

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 6323/2008

In the case between:

FUSI STEPHEN MACHEKA
SEJABENG EMILY MACHEKA

1st Applicant
2nd Applicant

and

ABSA BANK BEPERK
DIE BALJU VAN DIE LANDDROSHOF,
WELKOM
DIE REGISTRATEUR VAN AKTES,
BLOEMFONTEIN

1st Respondent
2nd Respondent

3rd Respondent

JUDGMENT: MOLEMELA, J

HEARD ON: 27 NOVEMBER 2008

DELIVERED ON: 6 MARCH 2009

[1] **Introduction**

The applicants brought an application on the 14th October 2008. This application was brought in two parts, i.e. Part A and Part B. Part A of the application was launched as an urgent application seeking interim relief pending the finalisation of Part B, the latter purporting to be an ordinary application.

[2] **Relief sought**

The relief sought under Part A of the application was *inter alia* the following:

- “1. Dispensing with the forms and service provided for in the Rules of the above Honourable Court and allowing the matter to proceed as one of urgency in terms of Rule 6(12) and condoning any non-compliance with the Rules by the Applicant;
2. Pending the finalisation of the application referred to in Part B hereunder;
 - 2.1 Interdicting and restraining the first and second respondents from proceeding to alienate by way of sale, alternatively, dispose in any manner whatsoever on 15 October 2008 or any other date set or arranged to be set by the second respondent the immovable property described as Erf 85, Rheeder Park, district Welkom, Free State Province, held under Deed of Transport No. T023081/2000 with its correlating physical address at No. 31, Uysstraat Rheeders Park, Welkom, Free State Province.
 - 2.2 Interdicting and restraining the third respondent from effecting transfer of ownership of the immovable property described as Erf 85, Rheeder Park, district Welkom, Free State Province, held

under Deed of Transfer No. T023081/2000 with its correlating physical address at 31 Uys Street, Rheeder Park, Welkom, Free State Province, to any other third party;

3. The first and second respondents shall pay the costs of this application on an attorney and own client scale.”

[3] **Background**

The background of this matter is that the applicants purchased an immovable property from the 2nd respondent (a sheriff of the Magistrate’s Court, Welkom) at a sale in execution on the 3rd March 2004. The purchase price was the sum of R5 000,00. In terms of the applicable conditions of sale, the applicant was to pay the purchase price to a firm of attorneys known as Neumann Van Rooyen Sesele Attorneys. At the request of this firm of attorneys, the applicant paid the sum of R1 574,00 in respect of transfer costs. This amount was paid on the 6th April 2004.

- [4] On the 19th April 2007 the applicant’s attorney addressed a letter to the first respondent’s office, requesting to be furnished with the original title-deed. There was no reply. On the 26th April 2007 the applicant’s attorney then

addressed a letter along the same lines to Messrs Neumann Van Rooyen Sesele Attorneys. There was no reply. The applicants continued sending similar letters without getting any response. On the 16th November 2007 they received a letter from a firm of attorneys called Naudes, which was apparently representing the first respondent. In their letter Messrs Naudes advised that they were contacting Messrs Neumann Van Rooyen Sesele Attorneys to ascertain what the position was with regards to the matter.

- [5] On the 17th March 2008 Messrs Naudes advised the applicants to direct all correspondence related to this matter to Messrs Neumann Van Rooyen Sesele Attorneys. It was only on the 16th July 2008 that the applicants received a letter from Messrs Neumann Van Rooyen Sesele Attorneys, in terms of which they were advised that the agreement of sale concluded between the applicants and the second respondent was allegedly cancelled on the 20th August 2004 due to the applicants' failure to comply with the terms of the Conditions of Sale. Correspondence was exchanged between the parties, culminating first

respondent informing the applicants that they were proceeding to arrange for a sale in execution relating to the property in question.

- [6] On the 10th September 2008 Messrs Neumann Van Rooyen wrote a letter to the erstwhile owner of the property, advising that a sale in execution had been arranged for the 15th October 2008. This letter was then delivered to the applicants on 28 September 2008. The contents of this letter prompted the applicants to bring this application against the respondents. The papers were served on the respondents on 10 October 2008, with the indicated date of the application being indicated as the 14th October 2008. On the 14th October 2008, by agreement between the parties, the following order was granted:

- “1. The sale in execution scheduled for the 15th October 2008 be cancelled and the first respondent will not arrange a new sale in execution until this application is finalized.
2. The matter is postponed to the 27 November 2008.
3. The respondents will file opposing affidavit on/or before 4 November 2008.

4. The applicant will file replying affidavits, if any, on or before 18 November 2008.
5. The costs of today stand over to be argued with the main application.”

[7] **Urgency**

Adv. Snellenburg contended on behalf of the respondents that the applicants had not shown urgency in respect of both Part A and B of their applications. Mr Beharie, on behalf of the applicants, submitted that only Part A of the application was launched on an urgent basis. Since Part A was settled by the parties, resulting in the order that was granted, no urgency still needed to be shown in respect of Part A. Part B was not launched as an urgent application but as an ordinary application.

[8] Adv. Beharie contended that the matter was indeed urgent as the applicant had only become aware of the planned sale in execution on the 3rd October 2008. Their attorneys immediately wrote a letter to the respondent’s attorneys pointing out why the sale in execution should not be proceeded with and threatening legal action if the said sale

in execution was not cancelled. The applicants' attorneys allowed the respondent's attorney's time to respond and when they received no response they then launched the application on the 10th October 2008. He submitted that there were no delays on the part of the applicants. On this point Adv. Snellenburg contended that the applicant had not acted swiftly despite the respondent advising them that it would be arranging another sale in execution. He contended that the applicants tried to cover up for their laxity by directing unnecessary correspondence to the respondents thus creating the urgency when there was none.

- [9] Mr Beharie contended that there was in any event, no longer any need to adjudicate on the urgency of the matter as the respondents had, by virtue of having agreed to the order granting cancellation of the contract, impliedly conceded the urgency of the matter. I would tend to agree with Mr Beharie's submission on this point. I accept that the respondent's representative voluntarily agreed to the granting of the order. Parties that are of the view that the time given to them by their opponents for purposes of

responding to affidavits supporting an urgent application is too short do not have to throw their hands in the air in despair and feel obliged to agree to the relief sought. Under such circumstances, they normally appear in court and request a postponement of the matter in order to enable them to file their papers. This was not done by the respondent and they instead opted to enter into an agreement the effect whereof was the granting of the very relief sought by the applicant, except for the cost order. I therefore agree that the agreement entered into by the parties amounts to a concession of the urgency of the matter and thus makes it unnecessary for me to adjudicate thereon, i.e. on urgency. I am fortified in this view by the decision of the court in VENTURE CAPITAL LTD v MAUERBERG 1991 (1) SA 96 (W) where it was held that where the matter has lost its urgency as a result of an interim arrangement between the parties the matter will not be enrolled otherwise than in accordance with the Rules, in other words will no longer be enrolled as an urgent application.

Part A of the Application:

[10] I also agree with Mr Beharie's contention that it is not necessary for the applicants to make a case for the granting of interim relief as sought in Part A of the application because the respondent agreed that the sale in execution be cancelled and that no further sale date be arranged until the outcome of the Part B application. Indeed, in so doing the interim relief had been obtained by way of agreement and I accordingly deem Part A of the application as settled.

Part B of the Application:

[11] I now turn to deal with Part B of the application. Adv. Snellenburg contended that the applicants needed to make out a case of urgency regarding this part of the application as it was not drawn up in compliance with the rules regulating ordinary applications. When one considers the format of Part B, it is indeed not strictly in accordance with form 2A of the first schedule. Adv. Beharie requested me to condone this non-compliance by the applicants. It is trite that such non-compliance is condonable. I am inclined to condone this non-compliance especially due to the close link or connection between Part A and B of the application,

especially as the respondents have not shown that they suffered any prejudice as a result thereof.

Prescription:

[12] The first respondent contends that the applicant's claim has become prescribed in terms of the provisions of the Prescription Act 68 of 1969. As the prescription is a point of law it stands to reason that I should first make a finding on this aspect before considering further arguments raised by the applicants. Section 12 of the Prescription Act 68 of 1969 provides as follows:

“12(1) Subject to the provisions of sub-sections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the debtor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises: Provided that a creditor

shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

(4) Prescription shall not commence to run in respect of debt based on the commission of an alleged sexual offence...”

[13] On the aspect of prescription, Adv Beharie contended that as the applicants were not aware that transfer had not been effected, prescription could not have started running until the 3rd April 2007, which was the date on which they became aware that the property was not registered in their name. On this point, adv. Snellenburg correctly pointed out that such an averment had not been made in the applicants' founding affidavit. Neither was it even made in the replying affidavit. One could perhaps, to the applicants' credit, consider that even though it was not expressly so stated, it was implied. However, this consideration is out of the question for two reasons:- firstly, the applicants' counsel did not advance such an argument; secondly, one of the averments made in the replying affidavit in fact negates this conclusion as it is to the effect that the applicants knew of no legal impediment that barred

transfer. In his own words the first applicant stated as follows:

“At this juncture I briefly pause to state, with respect, that there is no breach of any of the conditions of the deed of sale on my part...”

He further stated as follows:

“Based on the fact that I paid the purchase price to the second respondent, as well as the costs of transfer to Neumann van Rooyen, I was under the distinct impression that Neumann van Rooyen Sesele would attend to the transfer of ownership of the immovable property into my name.”

It is quite clear that the applicants expected transfer to be effected immediately after payment of the purchase price and costs.

- [14] In their replying affidavit, the applicants denied that the right to claim transfer constitutes debt as contemplated in the Prescription Act. In argument, it was contended on their behalf that the claim for transfer has not become prescribed

as the applicants did not have knowledge that the property was not transferred to them. These two contentions fly against the face of what was laid out in the case of **DESAI NO v DESAI** 1996 (1) SA 141 (A) at 146 I where the following was stated:

“The term “debt” is not defined in the Act but in the context of 510(1) it has a wide and general meaning and includes an obligation to do something or refrain from doing something.

...

It follows that the undertaking in clause 3(d) to procure registration of transfer was a “debt” as envisaged in section 10(1) Section 12(1) of the Act provides that “prescription shall commence to run as soon as the debt is due.”

In *casu*, the debt became due as soon as the second respondent was obliged to perform.

Insofar as the applicants seek to rely on the provisions of section 12(3) of the Prescription Act on the basis that they did not have knowledge of the facts from which the debt arises (i.e. they did not know that that transfer was not attended to), I would agree with adv Snellenburg’s contention

that the first applicant, being an attorney, could easily have acquired that knowledge by exercising reasonable care, i.e. by the simple exercise of doing a Deeds Office search on the property. The applicants would therefore be deemed to have had such knowledge.

[15] Insofar as the applicant has averred that they had complied fully with all the requirements and that there was no legal impediment that barred transfer, then the debt became due immediately after payment of transfer costs. As payment was, according to the applicants, made on the 6th April 2004, the debt became due on that day and became extinguished by prescription 3 years from date. It stands to reason that by the time the applicants brought their application, their claim in respect of transfer had already prescribed. In the light of the fact that this finding is in itself decisive of this case, it is unnecessary for me to decide on whether there was a valid cancellation of the contract or not.

[16] I accordingly make the following order:

16.1 Each party is to bear its own costs in respect of the application brought in terms of Part A of the Notice of Motion.

16.2 The application brought in terms of Part B of the Notice of Motion is dismissed with costs.

M. B. MOLEMELA, J

On behalf of the applicant:

Adv. N. Beharie
Instructed by:
Fusi Macheka Inc
BLOEMFONTEIN

On behalf of the respondent:

Adv. N. Snellenburg
Instructed by:
Naudes
BLOEMFONTEIN

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