

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

Case No.: 4818/2008

In the matter of:

S M MASHIYA

Applicant

and

STANDARD BANK OF SOUTH AFRICA
SHERIFF OF THE HIGH COURT: LADYBRAND
C SMITH
M E MASHIYA
THE REGISTRAR OF DEEDS: BLOEMFONTEIN

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

JUDGEMENT: EBRAHIM, J

HEARD ON: 28 AUGUST 2008

DELIVERED ON: 11 SEPTEMBER 2008

[1] This is an application by a joint owner of immovable property to set aside a sale in execution of that property by the bondholder (the 1st respondent) and prohibit the 5th respondent from registering the property into the name of the 3rd respondent. Only the 1st respondent has opposed this application. The 4th respondent has filed an affidavit titled “beëdigde verklaring ter berusting”.

- [2] During 1996 the applicant and the 4th respondent who were married to each other in community of property purchased an immovable property described as Subdivision 2 of Erf 386, Ladybrand, Free State Province. In their favour the 1st respondent registered a 1st and 2nd mortgage bond over the property in November 1996 and November 2003 respectively. As a result of the applicant's and 4th respondent's defaulting with payment in terms of these bonds, the 1st respondent issued summons for payment of arrear instalments during August 2007 in the sum of R160 842,65 together with interest and costs as well as a further order declaring the said property executable.
- [3] No street address for the property is given in the Deed of Hypothecation although the summons records the address for service as 1 Kommando Plein, Ladybrand, being the chosen *domicilium citandi et executandi*. This however is not borne out by the Deed of Hypothecation. The applicant accepted personal service of this summons at the address given in the Sheriff's return, namely No 1 Kommando Plein, Ladybrand and pursuant to this, judgment by default was ordered against her and the 4th respondent on the 10th

October 2007 jointly and severally for the amounts claimed in the summons.

- [4] Subsequently on the 25th October 2007, the Registrar of this court issued a writ of execution directing the Sheriff to attach and take into execution the said property at 1 Kommando Plein, Ladybrand. In accordance with the Provisions of Rule 46 of the Uniform Rules pertaining to Superior Court Practice, a Notice of Attachment together with a Notice of the Sale in Execution was prepared. On the 31st October 2007 a copy of the writ of execution together with a copy of the Notice of Attachment were forwarded by prepaid registered post by the Sheriff to the applicant and 4th respondent at 1 Kommando Plein, Ladybrand being, according to the Sheriff the address furnished to him by the 1st respondent's attorneys. These documents were annexed as annexure's C & D to the founding papers. The sale and execution notice advertising the property in question for sale by public auction on 23rd May 2008 described the street location of the property as 1 Kommando Plein, Ladybrand. A copy of this notice is annexed to the founding papers as annexure "F".

[5] It is not disputed by the applicant that she received personal service of the summons at the given address namely 1 Kommando Plein, Ladybrand. What is challenged by the applicant is the correctness of the given address as being the street address of the property in question. The applicant denies that this is the correct address pertaining to the property. It is her case firstly that, the writ of execution together with the notice of attachment and the Execution Sale Notice are fatally defective for want of the proper address of the property being reflected therein and secondly that she did not receive notice of the attachment and the execution sale notice.

[6] It is common cause that the local municipality in whose district the property in question is situated that is the Mantsopa Local Municipality, forwarded water and electricity bills to the applicant and the 4th respondent at an address given as 8 Joubert Street, Ladybrand. It is also common cause that this application falls to be decided in the light of the provisions of Rule 46 of the Uniform rules of Court which are peremptory. Rule 46 requires that a writ of

execution shall contain a full description of the nature and situation including the address of the immovable property in order to enable the sheriff to trace and locate it and in order for the provisions relating to service by prepaid registered post to be given effect to. Rule 46(7)(b) requires the execution creditor to prepare a sale notice containing the description of the property, its situation and street number. Rule 46(3) requires the debtor to be informed of the attachment and the prospective sale in execution by prepaid registered post and Rule 46(7)(a) provides that the sale in execution is to be held only after a period of one month has elapsed from the date of service of the notice of attachment on the debtor.

- [7] The thrust of the applicant's case therefore relates to the question of the correctness of the address given on these processes. In support of the first challenge mounted by the applicant, Mr. Greyling relied heavily on the decision in **MESSENGER OF THE MAGISTRATE COURT, DURBAN v PILLAY** 1952 (3) SA 678 A as authority for the proposition that, where a street address is not provided in the writ of execution and sale notice these documents

would have to be visited with nullity. His reliance on this decision is however misconceived. The case dealt with the question of whether the corresponding provision relating to the furnishing of a description of immovable property sold in execution of a judgment granted in the magistrate's court had been fully complied with. The only description of the property given in this case was the following:

“Subdivision number 6 of lot 42 of lot 107 of Midwentworth of the farm Wentworth number 860, situate in the country of Durban, Province of Natal, in extent 1 route 3.37 purchase.”

The respondents admitted the invalidity of the sale notice in that case by virtue of the fact that this description did not provide an address or street location. In this regard therefore the decision is distinguishable from the facts of the present case where a street address of the property is furnished in both the writ of execution as well as the sale notice, the only question being whether it is the correct street address of the attached property. In this regard it is apposite to revert to the remarks of Innes CJ in **DADOO**

LTD & OTHERS v KRUGERSDORP MUNICIPAL

COUNCIL 1920 AD 530 at 552 in order to limit the scope of the provisions of Rule 46 to what it enacts in clear language and in order to give effect to what is strictly necessary to achieve the object of the legislature.

“It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole.”

Although this dictum related specifically to statutory provisions, I am respectfully of the view that it has application in the present matter. The achievement of the object of the legislature would not be hampered if it were to be held that the Rules relating to attachment and execution have to be complied with.

Rule 46(1) provides for a full description of the property including the address to enable the Sheriff to trace the property and identify it. The same reasoning underscores

the provisions of Rule 46(7)(b) where it would be required that the public and potential buyers be enabled to trace and identify the property.

The rationale for the requirement of an address is therefore a practical one for without an address the Sheriff cannot attach and without an address a prospective buyer would not be able to visit the property if he wishes to do so in order to decide whether there is any point in bidding therefor. Provided then that the property to be attached and auctioned has been properly identified and the writ of execution served and the attachment made of the correct property, it is in my view irrelevant that the address furnished on the writ of execution and the sale notice differs from the actual street address of the property. It is only where an incorrect address is furnished which then leads to the incorrect property being subjected to the attachment that difficulties would arise with compliance with Sub-rule 1 and 7(b) of Rule 46. In the present matter this is not the case. In executing against the immovable property concerned at Number 1 Kommando Plein, Ladybrand, the Sherriff attached the very property bought by the applicant

and 4th respondent in respect of which the 1st respondent had passed in its favour a 1st and 2nd mortgage bond which property was then sold in execution by public auction to the 3rd respondent. The applicant, in her founding papers, does not at any stage provide the correct address for the property. This reticence on her part can only be due to a desire to frustrate the 1st and 2nd respondents in their attempts to proceed with and finalise the attachment and sale in execution of the said property. On the probabilities, it would therefore appear that she is motivated purely by self interests of a personal nature given her acrimonious relationship with the 4th respondent and the desire to retain the property for which she clearly could not pay and is still unable to pay.

- [8] In these circumstances it would be contrary to the interests of both parties, that is the applicant as the debtor and the 1st respondent as the creditor for the sale in execution to be said aside purely on the grounds that the given address on all the processes concerned with the attachment and execution is an incorrect one. For in practice, that piece of erroneous information has had no detrimental or prejudicial

effect on either party. In this regard Mr. Greyling's feeble attempt to lend substance to his client's case by raising the issue of prejudice on the grounds that if the correct address had been reflected on the sale notice, the property might have been sold to a higher bidder must fail as being entirely speculative. There is no evidence before me on the papers that prospective bidders were unable to locate the property from the address given.

- [9] The 2nd prong of the applicants attack concerned compliance with Rule 46(3) and I was referred by Mr Greyling in this regard to the decision in **SOWDEN v ABSA BANK LTD** 1996 (3) SA 814 (W) as authority for the proposition that service by prepaid registered post does not automatically create an irrebuttable presumption of service upon mere proof of posting so as to exclude the need for proper service on the applicant. The Sowden-case is however distinguishable on the facts. In that case service by prepaid registered post was held not to be proper service because of the lack of a postal delivery service to the address chosen by the mortgagor as *domicilium citandi et executandi* and because the creditor (the applicant) had

been informed of this. In the present case it is common cause that there was a proper postal delivery service to the property in question as the 4th respondent admitted receipt of the notice of attachment. Therefore upon strict interpretation of the provisions of section 46(3) it must be accepted that applicant received the notice of attachment forwarded to her by prepaid registered post.

[10] The application is dismissed with costs.

S. EBRAHIM, J

On behalf of applicant:

Adv. P du P Greyling
Instructed by:
Van Wyk & Preller Attorneys
BLOEMFONTEIN

On behalf of 1st respondent:

Adv. P. Zietsman
Instructed by:
Matsepe Inc.
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