

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 92664/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

20 June 2024

In the matter between:

SM THOKE

Applicant

**For and on behalf of the Sheriff of the High Court:
EKURHULENI KEMPTON PARK NORTH
(KEMPTON/TEMBISA)**

And

GLEN LIFE PROPERTIES CC

(Reg No: 2004/047179/23)

Respondent

In re:

FIRSTRAND BANK LIMITED

Plaintiff

and

TSHEPISO PERTUNIA PHADU N.O

Defendant

(ID NO: 9[...])

(Duly appointed Executrix in the deceased estate of the late

JUDGMENT

SK Hassim J

[1] The applicant, the Sheriff for Ekurhuleni Kempton Park North, applies for an order cancelling the sale in execution of Unit 2[...] M[...], 1[...] S[...] Close, Greenstone Hill Extension 2[...], Edenvale, Gauteng Province (“the property”) on 19 May 2022. The respondent has withdrawn its opposition to the cancellation of the sale. The outstanding dispute is the respondent’s liability for the costs of the application.

[2] The respondent purchased the property at the sale in execution for R905 000.00. It is common cause that it paid the 10% deposit required in clause 4.1 of the Conditions of Sale in Execution (“the Conditions of Sale”) but otherwise failed to comply with the Conditions of Sale either timeously, and in some instances at all. The respondent failed to deliver guarantees securing the balance of the purchase price within 2[...] (twenty-one) days of the sale. The guarantees were provided after the application was launched.¹ The respondent also failed to pay the amounts due to the municipality and the levies due to the body corporate.

[3] As a result, on or about 12 October 2022, the applicant launched this application seeking amongst others the cancellation of the sale in execution and costs on the attorney-client scale against the respondent. The application was enrolled on the unopposed motion court roll of 18 November 2022. On 17 November 2022, the respondent delivered a notice of intention to oppose the application. Consequently, the application was removed from the roll and the respondent was ordered to pay the wasted costs occasioned by the postponement. On 9 March 2023, the application was postponed due to the late delivery of the answering affidavit. The respondent was ordered to pay the wasted costs on an opposed basis on an attorney and client scale. These costs orders are collectively referred to as “the wasted costs order”.

¹ On or about 10 February 2023.

[4] Mr Sinwamali, the respondent's sole member, has personally been representing the respondent since the inception of this litigation. He appears to have prepared the answering affidavit and he appeared at the hearing before me.

[5] It is common cause that Mr Sinwamali informed the applicant's attorney on 9 November 2023 that due to financial constraints the respondent would not persist in opposing the cancellation of the sale in execution. This constituted notification of the withdrawal of the respondent's opposition to the application. However, costs were not tendered until 30 May 2024 when Mr Sinwamali sent an e-mail to the applicant's attorney to which a "Notice of Withdrawal of Defence" containing a tender for the payment of "the wasted costs occasioned by the applicant either taxed or agreed" was attached. The applicant's attorney informed Mr Sinwamali in an e-mail sent on 30 May 2024 that the applicant was not amenable to accepting the tender for the payment of wasted costs and insisted on the costs of the application on an attorney and client scale.

[6] When the application was called before me the applicant moved amongst others for the following orders against the respondent:

- (a) Cancellation of the sale in execution as claimed in prayer 1 of the notice of motion.
- (b) Authority to the Sheriff to retain the deposit paid by the respondent as claimed in paragraph 3 of the notice of motion.
- (c) Costs of the application on the attorney-client scale as claimed in prayer 6 of the notice of motion.

[7] Mr Sinwamali opposed the costs order. It became clear from his submissions that the respondent's case is that its liability for costs should be limited up until 9

November 2023. In support Mr Sinwamali handed to me six (6)² e-mails to prove that the applicant's attorney knew that the respondent did not intend opposing the application. Five (5) of these were sent by the respondent to the applicant's attorney and one was sent to him by the applicant's attorney.

[8] On their own, these e-mails are misleading in that they suggest that the e-mail sent on 9 November 2023 remained unanswered until 30 May 2024. Mr Marais who appeared for the applicant during his argument brought other e-mails to my attention to correct the picture and referred to them in argument. Those e-mails have been uploaded to CaseLines at my request. I have had regard to the e-mails handed up by Mr Sinwamali as well as those uploaded to CaseLines. A different picture emerges.

[9] Mr Sinwamali met with the applicant's attorney on 9 November 2023. He informed her that the respondent was agreeable to the cancellation of the sale in execution. On the same day at 18h20 he recorded in an e-mail that the respondent agrees to the cancellation of the sale. The applicant was thus entitled to its costs up to 9 November 2023. The withdrawal of the opposition has the same effect as a successful application which would generally entitle an applicant to the costs of the application.

[10] There was no response to the e-mail of 9 November 2023. Nor to the follow up e-mails sent on 13 November 2023 and 1 December 2023 in which Mr Sinwamali sought guidance on the way forward. My understanding is that he wanted guidance on the process in light of the concession that the sale should be cancelled. The last-mentioned e-mail reads:

"Please do respond to our e-mails below. Our previous emails remains [*sic*] without your reply although we have communicated our intention to withdraw any defence/

² 9 November 2023 sent to the applicant's attorney at 18h20. 13 November 2023 sent to the applicant's attorney on at 9h11. 1 December 2023 sent to the applicant's attorney at 10h44. 19 February 2024 sent to the applicant's attorney at 15h50. 30 May 2024 sent to the applicant's attorney at 09h53. 30 May 2024 sent by the applicant's attorney at 09h59.

opposition because of the CSOS ³ recommendations. Please advise on the way forward?”

[11] On 13 December 2023 at 8h57, a bill of costs relating to the wasted costs was sent to Mr Sinwamali under cover of an e-mail in which it was recorded that he had informed the applicant’s attorney at a meeting, and in correspondence, that the respondent did not want to proceed with the purchase of the property. Disappointingly, there was no response to the request in the e-mails of 13 November 2023 and 1 December 2023 for advice “on the way forward”. The e-mail concluded with the following statement:

“We await to receive your payment proposals as to the settlement of the legal fees herein.”

[12] At least by 19 February 2024, the respondent knew that the applicant was persisting with the application. He was informed on that day that the applicant’s attorney was awaiting a date for the hearing of the application on the opposed roll. Mr Sinwamali’s response was an offer of R20 000.00 in settlement of costs. ⁴ It is not clear whether this was in settlement of the wasted costs or whether it included the costs of the application.

[13] On 15 March 2024, Mr Sinwamali was notified that the offer was rejected but the applicant was amenable to accepting payment of R95 000.00 in full and final settlement of legal costs.⁵

[14] There is a *lacuna* in the e-mail correspondence provided to me. It seems that after 15 March 2024 Mr Sinwamali offered to pay R30 000.00 for legal fees. I infer this from an e-mail sent to him on 18 May 2024 informing him that the offer of

³ The respondent had unsuccessfully attempted to challenge before the Community Schemes Ombud Service the outstanding levies due to the body corporate

⁴ CL V11.

⁵ CL V10. Considering that the bill of costs (to be taxed for the wasted costs) was for R48 359.19, the amount of R95 000.00 in my view must have included the costs of the application.

R30 000.00⁶ “in respect of legal fees” was not acceptable. He was also informed that the applicant will proceed “with cancelling the Sale in Execution on the hearing date and obtaining a cost order on the attorney-client scale.” Therefore, by 18 May 2024, at the very latest, Mr Sinwamali knew that the applicant insisted on a tender for the payment of costs failing which the application would proceed on the opposed roll on 10 June 2024.

[15] The bill of costs for the wasted costs was settled at R30 000.00 at the taxation on 24 May 2024⁷. Later that day, Mr Sinwamali sent an e-mail expressing surprise that the application would proceed on the opposed roll. According to him, he had communicated as far back as 9 November 2023 that the respondent would not oppose the application and that it would not pay any legal costs after 9 November 2023. I have found nothing in any of the e-mails before me that the respondent will not pay for costs incurred after 9 November 2023. Regardless, the respondent was not absolved from paying the costs of the application because the applicant had to institute legal proceedings and incurred further costs consequent upon the respondent’s opposition to the application.

[16] On 30 May 2024 at 9h53 Mr Sinwamali sent by e-mail a “Notice of Withdrawal of Defence” embodying a tender for the payment of “the wasted costs occasioned by the applicant either taxed or agreed”. The applicant’s attorney responded to the e-mail at 9h59. She informed Mr Sinwamali that the applicant “does not consent to the withdrawal on the basis that [the respondent] only tender [*sic*] the wasted costs.” The e-mail ended with a demand that “legal fees must be tendered on the attorney and client scale for the opposed proceedings”.

[17] For more than six months (between 9 November 2023 and 30 May 2024) the respondent refused to tender any costs relating to the application, notwithstanding the consent to the cancellation of the sale on 9 November 2023.

⁶ The e-mail does not state whether the amount of R30 000.00 was tendered for the costs of the application or in settlement of the costs order made on 17 November 2022.

⁷ CL9-7 to CL9-12.

[18] I do not agree that the respondent's liability for costs should be limited until 9 November 2023. No tender for the payment of costs was made before 30 May 2024, not even costs up to 9 November 2023. A tender was made for the first time in the Notice of Withdrawal e-mailed to the applicant's attorney on 30 May 2024, but it is not by any means clear what would constitute wasted costs when litigation has come to an end. The Notice of Withdrawal embodying a tender for costs was however an acknowledgment that the respondent is liable for costs. Absent a tender for the payment of the costs of the application, the applicant could not recover the costs unless such an order was made. The applicant, was hence entitled to insist on the respondent tendering the costs of the application, failing which to obtain an order to that effect.

[19] While it is so that the applicant could have pursued the relief for the cancellation of the sale in an unopposed motion court it could not persist with an order for costs if the respondent decided to oppose the order for costs. There is a strong likelihood that Mr Sinwamali would have opposed a costs order when the application served in the unopposed motion court. The applicant could not anticipate whether the respondent would oppose the application for costs, or not. As it turns out the respondent did oppose the application for costs.

[20] The applicant is entitled to all costs up to and including the costs for the hearing in the opposed motion court on 10 June 2024.

[21] That leaves the question whether the respondent should be mulcted with costs on the attorney-client scale. The respondent did not honour its obligations under the Conditions of Sale. Mr Sinwamali, the sole member of the respondent appears to have been dilatory, but no case is made out for *mala fides*. Additionally I am not satisfied that special considerations⁸ exist to warrant a punitive costs order. The respondent had a right to demand that the dispute is settled by a court.

[22] The failure to tender the costs of the application on the face of it was unreasonable. There was no tender for any costs until 30 May 2023 and then too it

⁸ *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597

is not clear what costs were tendered. I cannot ignore that Mr Sinwamali was not represented by a legal practitioner. He did not have the benefit of advice on the rules of the game. He may not have appreciated that a respondent who withdraws its opposition to litigation is generally liable to pay the costs of the litigation.

[23] In the circumstances I cannot find that the respondent's conduct warrants the censure of a punitive costs order.

[24] There is a further reason why I am not inclined to award punitive costs against the respondent. Had the applicant's attorney responded to Mr Sinwamali's request in his e-mails of 13 November 2023 and 1 December 2023 for advice on the way forward the dispute as to costs may have been resolved months ago. The notice of withdrawal embodying the tender for wasted costs demonstrates that Mr Sinwamali did not understand the difference between wasted costs and costs of the application. I explained the difference to him before he commenced addressing me and his response confirmed that he did not understand the difference. Where a litigant is unrepresented especially in a case such as this one there is a moral responsibility, if nothing more, on the other party's legal representative to guide the unrepresented litigant who requests guidance on simple procedural matters which do not prejudice his/her client's case on the merits. If an attorney is not comfortable guiding the unrepresented litigant that should be communicated to the litigant. No reasons have to be given. In the circumstances of this case, it would not have prejudiced the applicant if the applicant's attorney explained to Mr Sinwamali that he should deliver a notice of withdrawal of opposition and that the notice had to embody a tender for costs, and why. Additionally, what the consequence of the failure to tender costs would be for the respondent. This would have allowed Mr Sinwamali to make an informed decision. It is not just in the circumstances of this case to mulct the respondent with punitive costs.

[25] The applicant has made out a case for the cancellation of the sale in execution under rule 46(11) of the Uniform Rules of Court.

[26] The applicant was authorised on 12 May 2020 to sell the immovable property. I am not asked to reconsider that decision. The sale was authorised without a

reserve price. The applicant seeks authority for the property to be sold subject to a reserve price. Even though rule 46(11) does not provide for this, I am not precluded from setting a reserve price. The application has been served on interested parties. There is no prejudice to the judgment debtor, and the judgment creditor is aware of the application.

[27] An amount of R3 329 189.32 (three million three hundred and twenty-nine thousand, one hundred and eighty-nine rand and thirty-two cents) is owed to the judgment creditor. The highest bid at the sale in execution on 19 May 2022 was R905 000.00.

[28] The approximate market value of the property is R1 600 000.00 (one million six hundred thousand rand). The municipal value of the property as per the municipal statement dated 5 June 2024 is R1 512 000.00 (one million five hundred and twelve thousand rand). It has decreased by approximately R188 000.00⁹ in the last 22 (twenty-two) months. The forced sale value is estimated at R1 280 000.00.

[29] An amount of R103 172.26 (one hundred and three thousand one hundred and seventy-two rands and twenty-six cents) is owed to the municipality. This is a R32 807.82¹⁰ increase in the last 22 (twenty-two) months. An amount of R571 758.73 (five hundred and seventy-one thousand seven hundred and fifty-eight rands and seventy-three cents) is owed to the body corporate for levies. This is a R274 844.09 increase in 22 (twenty-two) months.¹¹

[30] Considering the amounts due to the municipality and the body corporate, and taking into account that the highest bid at the sale in execution was R905 000.00 a reserve price set at R700 000.00 will protect the interests of the judgment creditor and the judgment debtor in this case.

[31] Consequently, I make the following order:

⁹ At 4 August 2022 the municipal value was R1 700 000.00.

¹⁰ On 4 August 2022 the outstanding rates and taxes were R70,364.18

¹¹ On 10 August 2022 the outstanding levies were R296 914.64

- (a) The sale in execution held on 19 May 2022, in respect of the immovable property described hereunder is cancelled and the Applicant is authorized to sell the property at a sale in execution as per the terms of the order granted on 12 May 2020 and subject to the reserve price in paragraph 2 below –

Section 211 as shown and more fully described on Sectional Plan No. SS89/2017 in the scheme known as MALAKITE, in respect of the land and building or buildings situated at Greenstone Hill Extension 2[...] Township, City of Johannesburg Metropolitan Municipality of which section the floor area, according to the said Sectional Plan is 108 (one hundred and eight) square metres in extent; and

an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

held under Deed of Transfer S[...] and subject to such conditions as set out in the aforesaid Deed.

- (b) The property described in (a) above shall be sold subject to a reserve price of R700 000.00.
- (c) The deposit paid by the respondent, Glen Life Properties CC, shall be retained by the applicant and held in trust, pending the quantification of the loss suffered, if any, and a judgment therefor in terms of Rule 46(11), provided that if no claim for loss is lodged within 120 days of the date of this order, the deposit shall be refunded to the respondent, Glen Life Properties CC.
- (d) The respondent, Glen Life Properties CC, is to pay the costs of this application on a party and party scale on scale B.

- (e) Tshepiso Pertunia Phadu N.O's ("the judgment debtor") attention is drawn to ss129(3) and (4) of the National Credit Act No. 34 of 2005 which provides that she may prior to the sale of the immovable property in execution, pay to the plaintiff, Firststrand Bank Limited all overdue/arrear amounts together with the plaintiff's permitted default charges and taxed or agreed costs of enforcing the agreement, and thereby revive the credit agreement.
- (f) The judgment debtor may obtain the arrear amounts and enforcement costs together with the default charges from the plaintiff or its attorney of record. The judgment debtor is advised that the arrear amount (together with default charges and enforcement costs) is not the full amount outstanding to the plaintiff but constitutes only the arrears owed by the judgment debtor to the plaintiff and does not constitute the accelerated amount.

S K HASSIM

Judge: Gauteng Division, Pretoria

Applicant's Counsel:	Adv H Marais
Hearing:	10 June 2024
Order:	20 June 2024

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 June 2024.