate action regarding the property by informing the applicant's attorneys that seeing that it is only the Fourth Respondent amongst all the creditors

who is objecting to the transfer of the property to the applicant that the Applicant should proceed to apply for a declaratory order from this court. That this Court should determine whether ownership of the property resides within the insolvent estate of Marais despite its sale to the Applicant.

2.9. Pursuant to that letter from the Fifth and Sixth Respondents in their capacities as joint trustees of the insolvent estate Marais the Applicant launched the present application.

THE EFFECT OF THE SALE IN EXECUTION ON THE 8TH OF SEPTEMBER 2011

- [3] As I understand it the Fourth Respondent contends that the sale in execution was irregular for want of compliance with Rule 46(3) which requires that the notice of attachment must be served on the Respondent by registered post. The Fourth Respondent has referred the Court to the decision of **Joosub v J.J SA (PTY) Ltd (now known as Construction and Special Equipment Co pty Ltd and Other 1992(2) SA 665(N)**. That matter is distinguishable from the present matter in that not only was it a matter decided on exception but it is clear as appears on page 673 where the Honourable McCall AJ says the following:

“ It must be accepted for the purpose of this exception, that when the deputy sheriff issued returns of service in respect of each of the properties, stating that he had on 18 August 1986 attached them he had not in fact served notices of attachment on the owner of the property that is the plaintiff in the present action or on the Registrar.”

- [4] In the present matter the notice of attachment on page ninety of the papers indicates that on the 27th February 2009 the Sherriff served the notice of attachment by Registered post on the Registrar of Deeds, the occupier and on the owner Mr E J Marais by registered post. I am of the view that the requirements of Rule 46(3) were fully complied with.
- [5] On the 18th August 2011 more than 2 years since the property was placed under attachment the Sherriff once more served a notice of sale by affixing the notice to the main entrance of the property. In that notice the debtor and the general body of interested purchasers were informed that the immovable property described therein would be sold by public auction to the highest bidder on the 8th of September 2011. Despite the publication of that notice the debtor and the Fourth Respondent took no steps to find fault with the process being followed.
- [6] The Fourth Respondent for the first time now finds fault with the description of the property sold. He did not raise this issues when he interdicted the Applicant during March 2012.
- [7] The primary purpose of Rule 46(7)(b) is to inform the public what is being sold, the object being to attract bidders to realise as high a price as possible for the property. In the matter of **Hopkins Boerdery (Edms) BPK v Colyn 2006(1) ALL SA 496C** the court dealt with what constitutes short description and differentiated between farmland and other land. It was held that in respect of farmland a mere title deed description of the property in the notice of sale is adequate and complies with the provisions of the subrule.
- [8] In the **Hopkins** matter (supra) Van Zyl J quoted and referred with approval the decision of Eloff J in the matter of **First Consolidated Leasing Corporation Ltd v**

Theron and Others 1974(4) SA 244(T) at page 246 D-F wherein the following was said:

" I do not think that this reasoning applies to farm property such as that with which we are concerned in this case. To begin with there is no suggestion that the description so far as it goes is a misdescription. In addition while the mere reference to the Deeds Office description in Pillay's case might convey to a potential purchaser that it is unimproved the description of the farm in the present case is not in my view, such as to convey to a reader of the advertisement that the farm is lacking in attributes such as trees, crops, fencing or other features frequently found in farms. I am certainly not persuaded that the reference to a farm in the advertisement without a description of enhancing attributes conveys that there are probably no such attributes. And I think that if the Deputy Sherriff were to be put to the task of listing all that there is on the farm, he would have great difficulty in deciding what to mention and what to omit. I do not think that the draftsman of the Rules contemplated that be done."

[9] In the present matter what was advertised is clearly farmland and I am satisfied that the description was sufficient to attract those members of the public who have interest in acquiring such land. It must be remembered that sale of farm land and sale of urban residential land or property will attract different markets. The mere fact that the notice gives details of the title deed number and where the property is situated is sufficient for purposes of Rule 46(7)(b). The fourth Respondent has failed to demonstrate how a more detailed description would have attracted more people than were present at the sale in execution.

[10] The next aspect raised by the Fourth Respondent in opposing this application appears in paragraph 8-11 of his founding affidavit. Therein the first respondent queries the sale price of the property and says that if the sale in execution that took place on the 8th of September 2011 is allowed to stand then it will not be in the

interests of the general body of the creditors of the insolvent estate Marais. The Fourth Respondent says that if the property is again re-advertised for sale by public auction it will be marketed and would easily fetch a price of R3 million.

- [11] The Fourth Respondent does not tell the Court how and who will do the marketing of the intended resale by public auction. It is safe to say that he is speculating and has not provided any hard facts to support his contention. This speculation is indeed at the core of his opposition to applicant's case.
- [12] What the Fourth Respondent forgets is that when the sale took place there was no sequestration pending. The asset belonged to Mr Marais who had received sufficient notice of the sale and if he wanted the property to be taken into consideration in his insolvent estate he would have taken steps to interdict the Sheriff from proceeding with the sale in execution pending the appointment of trustees, this he did not do. Accordingly section 20(1)(C) of the Insolvency Act 34 of 1936 has no application.
- [13] In terms of Rule 46(13) it is incumbent on the Sherriff who conducts a sale in execution to give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale. This section read with section 5(1) of the Insolvency Act 24 of 1936 makes it lawful to transfer property which became advertised for surrender in terms of the Insolvency Act if at the time of said sale the execution creditor did not know of the said surrender.
- [14] This situation arose in a number of cases referred to in the Applicants' heads of arguments namely **Gibson N.O v ISCOR Housing Utility CO. Ltd and Others 1963(3) SA 783 TPD, WSM Transport Pty Ltd v De Villiers 1977(1) SA 564 OPD; S Ramgobin and Two Others v ABSA Bank Limited (Unreported Durban and Coastal Local Division case number 13807/2007 delivered on the 21 July 2008; EDKINS v**

Registrar of Deeds Johannesburg and Others (Unreported judgment by Moshidi J in the South Gauteng High Court case number 16117/11 delivered on 9th March 2012.

- [15] The facts in the last mentioned case that of Edkins are perhaps similar to the facts in the present matter. In that matter after the sale in execution and before transfer the debtor surrendered her estate and published a notice to that effect in accordance with section 4(1) of the Insolvency Act. The joint trustees were appointed immediately thereafter. When the sheriff submitted documents to the Deeds Office requesting transfer of the immovable property that he had sold to the Applicant at an auction the Registrar declined to do so and referred the Sherriff to a directive of the Deeds Office being Resolution 54/2009 which reads and it formulates in question and answer form.

“If property was sold in execution and debtor is sequestrated after such sale, does the sequestration prevent the Sherriff from transferring the property to the purchaser of the sale in execution ?”

Resolution: yes

- [16] When the joint trustees when appointed they immediately took a decision and informed all concerned that they have elected not to transfer the immovable property into the purchaser's name. Moshidi J dealt with the legal principle applicable in such transfer commencing with Rule 46(13) to which I have already made reference to earlier on. He reached the conclusion that the Registration of Deeds Conference Resolution 54/2009 has no binding legal effect it is at most a guideline. The views of the Registrar cannot supercedes a Court's function and discretion.
- [17] The learned Judge concluded by saying that in terms of section 5(1) of the Insolvency Act provision is made that in the event that the sale in execution takes place before

the publication of the notice of voluntary surrender the transfer of the property can itself take place. The publication of the notice can therefore effectively stop a sale in execution that has not taken place but not the transfer of the property after the sale had taken place.

[18] In the present matter Section 4(1) does not come into operation because Marais did not surrender his estate voluntarily. His sequestration was brought about by an application at the instance of his creditor being the Fourth Respondent.

[19] The last aspect raised by the Fourth Respondent is the non-joinder of the debtor Mr Marais in the application. Fourth Respondent contends that Marais has a material interest in the outcome of the matter.

[20] It is not denied that Marais has an interest in the outcome of the matter. However his interests are taken care of by the trustees namely the Fifth and Sixth Respondent. Mr Marais' estate having been placed under sequestration renders him unsuitable to take part in legal proceedings hence the appointment of the trustee.

[21] In the matter of **Van Aardt v Hartley's Trustee (1845) 2** Menzies 135. Hartley before insolvency sold his rights under a deed of sale of immovable property to a third person before transfer in his name. Hartley went insolvent before transfer was given either to him or to the purchaser. It was held that in his case the purchaser was entitled to transfer of the property by the trustee to himself.

[22] In the present matter the insolvent Mr Marais knew very well about the attachment and the imminent sale in execution on the other hand neither the Sheriff nor the Applicant were aware that during the period between the sale of the property and

the transfer thereto that Marais estate had been placed under sequestration. The purchaser being the applicant as well as the Sherriff the Third Respondent acted in goodfaith. See **Gibson NO v ISCOR Housing Utility Co and Others 1963(3) SA 783 T at 787-A-B.**

[23] In conclusion, I am of the view that the Applicant has succeeded to prove on a balance of probabilities that he is entitled to the immovable property described as portion 25 (a portion of portion 1) of the farm Kopjeskraal 517 Registration Division 1.Q Province of Northwest extent 10, 9879 hectares held by Applicant under Deeds of Transfer T82133/2011.

[24] There is also no compelling reason why costs should not follow the result.

ORDER

[25] In the result the following order is made :

- (i) The Applicant is declared the lawful owner of the immovable property portion 25 (a portion of portion 1) of the farm Kopjeskraal 517 Registration Division 1.Q Province of Northwest extent 10, 9879 hectares held by Applicant under Deeds of Transfer T82133/2011.
- (ii) The Fourth Respondent is ordered to pay the taxed party and party costs of this application.

Dated at Pretoria on this the 14th day of May 2013.



MAKUME J

(JUDGE OF THE
HIGH COURT)