



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

12/07/2013

CASE NUMBER: 51141/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
12-07-2013	
DATE	SIGNATURE

In the matter between:

OSMAN JARDINE

APPLICANT

And

FIRST NATIONAL BANK A DIVISION OF

1ST RESPONDENT

FIRSTRAND BANK LIMITED

THE SHERIFF FOR THE DISTRICT OF

2ND RESPONDENT

JOHANNESBURG WEST

THE REGISTRAR OF DEEDS

3RD RESPONDENT

FEROZ KHAN

4TH RESPONDENT

WILLIAM BUTI MOTAUNG

5TH RESPONDENT

JUDGMENT

MAVUNDLA J

- [1] The applicant brought an application to set aside the sale in execution, of Erf 1228, Albertskroon Township, Registration Division I.Q., Province of Gauteng, measuring 441 square meters and the remaining extent of Erf 1228, Albertskroon Township, Registration Division I.Q., Province of Gauteng measuring 441 square meters on 27 October 2011, together with ancillary relief.
- [2] The application served before this Court on the 15 March 2013 and was dismissed with costs on the 19 April 2013. The applicant now seeks leave to appeal to the Supreme Court of Appeal alternatively the Full Bench of this Division against the whole of judgment and order including the order in respect of costs.
- [3] It was submitted on behalf of the applicant that there are reasonable prospects that another court might find, on the facts, differently from this Court's findings in that;

- 3.1 the warrant of execution was lawfully issued on the 22 September 2010 and properly served and the property attached on the 7 October 2010;
- 3.2 the version of the first respondent that the notice of sale in execution of the 27 October 2011 was served on the 26 September 2011 is more probable than that of the applicant;
- 3.3 there was no evidence which could support an application for rescission in the event the applicant's relief is granted;
- 3.4 rejecting the applicant's contention that his rights to housing in terms of the Constitution were impugned;
- 3.5 that the applicant did not bring this application *bona fide*.

[4] The applicant in its notice for leave to appeal further contended that:

- 4.1 the first respondent as a creditor chose to enforce its rights not by way of summons but notice of motion. The notice of motion, unlike summons does not contain the requisite notice to the applicant of his rights in terms of s26 and while the applicant's rights and warning in this regard

were contained in the founding affidavit, there is no evidence that the sheriff explained the applicant's rights in terms of s26 of the Constitution;

4.2 it was improbable, especially in the absence of any evidence to the contrary that the second respondent ("the sheriff") explained anything from the founding affidavit to the first respondent's application and especially not in relation to the applicant's rights to housing in terms of s26 of the Constitution.

4.3 the fact that the applicant continued to pay his bond instalment and to pay up his arrears believing that same was good enough in the face of the notice of motion;

4.4 the fact that the applicant continued to pay and later acted in the way he did on the morning of the sale in execution when he heard about the sale, suggest the overwhelming probability that had the applicant actually understood the exigency of the process, or became aware of the warrant of execution and sale in execution earlier, he would have approached his attorney or an attorney at that time already.

[5] It was submitted on behalf of the applicant that the Court made factual findings that the warrant of execution was served upon the applicant. This finding was premised on *prima facie* evidence, which was the return of service. It was submitted that because the applicant had contended that the warrant of execution was not served upon him, the *onus* shifted upon the first respondent to tender real evidence to prove that, indeed the sheriff did serve upon the applicant. It was further submitted that because the matter relates to the applicant's right to housing as protected in s26 of the Constitution, it was not enough to rely on the *prima facie* evidence and that the *onus* rested upon the applicant.

[6] It was further submitted on behalf of the applicant that the arrears which unleashed the default judgment, were only an amount of R11, 907. 77. The bonded amount was R350 000. 00, as at the issuing of the application. The judgment was in the amount of R361 906. 77. The judgment was obtained some 4 months later on the 19 August 2010; the outstanding amount was something less than R11 907. 77. The first respondent did not file a supplementary affidavit to explain what the actual amount in

arrears was when the sale in execution was effected in September 2011;

[7] It was further submitted that having regard to the fact that the sale in execution affected the applicant's rights to housing, in terms of s26 of the Constitution, with the property having been attached in October 2010 prior to the change in Rule 46(3). Even and even if attachment of sale set for 10 March 2010, then the change to Rule 46(3), it was imperative upon the first respondent to comply with the prescriptive flowing from decisions of the Supreme Court of Appeal, such as *Japhta v Schoeman and Others*; *Van Rooyen v Scholtz and Others*¹; *Standard Bank of South of South Africa Ltd v Saunderson*²; *Nedbank Ltd v Mortinson*.³

[8] On behalf of the first respondent it was submitted that the court decided the matter on the facts placed before it by way of affidavits and that there is no reasonable prospect that another court might come to a different conclusion. It was further

¹ 2005 (2) SA 140 (CC) at 161-163 I-163B.

² 2006 (2) SA 264 (SCA) at 277C-F, handed down in 2006;

³ 2005 (6) SA 462 AT 468b-469I handed down in 2005.

submitted that the applicant in its founding affidavit when it launched the application for setting aside the sale in execution, did not raise any impugning of his rights in terms of s26 of the Constitution, but confined himself to the question of the applicability of Rule 46(3) as amended. It was further submitted that the issue of the applicant's rights having been impugned was submitted over the bar and not supported by any facts contained in the affidavit. It was submitted that the court should not entertain this ground advanced and that the application for leave to appeal should be dismissed with costs.

- [9] It is trite that leave to appeal is a matter of the discretion of the Court. It will be granted where there is a reasonable prospect of success on appeal and another court arriving at a different decision than that of the court against whose decision leave to appeal is sought. However, that is not the only consideration, also the circumstances of the case and the conduct of the parties to the litigation.

[10] I am of the view that in the exercise of my discretion, this application for leave to appeal should be dismissed with costs. In

arriving at this conclusion I am influenced by the following:

10.1 The whole chain of events leading to this action was the notice of motion under case number 33537/10 for the payment of the amount of default judgment obtained against the applicant which was in the amount of R361 906. 77 and an order declaring the property especially executable, served on the applicant on 15 June 2010, which is common cause. Default judgment was granted by Botha J on the 19 August 2010. To date hereof there is no application for rescission of this order.

10.2. On the 27 October 2011 the applicant became aware that his house was to be auctioned. On the 14 February 2012 the applicant learnt for the first time of the result that his property has been sold.

10.3 There is no explanation what steps were taken by the applicant between:

(i) The 15 June 2010 and 19 August 2010;

(ii) The 27 October 2011 and 14 February 2012.

10.4 It is common cause that the relevant immovable property was purchased from the auction by the fourth respondent who in turn sold it to the fifth respondent. The latter has as much rights in terms of s26 as the applicant does.

10.5 The unexplained dilatory conduct of the applicant mentioned in 10.3 *supra*, in the face of an action directed against his precious commodity namely housing, was rather nonchalant, to an extent, in my view, that it ought not to be condoned, otherwise would be to the disadvantage of the fifth respondent; *vide Beira v Raphaely-Weiner and Others*;⁴ *Van Wyk v Unitas Hospital* *9Open Democratic Advice Centre as Amicus Curiae*)⁵.

⁴ 1997 (4) SA 332 (SCA) at 337C-F.

⁵ 2008 (2) SA 472 (CC) at 480A-B where The Court held that: "After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interest of justice."

10.6 Consideration of fairness to all the stake holders, in my view, dictates that the litigation should reach speedy finality and this can only be achieved by not permitting this protracted litigation beyond this point, otherwise would prejudice the fifth respondent's 26 rights; *vi de Napier v Tsaperas*.⁶

10.7 Where there are equal rights between parties, the court, in my view, should consider the conduct of the respective parties. *In casu* I am of the view that the applicant was remiss, in not having brought an application for rescission at the earliest opportunity; otherwise the immovable property would not have been sold and eventually transferred to the fifth respondent⁷;

10.8 Assuming that the appeal was to be successful, the prospects of success in bringing an application for condonation and rescission of the default judgment are in my view, non-existent. The inescapable conclusion is, in

⁶ 1995 (2) SA 665 (AD) at 671A-D; *Minister of Land Affairs and Agriculture v D & F Welvell Trust* 2008 (2) SA 184 (SCA) at 199A-D.

⁷ *Vide Napier v Tsaperas* (supra).

⁷ 1927 AD 389 at 390-391.

my view, that the singular purpose of the application for leave to appeal, is *mala fide*; vide *Kapotes v Grobbelaar*.⁸

[11] I have further taken into account the fact that on the applicant's own admission, the first respondent's founding affidavit initiating the proceedings resulting in the default judgment, referred to 26(1) of the Constitution. In the matter of *Standard Bank of South of South Africa Ltd v Saunderson*⁹ the Supreme Court of Appeal held that:

"Bearing in mind that in most cases where an order for execution is sought the defendant has no defence to the claim for payment, and is thus unlikely to seek or obtain legal advice, it seems to us desirable that the defaulting debtor should be informed, in the process of initiating action, that s26 (1) may affect the bond holder's claim to execution. Should it be held that the negative obligation of s26(1) binds even the bond-holder, the debtor would have the right to invoke circumstances that may persuade the court to grant extenuation in the execution of the order (albeit that the bond-holder's summons need not attempt to justify in advance a possible constitutional infringement)...The development should be prospective only, and it is as well to make clear that the existing summons are not invalid for want of reference to s26(1)."

⁹ *Supra* at 276G-277A.

[12] On the applicant's own admission, the affidavit accompanying the notice of motion of the first respondent made reference to s26(1) of the Constitution. He admitted service. He chose to go into slumber instead of defending the matter. It is safe to assume that he read and understood what the matter was all about. I am of the view that another court will find that the prescripts of *Saunderson* case and the likes have been met.

[13] I am further of the view that it was not necessary for the first respondent to have filed a supplementary affidavit, as was contended on behalf of the applicant, to show that s26(1) contained in the affidavit were explained to the applicant.

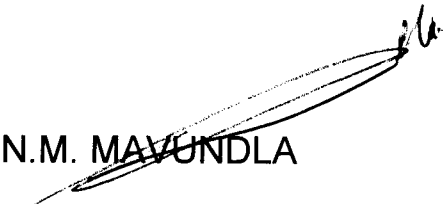
[14] I am further of the view that it is not necessary that I should traverse the rest of the submissions made on behalf of the applicant. I am of the view that in the circumstances of this case, the mere fact that the applicant may have an arguable case on

appeal, that does not mean that leave to appeal should therefore be granted; *vide Shaik and Others v Pillay and Others*¹⁰.

[15] As I have already stated that I am of the view that the application should be dismissed . It stands to reason that the applicant must be mulcted with costs. *In casu*, the costs would then include the costs of the fifth respondent, who was on the day when the application was argued, represented by counsel. The fifth respondent was at all times present at court when the application resulting to the judgment leave to appeal is sought, was heard. The court advised him, as a lay person, that he should seek legal assistance. In my view, he had a legitimate interest in this matter, which warranted that he should be legally represented. His counsel aligned his submission with the submissions made on behalf of the first respondent, and further made submissions why the application should be dismissed.

¹⁰ 2008 (3) SA 59 (NPD) at 62D-E.

[16] In the result the application for leave to appeal is dismissed with costs.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 03 JULY 2013

DATE OF JUDGMENT : 12 JULY 2013

APPLICANT'S ATT : GERHARD CULHANE ATTORNEYS

APPLICANT'S ADV : ADV. R. E.G. WILLIS

1st RESPONDENTS' ATT : STRAUSS DALY INC

1st RESPONDENTS' ADV : ADV. A. P. ELLIS

5st RESPONDENTS' ATT : ATTORNEY V MABE

5st RESPONDENTS' ADV : ATTORNEY V MABE