

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 2908/2010

In the matter between:

DHIRAJLAL VALLABH SONI
SHELA DEVI SONI

FIRST APPLICANT
SECOND APPLICANT

and

ABSA BANK LIMITED

RESPONDENT

J U D G M E N T
(Handed down on 28 March 2013)

BALTON J:

[1] The respondent as plaintiff, instituted action against the first applicant who is married in community of property to the second applicant.

[2] The summons was personally served on the first applicant on 10 March 2010. No notice of intention to defend was lodged and the respondent applied to the Registrar for default judgment against the first applicant on 14 April 2010 which was accordingly granted as follows:

- (a) Payment of the sum of R1 333 203,60;
- (b) Interest thereon at the rate of 10,5% per annum, calculated from 28 January 2010 to date of final payment;
- (c) Costs of suit as between attorney and client;

- (d) An order declaring executable the immovable property described as:
The remainder of Erf 303 Atholl Heights (Extension No 1) Registration Division FT, Province of KwaZulu-Natal, in extent of 2041 square metres HELD under Deed of Transfer No T8346/95, situate at 7 Tummel Place, Atholl Heights;
- (e) An order declaring executable the immovable property described as:
Erf 1425 Reservoir Hills (extension No 6) Registration Division FT, Province of Kwazulu-Natal, in extent of 718 square metres HELD by Deed of Transfer No T16984/1978 subject to the conditions therein contained, situate at 107 Kies Avenue, Reservoir Hills.¹

[3] A writ of execution was issued but before the sale took place the first applicant arranged with the respondent to pay a lump sum of R42 000,00 and R12 000,00 per month.

[4] In April 2011 the first applicant commenced defaulting with the payments of monthly instalments. He made an application for a reduction of the monthly payments which was declined by the respondent. On 27 January 2012 the first applicant received the notice of sale that the immovable property was to be sold on 8 February 2012. Discussions ensued between the parties' attorneys concerning payment of the arrears. The sale, set down for 8 February 2012, did not proceed and was reinstated for 11 April 2012.

[5] The matter proceeded to the opposed roll and the applicants seek confirmation of the rule.

¹ Pages 16 and 17 of the indexed papers.

[6] On 10 April 2012 the applicants were granted a rule *nisi* against the respondent for an order:

- (a) That the sale in execution set down on 11 April 2012 and all sale of executions of the immovable property situated at 7 Tummel Place, Atholl Heights described as the remainder of erf 303 Atholl Heights (extension No 1) registration division Ft, Province of Kwazulu Natal, in extent 2041 square metres held under deed of transfer number T8346/95 be stayed;
- (b) That the default judgment declaring the immovable property specially executable on 14 April 2010 and all writs issued subsequent thereto is hereby set aside;
- (c) That the respondent is ordered to comply with rule 46(1)(ii) of the uniform rules of Court;
- (d) That any non-compliance with rules of Court and time limits be condoned;
- (e) That the respondent is to pay the costs of this application on the scale as between attorney and client;
- (f) That the relief set out in (a) above shall operate with immediate effect pending the final determination of the other relief prayed for.

[7] It was submitted on behalf of the applicants that in terms of **GUNDWANA v STEKO DEVELOPMENT CC AND OTHERS**² the order declaring the immovable property specially executable was unconstitutional.

[8] The Constitutional Court in **GUNDWANA** held that it is unconstitutional for a Registrar to declare immovable property specially executable when ordering default

² 2011 (3) SA 608 (CC).

judgment under section 31(5) of the Uniform Rules of Court to the extent that this permits the sale in execution of a person's home³.

[9] The Constitutional Court was mindful of the issue of retrospectivity

[57] But what about retrospectivity? In *Jaftha*, this court placed no limit on the retrospectivity of its order. The declaration of invalidity of the legislative provisions in that matter did not entail, however, that all transfers made subsequent to invalid execution sales were automatically invalid. Individual persons affected by the ruling still needed to approach the courts to have the sales and transfers set aside if granted by default. This was made clear in *Menqa and Another v Markom and Others*.⁴ A similar approach should be followed here.

and found that individual persons affected by the ruling will still need to approach the courts to have the sales and transfers set aside if granted by default.⁵

[58] In order to turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule, under which the property was declared executable, is not sufficient to undo everything that followed.⁶ In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them.⁷ It may be that in many cases those aggrieved may find these requirements difficult to fulfill.

[59] From what has been stated above, in relation to the legitimacy of resorting to execution in order to obtain satisfaction of judgment debts sounding in money, and that only deserving cases would justify other means to satisfy the judgment debt, it follows that a just and equitable remedy, following upon the declaration of unconstitutionality, should seek to ensure that only deserving past cases benefit from the declaration.

³ Paragraph 65 at 629G.

⁴ 2008 (2) SA 120 (SCA). See also *CAMPBELL v BOTHA AND OTHERS* 2009 (1) SA 238 (SCA).

⁵ See further *MENGA AND ANOTHER v MARKOM AND OTHERS* 2008 (2) SA 120 (SCA).

⁶ *OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at paras 27 – 38; and *BENGWENYAMA MINERALS (PTY) LTD AND OTHERS v GENORAH RESOURCES (PTY) LTD AND OTHERS* (CC case No CCT 39/10, 13 November 2010) ([2010] ZACC 26), as yet unreported, in paras 81 – 85.

⁷ *GRANT v PLUMBERS (PTY) LTD* 1949 (2) SA 470 (O); *CHETTY v LAW SOCIETY, TRANSVAAL* 1985 (2) SA 756 (A) at 764I – 765D; and *DE WET AND OTHERS v WESTERN BANK LTD* 1979 (2) SA 1031 (A) at 1042.

[10] The applicants became aware in June 2010 that the judgment had been granted, a warrant of execution issued against their immovable property and that a sale in execution had been arranged. The application for rescission is out of time.

[11] Condonation can only be granted upon good cause shown. Mr Chetty was unable to advance any grounds for condonation when requested to do so by the Court. He maintained that the **GUNDWANA** judgment automatically declared the order declaring the property executable unconstitutional.

[12] The **GUNDWANA** judgment requires the applicants to show in addition to the normal requirements for rescission that a Court with full knowledge of all the relevant facts existing at the time of granting default judgment, would have refused leave to execute against specially hypothecated property, that is, the debtor's home.

[13] The applicants have failed to set out any ground for rescission or any defence to the claim. In fact, they do not seek rescission of the default judgment. The applicants only seek to set aside the writ of execution against the immovable property at 7 Tummel Place, Atholl Heights. The only attack is on the property being declared executable.

[14] There is accordingly no need to deal with the second leg of the enquiry as set out in **GUNDWANA** which states⁸

Aggrieved debtors who seek to set aside past default judgments and execution orders granted against them by the registrar, must **ALSO** show, in addition to the normal requirements for rescission, that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home.

[15] The **GUNDWANA** judgment is clear and unambiguous on retrospectivity. The onus is on the applicants to have satisfied the Court that they have met these requirements. The Court allowed Mr Chetty the opportunity to deal with the application for condonation but he was adamant that it was unnecessary. Unfortunately, in the circumstances, this Court is not satisfied that the applicant has set out any grounds for rescission as sought.

[16] The application is dismissed with costs.

⁸ (supra).

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DATE OF ARGUMENT: 28 JANUARY 2013

JUDGMENT HANDED DOWN ON: 28 MARCH 2013