

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**Case No.: 1885/2009**

In the matter between:

**VANESSA NAIDOO (formerly PADAYACHEE)**

Applicant

and

**CHANGING TIDES 17 (PTY) LTD NO**

First Respondent

**ANWAR SAYED**

Second Respondent

**REGISTRAR OF DEEDS, PIETERMARITZBURG**

Third Respondent

**THE SHERIFF OF THE HIGH COURT, CHATSWORTH**

Fourth Respondent

**eTHEKWINI MUNICIPALITY**

Fifth Respondent

**ORDER**

**The following orders shall issue:**

1. The credit agreement between the first respondent and the applicant is reinstated as of 26 October 2021.
  
2. The default judgment granted on 9 December 2013, and the subsequent execution against the applicant's property, has no force or effect.

3. The fourth respondent's auction on 26 October 2021 is set aside.
4. The third respondent is directed to cancel the registration of the transfer of the property, Portion 5[...] (of 5[...]) of Erf 1[...] C[...] ("the property"), into the name of the second respondent, and is directed to revive the title deed under T53562/2003, together with any mortgage bond, or bonds, as registered against the property in existence as of 26 October 2021. The first respondent is directed to give effect to this at its own cost.
5. The first respondent is directed to pay R119 096.23 (one hundred and nineteen thousand, and ninety-six rand, twenty-three cents) to the second respondent.
6. The first respondent is directed to pay the second respondents attorney-client costs as taxed or agreed, incurred under case number 15800/2022P.
7. Judgment is granted in favour of the second respondent against the applicant for payment of the sum of R195 027.02 (one hundred and ninety-five thousand, and twenty-seven rand, two cents). Together with interest at 11.75% per annum from date of judgment.
8. The first respondent is directed to pay the second respondent's costs of this application with counsel's fees to be on Scale A.

## **JUDGMENT**

### **HARRISON AJ**

[1] The applicant, a litigant in person, seeks to set aside the sale in execution and transfer of the property, namely, Portion 5[...] (of 5[...]) of Erf 1[...] C[...], 1[...] D[...] Crescent, Moorton, Chatsworth ("the property"). In seeking to set aside the sale in execution and the transfer of the property to Anwar Sayed (the second respondent), the applicant also seeks an order against the Registrar of Deeds (the third

respondent) to revive the title deed T53562/2003, in terms of which the second respondent took transfer of the property.

[2] The issues in this matter highlight the need for judicial oversight of the execution process and emphasise why Uniform rule 46A plays such an important part of ensuring the protection of parties' fundamental rights to housing as enshrined in s 26 of the Constitution.

[3] The applicant took transfer of the property under title deed T53562/2003, and, in 2008, borrowed money from Main Street 65 (Pty) Ltd, which loans was guaranteed by the first respondent, who passed a mortgage bond over the property in its favour.

[4] The loan agreement and mortgage bond were administered by SA Home Loans. The applicant defaulted in the repayment and summons was issued in January 2009. In February 2009 the applicant paid an amount of R18 093.29 towards the arrears. This discharged the arrears but not the costs. The applicant thereafter continued to pay, but fell into further arrears later in 2009.

[5] On 29 October 2009, the applicant signed a consent to judgment and signed the necessary verifying affidavit acknowledging an indebtedness to the first respondent in the sum of R279 866.14, as well as consenting to an order declaring the property executable. At the time of signing the consent to judgment, the arrears and the indebtedness referred to in the January 2009 summons had been extinguished.

[6] The first respondent did not apply for judgment in October 2009, and only lodged the application for default judgment on 11 October 2013.

[7] From the bank statements and the application for default judgment before me, it is clear that between the date of the signing of the confession to judgment, and the application for default judgment, numerous and various payments had been made by the applicant towards the property.

[8] The application for default judgment had been placed before various judges of this Division, between June and December 2012. However, it was only on 9 December 2013, pursuant to an application launched on 11 October 2013, that the default judgment was granted on 9 December 2013. When the default judgment was granted for the outstanding arrears, the order declaring the immovable property executable was granted. There was no requirement for an application in terms of rule 46A, as the rule only came into effect in November 2017.<sup>1</sup>

[9] Despite default judgment being granted in December 2013, it is common cause that the applicant remained in the property and continued to make payments towards the property.

[10] From the statement of account, it is apparent that the parties continued with the loan, and all arrears were discharged. The first respondent continued to accept payments and, as at 1 July 2019, there was nothing outstanding by the applicant to the first respondent, i.e., the parties had reinstated the loan agreement.

[11] Going back in time to the issue of the summons, the first respondent admits that there was payment of the sum of R18 093.29 on 14 February 2009, which would have brought the applicant's arrears up to date. By virtue of this concession, the applicant has sought to argue before me that the basis for the original summons was thereby extinguished and, accordingly, the right to seek default judgment on the original cause of action had fallen away. I shall deal with this issue hereunder.

[12] The founding affidavit of the applicant further details how certain arrears were 'written off' during or about January 2015, which write off she contends arose out of a recapitalisation of the outstanding debt, such that the monthly instalment increased from R3 283 per month, to R3 514.41 for the remaining period of the loan.

[13] Whilst the first respondent has denied the write off, in the answering affidavit it concedes that it did '... by agreement with the applicant, grant various indulgences to

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<sup>1</sup> Government Notice R1272 of 17 November 2017.

the applicant with regard to her repayment obligations under the terms of her loan ...  
'.

[14] These allegations and concessions relate to a time after the default judgment had been granted and were clearly intended to be a reinstatement of the original loan agreement. Crucial to the concession is that the first respondent admits that the indulgences were 'by agreement', and that the records show payments were made. It is clear from the statements that the debt for the cause of action for the 2009 summons had long since been extinguished.

[15] The applicant again fell into arrears with her new monthly instalments, and a further settlement agreement was concluded during or about December 2020, which settlement agreement, it is common cause, was not adhered to by the applicant. Arising out of the failure by the applicant to pay the amounts under that settlement agreement, the first respondent dusted off the default judgment granted in December 2013, issued a warrant of execution, and sold the property on 26 October 2021, at a sale in execution conducted by the fourth respondent.

[16] Pursuant to that sale, the property was transferred into the name of the second respondent by deed of transfer T22701/2022. That transfer was effected on 5 July 2022.

[17] The second respondent paid the following:

|                                |             |
|--------------------------------|-------------|
| (a) purchase price to sheriff: | R102 000.00 |
| (b) sheriffs commission:       | R6 980.50   |
| (c) transfer fees:             | R10 115.73  |
| Total:                         | R119 096.23 |

[18] In effecting transfer of the property, the second respondent discharged the arrear rates, electricity and water owing to the fifth respondent, in the sum of R195 027.02.

[19] After transfer to the second respondent, the applicant has remained in the property. The second respondent has subsequently launched proceedings in Pietermaritzburg High Court under case number 15800/2022P, for the eviction of the applicant from the property.

[20] That eviction application has been opposed and this application was subsequently launched by the applicant in January 2023. In launching the application, the applicant's intention is clearly not only to secure the retransfer of the property, but also avoid the eviction proceedings which have been instituted by the second respondent.

[21] The effect of granting an order in favour of the applicant and setting aside the transfer, will also dispose of the matter in Pietermaritzburg, a factor which I must consider. The second respondent has detailed that he has spent R25 836.63 in legal costs in the eviction application. Whilst these may be attorney-client charges, there was no dispute when the matter was heard, that the second respondent was an innocent party who has expended substantial amounts for no benefit. Accordingly, in addition to the R119 096.23 referenced in paragraph 17 above, the second respondent is out of pocket for:

|                                    |             |
|------------------------------------|-------------|
| (a) rates, electricity, and water: | R195 027.02 |
|------------------------------------|-------------|

|                                  |             |
|----------------------------------|-------------|
| (b) legal expenses: <sup>2</sup> | R25 836.63  |
|                                  | R220 863.65 |

[22] The second respondent has, in his papers, asked that he be refunded all monies paid by him. The order sought by the applicant also contemplates that the

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<sup>2</sup> These are not taxed costs and the amount is determined from a detailed statement of account, "AS9", index papers at 180.

first respondent repay the proceeds of the sale in execution, and the fourth respondent repay his commission.

[23] The applicant has conceded that the second respondent has paid amounts to the fifth respondent and suggests that she will repay amounts paid on her behalf 'once the application has been determined'. Despite that undertaking, the applicant's poor payment history demonstrates a lack of candour, which I shall deal with hereunder.

[24] In opposing this application, the first respondent has acknowledged the payment of R18 093.29 on 14 February 2009. The first respondent concedes that there was the payment, however, seeks to suggest that although the arrears were paid, there was still the taxed costs outstanding, and this entitled the first respondent to proceed with the default judgment in due course. The first respondent has also sought to rely on the subsequent breaches of the 2020 settlement agreement, as this in some way acknowledged the 2013 default judgment based on the 2009 summons. I am not impressed with this argument, or the submissions, particularly as I have pointed above, the arrears were brought up to date and, at various times, there was nothing outstanding on the account and, in fact, there are various occasions when the applicant appears to have been in advance of her monthly obligations.

[25] The fundamental issue is whether the first respondent was entitled to proceed with execution against the applicant's property in 2021 based on the 2013 default judgment, when the parties had quite clearly conducted themselves on the basis that the original loan agreement had been reinstated through the continuous payments and the bringing of the account up to date, as I have detailed above.

[26] The original court file relating to this case, was archived and the only documents available in this regard were the digital copy of the file. That digital copy reflects that there were various queries raised between June 2012 and December 2013 when the default judgment was granted. I sought clarity from the first respondent in this regard and, as a result, all parties filed submissions from which it came to light that the queries raised by the various judges between June 2012 and December 2013, related to the service of the papers. The applicant also made

further submissions that as regards the municipal accounts, that have been paid by the second respondent, these should be repaid by the fifth respondent to the second respondent (despite the fact that she is the one who has secured the benefit and enjoyment of the property and used these municipal services).

[27] The first respondent furnished a complete breakdown of the account, demonstrating the various payments and how the parties conducted themselves in regard to the account proceeding after the default judgment, and from 2013 to 2021.

[28] The applicant, in her heads of argument in this matter, has enjoined that I should look benevolently on her documents and submissions as she is litigating in person, cannot afford legal representation, and that I should not hold her to the same standard of accuracy, skill, or precision as is required by lawyers.<sup>3</sup> I have done so. The crux of the applicant's argument is that by payment of the arrears amount in 2009 she extinguished the basis for the cause of action for the 2009 summons, and that the credit agreement was then reinstated. In this regard, she relies specifically on *Nkata v FirstRand Bank Ltd*.<sup>4</sup>

[29] The first respondent has indicated that, notwithstanding the payment of the arrears amount, there was still the issue of costs outstanding which had not been paid at that time. The applicant has correctly identified from the *Nkata* judgment that those legal costs were not yet due at the time she made the initial payment and were only due when taxed or agreed. There is no evidence before me that those costs were ever taxed or agreed.

[30] Notwithstanding this argument, it is clear from the papers that the parties had reinstated the agreement and that at least by 2016, there was no amount outstanding. The cause of action for the 2009 summons and the 2013 default judgment had been extinguished. The applicant has further argued that in light of the *Nkata* judgment, and the reinstatement, the subsequent sale in execution was invalid and the transfer of the property and the registration in the name of the second respondent, stands to be set aside.

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<sup>3</sup> *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC) para 13.

<sup>4</sup> *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC).

[31] As regards setting aside the transfer and reinstating of the old title deed, the applicant quoted various authorities, including *Legator McKenna Inc and Another v Shea and Others*<sup>5</sup> and *Knox NO v Mofokeng and Others*.<sup>6</sup>

[32] As I find that the sale in execution was improper for want of a valid causa, the entire sale and the transfer to the second respondent is invalid. The reinstatement of the original title deed must follow.

[33] The first respondent, in opposing this application, has sought to rely heavily on the decisions of *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*<sup>7</sup> and *Zuma v Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and Others*,<sup>8</sup> the delay in bringing and prosecuting this application should preclude the applicant obtaining relief as her delays are inexplicable and that the underlying motive for this application is to avoid the consequences of the eviction application in the Pietermaritzburg High Court.

[34] As persuasive as these arguments may be, they overlook the fundamental issue that it is a house which is the applicant's primary residence, which is at the heart of this matter. There is a need to protect the constitutional right recognised in s26 of the Constitution. That constitutional right trumps the delay argument.

[35] The second respondent has argued that he is an innocent party and that he is out of pocket. He is quite clearly an innocent party who has expended money without any gain and, in light of the concessions made that these amounts have been paid and that there is no dispute as regards the municipal and other expenses which he has discharged, I have sought to indemnify him as far as possible as set out in the orders hereunder.

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<sup>5</sup> *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA).

<sup>6</sup> *Knox NO v Mofokeng and Others* 2013 (4) SA 46 (GSJ).

<sup>7</sup> *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA).

<sup>8</sup> *Zuma v Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC).

[36] As regards the costs of the eviction that application was legitimately brought by the second respondent against the applicant. However, the costs of that application stand to be discharged by the first respondent, as it was the first respondent's conduct which gave rise to the sale in execution and the eviction flows as a direct consequence.

[37] The first respondent, through its conduct and by the acceptance of payments subsequent to the issuing of summons, as well as subsequent to the granting of the default judgment in 2013, conducted itself in a manner consistent with the reinstatement of the loan agreement. In this regard, the first respondent's conduct mirrors that of *Nkata v First National Bank*,<sup>9</sup> and the facts are very similar as regards the parties' conduct save and except that in present circumstances, not only is the first respondent's conduct more egregious due to the 2009 default having been discharged even prior to the seeking of the default judgment in 2013, but the renegotiation and the settling of all arrears, including in 2016. This demonstrates that the cause of action for declaring the property executable had long since ceased to exist when that default judgment was dusted off in 2020, and used as a means of execution against the applicant.

[38] It has oft been said that litigation is not a game. Litigation is also not a game show where a plaintiff can "bank" a breach and default judgment, and "bank" the declaration of executing against immovable property, and then, at its own instance and at a time when it suits them, play the default judgment and execution order as a trump card to enforce as against a recalcitrant debtor.

[39] In light of the similarity of the facts in the present matter with that of *Nkata*, it is clear that the applicant is entitled to relief. The exact form of that relief includes the right to the reinstatement of the title deed into the applicant's name. The applicant cannot escape the consequences of the reinstatement.

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<sup>9</sup> *Nkata v First National Bank* 2016 (4) SA 257 (CC)

[40] The reinstatement of the loan agreement requires, in present circumstances, a reinstatement of the security which the first respondent held, namely the mortgage bond over the property.

[41] Whilst I am aware that this is not relief that was tendered by the applicant, in present circumstances, the restoration of the status quo ante requires an order for the reinstatement of that mortgage bond.

[42] As regards the amounts outstanding, and with the reinstatement of the loan agreement, that must be as at the date of the sale in execution namely October 2021.

[43] By virtue of the first respondent's conduct, I direct that interest and the amount to be reinstated will be as at the date of the sale in execution, namely 26 October 2021, and that the first respondent is directed to reinstate the agreement as at that date. In reinstating at that date, the first respondent is not entitled to raise any legal charges relating to the sale in execution, or the execution of the property, and those amounts must be reversed from the account.

[44] This will mean that the applicant will become liable for monthly instalments in accordance with the reinstated agreement as of September 2024.

[45] As regards the second respondent, those amounts which have been paid to the fifth respondent are amounts which are conceded by the applicant and I, accordingly, grant judgment in his favour against the applicant for such amounts. The applicant cannot avoid this liability, for indeed, she has enjoyed the benefit of and made use of the lights and water. She has benefited at the expense of the second respondent.

[46] I am disinclined to reinstate it in favour of the fifth respondent as suggested by the applicant. This would mean that the fifth respondent would have to institute its own action against the applicant for the recovery of such amounts, which amounts the applicant has conceded she has received the benefit.

[47] The costs of the eviction proceedings under Pietermaritzburg High Court case number 15800/2022P. Those costs are a direct consequence of the first respondent's conduct and, accordingly, I direct that the first respondent pay the second respondent's costs of that application, on an attorney-client scale, as taxed or agreed.

[48] Finally, as regards reversing the amounts paid by the second respondent, the first respondent is directed to reimburse the second respondent in the sum of R119 096.23 as calculated and set out in paragraph 17 above.

[49] As the applicant is a litigant in person, she has not incurred any costs, however, the second respondent, having been represented and having been successful in reclaiming monies expended by him, and having been the innocent party in these entire proceedings.

### **Order**

[50] In the circumstances, I make the following orders:

1. The credit agreement between the first respondent and the applicant is reinstated as of 26 October 2021.
2. The default judgment granted on 9 December 2013, and the subsequent execution against the applicant's property, has no force or effect.
3. The fourth respondent's auction on 26 October 2021 is set aside.
4. The third respondent is directed to cancel the registration of the transfer of the property, Portion 5[...] (of 5[...]) of Erf 1[...] C[...] ("the property"), into the name of the second respondent, and is directed to revive the title deed under T53562/2003, together with any mortgage bond, or bonds, as registered against the property in existence as of 26 October 2021. The first respondent is directed to give effect to this at its own cost.

5. The first respondent is directed to pay R119 096.23 (one hundred and nineteen thousand, and ninety-six rand, twenty- three cents) to the second respondent.

6. The first respondent is directed to pay the second respondents attorney-client costs as taxed or agreed, incurred under case number 15800/2022P.

7. Judgment is granted in favour of the second respondent against the applicant for payment of the sum of R195 027.02 (one hundred and ninety-five thousand, and twenty-seven rand, two cents). Together with interest at 11.75% per annum from date of judgment.

8. The first respondent is directed to pay the second respondent's costs of this application with counsel's fees to be on Scale A.

**G M HARRISON AJ**

Appearances

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