NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NO: 61276/2013

DATE:17/10/2013

In the matter between:

MEDUPI LUCAS RAMETSI	**First Applicant**
ENILY DIPUO RAMETSI	**Second Applicant**
And	
ABSA BANK LIMITED	**First Respondent**
GARRISON LESIBANA RAMETSI	**Second Respondent**
SALOME RAMETSIThird	**Respondent**

PULANI VINCENT RAMETSI **Fourth Respondent**

ACTING SHERIFF WONDERBOOM **Fifth Respondent**

JUDGMENT

[1] This matter came before me as one of urgency during the course of this week and the applicants seek, inter alia, the following relief:

"2. Sale of Property known as […….], Pretoria, Registration Division JR, to all owners after same was repossession from Applicants is hereby set aside.
3. Costs of suit"

[2] The facts are briefly, the following:

2.1 The first and second applicants are […..]

2.2 The property in question was originally purchased by the first applicant and that the Erstwhile Trust Bank (now ABSA Bank the first respondent) held a mortgage bond over the property.

2.3 At the time he alleges he was employed at Siemans as a labourer and he further alleges that there was an express agreement between Siemans and himself that, in the event that he was retrenched or he resigned before his bond was paid up, the outstanding balance would be settled by his Siemans Provident Fund.

2.4 In 1989 he was retrenched and he alleges that he received no monies from his provident fund and his understanding was that it had settled the outstanding bond. He was "called back to Siemans in 1991.

2.5 He also alleges that he is in possession of a letter from ABSA Bank dated 22 October 2003 advising that his mortgage bond had been paid in full and enclosing a refund in the amount of R4 440.91.

2.6 He states that ABSA Bank had the house sold in execution to one Molefe and he attaches a Deeds Office search as proof thereof. From this it would appear that the house was sold in execution during 2005 (or so it would appear). This is the only information provided by the applicants - there is absolutely no information given as to when judgment was granted against them, when the house was repossessed, when the sale in execution was held, when they were forced to vacate the house etc.

2.7 Then the second, third and fourth respondents decided to purchase the house "...since we as a family needed accommodation."[1]

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[1] This matter came before me as one of urgency during the course of this week and the applicants seek, inter alia, the following relief:

"2. Sale of Property known as […….], Registration Division JR, to all owners after same was repossession from Applicants is hereby set aside.

3. Costs of suit..."

2.8 They then took out a bond with the first respondent.

2.9 He states that “we”[2] “attended court on 19 April 2013 and the matter was postponed to 28 May 2013 when they were at court once again.
On both occasions they “...did not have lawyers because they did not
According to paragraph 19 they are the applicants' children, however, the description of these parties in paragraphs 7, 8 and 9 states that the second respondent is the first applicant's sister; the third respondent is married to the fourth respondent and I assume, given the surname, that the third respondent is the first applicant's brother.
Have money... ” It appears that it was on that date that the house was declared executable by the court.

2.9 The house was sold in execution on 20 September 2013.

2.10 The property will “soon be transferred’ and he alleges that it will be within 14 days.

2.11 They then found and attorney who was prepared to assist them and it appears that an application was brought on 19 September 2013 before Kruger AJ which "...failed due to the cause of action then chosen and this new application was drafted overnight... ”

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2 The facts are, briefly, the following:

[3] It bears mentioning that the application that was brought on 19 September 2013 was not placed before me, nor was Annexure "R4" attached to the papers.

3] Annexure"R4" is the letter referred to in paragraph 2.5 supra. In his affidavit the first applicant alleges that when the house was repossessed originally, he had misplaced all the documents and that Annexure "R4" was only found during June 2013. No explanation is given as to why it was not attached to the papers when they were originally served. This latter document was served by way of a notice on the first respondent on Monday 7 October 2013, i.e. one day before this matter is set down for hearing, and absolutely no explanation is provided as to why it is only now surfacing. A copy was provided to me during the hearing of this matter. Interestingly enough, in the affidavit, the first applicant states that although the latter is dated 22 October 2003, he only received it in 2005.

4] The argument for the applicants runs along the following lines:

4.1That it appears to be common cause that the second, third and fourth respondents were unable to pay the bond and that no issue is taken with the sale of execution on 19 September 2013 being a valid sale;

4.2 However, "... the only reason why they bought the house and borrowed money from the First Respondent was because we were of the mistaken belief that there was indeed money owing to the First Respondent when it repossessed the house and sold it to Molefe..."[3]

Par 13.6 ot the founding affidavit

4.3 That insofar as Annexure "R4" was not attached to the founding affidavit, the first respondent should have utilised the provisions of Rule 6(12);

4.4 That inasmuch as the content of R4", and its accompanying paragraphs 12.6 and 12.7 , were not specifically denied by the first respondent, they are deemed to be admitted;

4.5 That the first respondent is estopped from denying the correctness of Annexure "R4";

4.6 That the "...Right to adequate housing is a constitutionally protected right in terms of the constitution..."

5] The first respondent's attorney of record has deposed to an affidavit in which the following was stated:

5.1 That the application was served on 20 September 2013 and an answering affidavit prepared;

5.2 On 2 October 2013, the applicant's attorney served a Supporting Affidavit on them, without a Notice of Motion, annexures or any Confirmatory Affidavits but with a

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[3] The first and second applicants are married.

covering letter in which they were informed that the affidavit served on 20 September 2013 did not include an allegation to the effect that the property had already been sold and would soon be registered at the Deeds Office. Thus this letter informed the first respondent that this omission was cured in the affidavit which was attached to the letter and that the first affidavit should be “ignored”;

5.3 That the answering affidavit had already been drafted which dealt with the averments in the affidavit of 20 September 2013 and that the manner in which the applicants attorney had dealt with the issue was contrary to the rules and accordingly a Notice in terms of Rule 6(5)(d)(iii) was delivered.

5.4 To compound matters, on 7 October 2013, a day before the hearing, the applicants attorney then served annexure “R4” - this was done under cover of a filing notice and without any explanatory affidavit.

6] Counsel for first respondent also took the points of res judicata and non joinder of Molefe, the second owner of the property in question. He furthermore raised the issue that the application that served before Kruger AJ on 19 September 2013 was not placed before me.

7] Before I deal with the issues placed before me, I must record that the manner in which this application has been brought leaves much to be desired. The applicants attorney has made little effort to comply with the rules of court: the papers were not placed timeously in my file; the issue of the service of a new affidavit and the “withdrawal” of the affidavit that was served on 20 September 2013; the manner in which annexure “R4” was delivered; the fact that the application that served before Kruger AJ was not before me are all issues that warrant consideration of an order de bonis propriis. Indeed, the first respondent seeks such an order- I will deal with this issue when I deal with the issue of costs later in this judgment.

7]RES JUDICATA: This point was argued before me. Mr du Preez on behalf of first respondent argues that the issues that served before Kruger AJ, and were dismissed, were exactly the same. He argues that the affidavits are virtually identical with a small addition at the end to deal with the issue of the sale in execution on 20 September 2013 and the relief sought in this Notice of Motion is slightly different but he argues that, on a proper construction, the two applications will have the same result and that Kruger AJ already pronounced on the present issues when he dismissed the applicant on 19 September 2013.

8] If one were to compare the two affidavits, it is quite clear that 95% of the affidavits have remained the same. Ingeniously, the second, third and fourth applicants in the previous application are simply now the second, third and fourth respondents in the matter before me. Unfortunately, in the affidavit, paragraphs 7, 8 and 9 and the last sentence of paragraph 19 leave one somewhat confused and it is evident that this application is simply a “copy and paste” of the previous application - little thought has gone into framing this application properly.

9]What is so is that the relief sought in the two applications is not the same as per the Notice of Motion:

9.1 Before Kruger AJ the relief sought was to stay the sale in execution of the immovable property and other relief;

9.2 Before me, the relief sought is:

"Sale of Property known as Erf 21586 Mamelodi Extension 3 Township, Pretoria, Registration Diviosn JR, to all owners after same was repossessed from Applicants is hereby set aside. "

10] In Bafokeng Tribe v Impala Platinum Ltd[4], Friedman JP stated the following:

"From the a foregoing analysis I find that the essentials of the exception res judicata are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (ex eadem petendi causa), (3) with respect to the same subject-matter, or thing (de eadem re). Requirements (2) and (3) are not immutable requirements of res judicata. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.

However, where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed.

A court must have regard to the object of the exceptio res judicata that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the

4 1995 (1) SA 653 (SCA) at 656

concomitant deleterious effect of conflicting and contradictory decisions.

This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.

The doctrine of issue estoppel has the following requirements: (a) where a court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way, (b) if the same issue is again involved, and the right to reclaim depends on that issue, the determination in (a) may be advanced as an estoppels in a later action between the same parties, even if the later action is founded on a dissimilar cause of action.

Issue estoppels is a rule of res judicata but is distinguished from the Roman- Dutch Law exception in that in issue estoppel the requirement that the same subject-matter or thing must be claimed in the subsequent action is not required. ”

11] I am of the view that, although the facts are virtually exactly the same, the relief sought and argued was different: before Kruger AJ the issue was whether the sale in execution should be stayed. Before me the issue is whether the previous transfers of the immovable property should be set aside. The relief sought and the legal principles are therefore different and this point in limine is therefore dismissed.

12] NON-JOINDER: The second point in limine is that Molefe, who originally purchased the immovable property on a sale in execution, has not been joined. The argument is that he has an interest in the outcome of this application as, if the court grants the relief sought, there will be certain consequences such as restitution in integrum of the purchase price he paid and was paid in respect of this property.

13] Ms Mbanjwa, on behalf of the applicants, argues that he has no interest in this application as he will not be affected by the relief sought.

14] I disagree: by the very fact that the applicants wish to set aside the sale of the house to the second, third and fourth respondents, it would mean that Molefe would have to refund the money he received for the sale to them. There is no indication of how much that was nor the profit did he make from this sale vis-a-vis the price he paid on auction when he purchased it. The applicants and second, third and fourth respondents are in possession of the relevant information but have chosen not to share it with the court.

15] Also, interestingly enough, the person who purchased the property on 20 September 2013 is also not before me - surely it is necessary for him/her to know that his purchase may not necessarily be realised and that, he too should have been joined?

16] I will return to these issues in due course.

15]SETTING ASIDE OF ALL PREVIOUS TRANSFERS

Ms Mbanjwa referred me to the matter of ABSA Bank Ltd v Morrison and others[5] as authority for her proposition to set aside all previous sales. In this matter, Spilg J held that the sale in execution of an immovable property by public auction may be set aside where the debtor had settled what it owed to the creditor in full prior to the date of the

5 2013 {5} SA 199 (GSJ)

sale, but the creditor in error had failed to instruct the sheriff to cancel the sale.

17] The glaring differences between that reported case and this one are the following:

171 In the present matter the original sale and transfer seems to have taken place somewhere around 2003/2005 - no proper facts are placed before me and so this is merely a “guesstimate” based on the facts at hand. The property was transferred to Molefe and then to the second, third and fourth respondents and now the property have been sold again and transfer to the purchaser is imminent (when I am not told other that it is “within 14 days”). This is a period of some 10 years and 3 purchasers later.

172 In the matter before Spilg J the sale took place on 7 September 2011. Although there is no date mentioned of when transfer took place, it would appear that the matter was heard during June 2012 and from the argument presented, one would surmise that transfer had already taken place: thus a period of 6 months in that matter and one purchaser.

173 In the matter before Spiig J it was common cause that the judgment debt had been paid in full by the debtor prior to the sale and that the creditor had omitted to cancel the sale.

174 In the present matter there is no such admission. Ms Mbanjwa argued that as the first respondent had not specifically denied the allegation in paragraphs 12.6 and 12.7, it is deemed to be admitted. This is disingenuous as the first respondent specifically pleads as follows:

“The deponent bears no knowledge of the contents of these paragraphs and can therefore neither admit nor deny these allegations. The deponent also notes that the letter referred to in par. 12.7 is not attached although it’s alleged to be in the Applicant’s possession. The content of these paragraphs is therefore denied. ”

One must also bear in mind that the relevant letter was only served on the first respondent on 7 October 2013 without any explanation and was handed up to me in court. The first respondent has therefore been denied a proper opportunity of considering and responding to that letter and this whilst the applicants have been in possession all the while.

175 She then argues that the first respondent should have availed itself of the provisions of Rule 35(12). This argument too seems to lose sight of the fact that this application was brought as one of urgency and the provisions of Rule 35(12) would not have afforded the first respondent with sufficient time to respond to the application.

176 Why this letter could not simply have been attached to the application, when the applicants were quite clearly in possession of it all the while is not explained anywhere and this conduct is to be frowned upon. It would smack of “stealing an advantage” which is certainly not to be encouraged.

18] It falls then to discuss the content of Annexure “R4”. This reads as follows:

“22/10/2003

Mr ML Rametsi

Stand...

Mamelodi East …

Dear Client

LOAN ACCOUNT NUMBER: …

We confirm that your mortgage documents have been placed in Safe Custody and your bond account reflects a nil balance.

Please cancel your monthly payments to this account, as credit balances are not permitted on bond accounts.

Your refund of 4 440, 91 is enclosed.

We trust that this meets your approval and look forward to being of continued service to you... ”

19] At first blush this document does seem rather damning, but the question is: when was the applicants’ property repossessed by the first respondent? If the property was repossessed and sold in execution earlier then it may well be that this letter is simply confirmation that the bond was paid off by the sale in execution proceeds. As there is absolutely no information about this at all in the papers, I am left completely in the dark.

20] However, assuming that the applicants are correct and the property was sold in execution in error, then the application is so defective that I cannot see how relief can legitimately be granted on the paucity of evidence presently before me. At the very least both Molefe and the present purchaser must be given notice of this application and afforded an opportunity to decide whether they wish to oppose or not.

21] In any event, I am of the view that given the particular set of circumstances, to disturb the status quo is not in the interests of justice. There are other avenues open to the applicants to explore as against Siemans and against the first respondent other than disturbing the status quo with regard to the property especially after this long lapse of time.

22] The issue of costs is also relevant here. The usual order is that costs should follow the result. However, I am mindful of the circumstances of the present applicants. They are not people of means and they have sought the counsel of someone who is more knowledgeable than they and they have followed her advice. To order them to pay the costs would, in my view, neither be just nor equitable. The question is whether, in light of the manner in which the present litigation has been conducted, I should grant an order de bonis propriis against the applicants' attorney, Ms Mbanjwa. In this regard I mention that this order is sought in Mr du Preez heads of argument which are dated 7 October 2013.

23] It is my view that little thought has gone into the preparation of this application. It has been drafted in a haphazard manner with little thought as to the essentials that will be necessary for a court to properly adjudicate on the merits of the matter. The fact that the first respondent suddenly receives a proper copy of the application 3 days before the hearing is, in it, severely prejudicial and the manner in which service took place is not acceptable conduct of an officer of this court. This is compounded by the fact that an essential component of the applicants' case (being Annexure "R4") is only given to the first respondent a day before the matter is set down which deprives the first respondent of a proper opportunity to consider it. The argument presented to this court in order to circumvent its proper disclosure is deserving of this court's censure. Put together with the fact that I was not given a copy of the papers that served before Kruger AJ, and that service was affected neither on Molefe nor the most recent purchaser of the immovable property, it is clear that an order of de bonis propriis is warranted.

24] Thus the following order is granted:

1.The application is dismissed.

2.The applicants attorney is ordered to pay the first respondent's costs of the application de bonis propriis.

NEUKIRCHER AJ October 2013

NEUKIRCHER AJwho "we" may be is not explained in the papers