

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

CASE NO: 2015-93650

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 24/3/2025

MOKOSE SNI

In the matter between:

MICAH DOCTA NKOSI
(IDENTITY NUMBER 5[...])

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED
(REG NUMBER: 1962/000738/06)

1st Respondent

SHERIFF: HALFWAY HOUSE ALEXANDER

2nd Respondent

THE SHERIFF: HALFWAY HOUSE-ALEXANDER

Applicant

and

KGOTSO SECHABA NKOSI
(IDENTITY NUMBER 9[...])

Respondent

In re:

THE STANDARD BANK OF SOUTH AFRICA LIMITED
(REG NUMBER: 1962/000738/06)

Applicant

and

MICAH DOCTA NKOSI
(IDENTITY NUMBER 5[...])

Respondent

JUDGMENT

MOKOSE J

Introduction

[1] Two applications serve before this court in respect of the same matter. For expediency purposes and for the reason that both applications are in respect of the same matter and are intertwined, I shall deal with them together. The first application I shall deal with is an application in terms of Rule 46(11) of the Uniform Rules of Court for the cancellation of the sale held on 29 August 2023 in terms of a writ of attachment against the immovable property situate at 2[...] B[...] W[...] Street, Kelvin. This application is against Kgotso Nkosi, who I shall refer to as Mr Nkosi Jnr. The second application is one by Mr Nkosi Snr where he seeks an order that the sale in execution be reversed or stopped.

[2] The respondent in the Rule 46(11) opposes the relief sought by the applicant.

Brief Facts

[3] The litigation between Standard Bank Limited ("the Bank") and Mr MD Nkosi ("Mr Nkosi Snr") has been protracted and has a material impact on the matter between the Bank and Mr Nkosi Jnr. An order was granted by this court on 11

February 2016 in favour of the Bank after summons had been served on Mr Nkosi Snr and he had failed to defend the summons. Subsequently and on 22 February 2016, Mr Nkosi Snr filed an application for the rescission of the default judgment. This application was opposed by the Bank and dismissed with costs on 28 June 2018.

[4] Mr Nkosi Snr then applied for leave to appeal which application was dismissed with costs on 19 September 2018. Mr Nkosi Snr then petitioned the Supreme Court of Appeal which application was dismissed on 17 January 2019 on the grounds that there were no reasonable prospects of success on appeal and that there were no compelling reasons why the appeal should be heard. Having failed in the petition, Mr Nkosi Snr again applied to this court for an application for review and/or reconsideration and/or rescission of the judgment and warrant granted against his immovable property. That application was dismissed on 16 November 2020. On 15 November 2021, nearly a whole year later, Mr Nkosi Snr approached the Supreme Court of Appeal for leave to appeal against the judgment of Ceylon AJ of 16 November 2020. This application was also dismissed with costs.

[5] The Bank then proceeded to schedule the sale in execution of the immovable property after the protracted litigation. On 29 August 2023 Mr Nkosi Jnr placed the awarding bid in respect of the sale in execution in the sum of R2 000 000,00. In accordance with the conditions of sale, Mr Nkosi Jnr agreed to pay the deposit of ten per cent of the purchase price and also agreed that the balance would be secured by a guarantee issued by a financial institution approved by Standard Bank or its attorneys. Such guarantee had to be furnished within 21 days of the confirmation of the sale by this court. Furthermore, it was a condition of the sale that should Mr Nkosi Jnr fail to furnish the said guarantee as stipulated in the conditions of sale, the applicant could, in its discretion, grant the Bank's attorneys of record, a demand to furnish them with his FICA documents as well as the pro-forma invoice in respect of the transfer fees. It was also brought to Mr Nkosi Jnr's attention that the balance of the purchase price was due in the form of guarantees within 21 days.

[6] Several follow-up letters were sent to Mr Nkosi Jnr requesting him to furnish the guarantees before 28 September 2023 as per the conditions of sale, but to no

avail. On 29 September 2023 a letter of demand was sent to Mr Nkosi Jnr. This letter was met with an urgent application by Mr Nkosi Jnr who sought the enforcement of a previous offer to purchase which he had signed with Mr Nkosi Snr. It was during the exchange of papers in the urgent application that it became apparent to the Bank that Mr Nkosi Jnr was the son of Mr Nkosi Snr, the execution debtor. The urgent application was dismissed with costs on 2 October 2023.

[7] On 9 October 2023 the Bank's attorneys of record received an email from Mr Nkosi Jnr advising of his struggles to obtain finance in respect of the balance of the purchase price and proceeded to make a counteroffer of R600 000,00. He was informed that the offer was unacceptable and that he was in breach of the conditions of sale. He was informed that the Bank would consider bringing an application in terms of Rule 46(11) to cancel the sale. Despite notice of cancellation of the sale, Mr Nkosi Jnr failed to secure the balance of the purchase price.

Application for postponement and recusal

[8] At the commencement of proceedings Mr Nkosi Jnr sought to bring an application for a separation of the hearing from the other application brought by Mr Nkosi Snr to stop or reverse the sale in execution. He expressed the view that there was a risk of procedural unfairness should the matters both be heard by one judge and demanded my recusal on the basis of a reasonable apprehension of bias. No papers in respect of such application were filed. This application was opposed by the Bank.

[9] The test to be applied in an application for a recusal contains a two-fold objective element being:

- (i) the person considering the alleged bias must be reasonable; and
- (ii) the apprehension of bias itself must be reasonable in the circumstances.

This is the 'double reasonableness test' in which the question to be asked is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the

adjudication of the case, that is open to persuasion by the evidence and submissions of the applicant. Mere allegations and speculation will not suffice in a recusal application.

[10] Mr Nkosi Jnr made no submissions other than those that he thought I would be biased in the adjudication of his matter as I was also tasked with the adjudication of the application in which Mr Nkosi Snr would be applying for the reversal of the sale in execution of the same subject matter. The application was opposed by counsel for the Bank for the reason that a substantive application was not before this court and both Mr Nkosi Jnr and Mr Nkosi Snr were aware since December that the two matters were on the roll on the same day in respect of the same property. No correspondence had been sent to the Bank raising a concern or even seeking a postponement of any of the matters.

[11] It was noted that the two applications before this court were in respect of the same property but were different applications against differing parties. The purported grounds for the postponement did not justify such a postponement as it appeared to be an abuse of the court process. In view of the law regarding recusals by judicial officers and the facts of the matter, I was of the considered view that the application for my recusal did not have any merit and was accordingly dismissed. It must also be noted that at the commencement of the other application, Mr Nkosi Snr made the exact same application which was also dismissed for similar reasons. The application for the postponement was also seen as an abuse of court processes and accordingly dismissed. Furthermore, the applications of both Mr Nkosi Jnr and Mr Nkosi Snr were mutually destructive as Mr Nkosi Jnr opposed the application brought by the Bank to cancel the sale in execution whilst Mr Nkosi Snr brought an application to reverse the sale in execution.

Rule 46(11) Application

[12] In opposing the application, Mr Nkosi Jnr confirmed that he had paid the deposit of R200 000,00, the VAT payable as well as the auctioneer's fees. He conceded that he had not paid the balance of the purchase price, nor had he furnished the attorneys of record with guarantees in respect of the balance of R1 800 000,00. In his defence, he contends that 'the court had been presented with an

application that is fatally compromised by the applicant's failure to adhere to mandatory procedural steps'. He contends that the applicant has failed to furnish the court with the Sheriff's report and as such, the application is fatally flawed.

[13] Rule 46(11) provides a quick and inexpensive procedure for the prompt resale of property concerned - without compromising the rights of notice and the *audi alterem partem* rule - thereby guaranteeing that the property may be quickly realised for the benefit of both the creditor and debtor without increasing the interest on the outstanding debt.¹ With effect from 18 April 2019 a Practice Directive was issued by the Judge President of the Gauteng Division of the High Court dealing with applications in terms of Rule 46(11) so as to ensure compliance with the provisions of Rule 46A of the Uniform Rules of Court. The directive was to the effect that such applications were no longer to be dealt with by a judge in chambers but were to be referred to open court. The subrule stipulated that a sale in execution must be cancelled by a judge before the sheriff conducting the sale would be entitled to put the property up for sale again.

[14] The respondent, Mr Nkosi Jnr, does not deny the chain of events as stated above. He however opposes the application based on 'a lack of the sheriff's report' which he contends amounts to a procedural irregularity. It is trite that such applications are no longer held in chambers and are now conducted pursuant to the provisions of Rule 6 of the Uniform Rules of Court. The applicant is obliged to file an affidavit in support of his application. Such affidavit serves as the report as is emphasised in Rule 46(11).

[15] I am satisfied that the sheriff has filed an affidavit in support of the application. Such affidavit serves as the report. I am furthermore satisfied that the affidavit sets out the facts that led to the current application before this court which include that the sale in execution was held, that the respondent signed the conditions of sale and that the respondent failed to pay the balance of the purchase price or secure such purchase price by means of a guarantee within 21 days of the sale in execution. The respondent labours under a misapprehension that no report serves before the court

¹ Sheriff of the High Court, Johannesburg v Sithole and Three Similar Cases 2013 (3) SA 168 (GSJ) at 171 A-B

and as such, the application is flawed. This is certainly not the case and as such, his defence in respect of the rule 46(11) fails.

Costs

[16] The applicant seeks a punitive costs order for the reason that the litigation the respondent persists in is vexatious. The respondent made no submissions as to the costs.

[17] The general rule in litigation pertaining to an award of costs is that costs should follow the result. The general purpose of a costs award is to indemnify the successful party for the expenses, he or she may have been put through some sort of hardship by being compelled to either initiate or defend the litigation, I am obliged to consider and determine whether an award for costs in favour of one or the other party in the matter should be granted costs.

[18] There is no reason that I should depart from the general award of costs. I also take note of the protracted litigation the Bank has been put through and in particular, the fact that Mr Nkosi Jnr has failed to put up a defence to the application on hand whilst he concedes that he has failed to pay the balance of the purchase price. Furthermore, punitive costs may be granted where the court wishes to show its displeasure at the way the litigation has been conducted. This is one such case which is affording of such order.

Application to Reverse Sale in Execution

[19] The applicant, Mr Nkosi Snr, approaches this court for the following relief:

- (i) to prevent and/or reverse the enforcement of a sale in execution pursuant to a judgment granted in favour of the first respondent; and
- (ii) to have the writ of attachment of the immovable property set aside.

[20] Before I deal with this matter, it is prudent for me to deal with the application which came before me on the day and without a substantive application for my recusal. The applicant indicated that he aligns himself with the submissions made by his son in the matter above, being that of the Rule 46(11) application. As per that

matter, I dismissed the recusal application on the same basis as that of the Rule 46(11) application.

[21] As stated above, the first respondent obtained judgment against the applicant on 11 February 2016. The applicant filed two applications for rescission, which applications were both dismissed with costs. These rescission applications were the subject of an application for leave to appeal which were also dismissed with costs. These applications for leave to appeal were followed up with petitions to the Supreme Court of Appeal, which were also dismissed. The matter on hand is an application which was served subsequent to the last failed bid to the Supreme Court of Appeal, which judgment was handed down on 4 May 2023.

[22] The applicant contends that he never gained knowledge of the decision of the Supreme Court of Appeal order dated 4 May 2023 and contends that the warrant in execution issued by this court should be suspended accordingly. This is opposed by the first respondent and is seen as a blatant attempt by the applicant to mislead the court. It is noted that on 29 May 2023 the first respondent's attorneys of record informed the applicant of the dismissal of his matter by the Supreme Court of Appeal. He subsequently reserved his right to approach the Constitutional Court for leave to appeal the matter.

[23] The first respondent contends that the applicant knew or at least ought to have known of the outcome of his appeal by the very latest on 29 May 2023. As such, the applicant had a factual knowledge of the order of the Supreme Court of Appeal. Accordingly, this application is tantamount to vexatious litigation to further protract the litigation between the parties.

[24] After the dismissal of the applicant's leave to appeal by the Supreme Court of Appeal on 4 May 2023, the first respondent proceeded to schedule a sale in execution of the mortgaged property. The sale was scheduled for 29 August 2023. On 6 August 2023, one Mr KS Nkosi indicated his willingness to purchase the property. It was subsequently ascertained that the intended purchaser was the son of the applicant, Mr Nkosi Jnr as stated above. The offer was not accepted by the first

respondent and the sale by public auction proceeded on 29 August 2023 as scheduled.

[25] Unknowingly, the applicant's son successfully bid for the property in the amount of R2 000 000,00 which bid was accepted. This sale by the applicant's son is the subject of an application in terms of Rule 46(11) above.

[26] It is noted that the applicant failed to file a replying affidavit in this application. Therefore, applying the Plascon-Evans Rule, a final order may be granted only if those facts averred in the applicant's affidavit, which have been admitted by the first respondent, together with the facts alleged by the respondent justify such an order. The court cannot determine the disputed facts on a balance of probabilities on the affidavits.

[27] Looking at the facts herein, it is undisputed that the applicant knew that his application for leave to appeal to the Supreme Court of Appeal was dismissed on 29 May 2023. It is evident from all the applications the applicant has brought pertaining to this matter, that they were all brought with the sole intention of delaying the first respondent's rights pursuant to the order granted in 2016 by this court. It is evident that this application is vexatious like the other applications. Accordingly, the application is dismissed.

Costs

[28] As in the case above, the third respondent seeks a punitive costs order for the reason that the litigation the applicant persists in is vexatious. Counsel for the third respondent further brought to the court's attention that the two applications presently before this court are mutually destructive. On the one hand Mr Nkosi Snr seeks an order to reverse the sale in execution in which his son was the successful bidder and on the other hand, Mr Nkosi Jnr seeks an order refusing the cancellation of the sale. I agree with Counsel for the first respondent that these applications are mutually destructive.

[29] As stated above, there is no reason why the costs should not follow the result. Furthermore, punitive costs may be granted where the court wishes to show its

displeasure at the way the litigation has been conducted. I am of the view that this matter is one where the applicant has abused the court processes. He has brought innumerable cases to this court and other courts in an attempt to deny the first respondent the exercise of its rights.

Orders

Rule 46(11)

[30] Accordingly, the following order is granted:

1. That the sale concluded on 29 August 2023 in terms of a Writ of Attachment against immovable property granted on 1 February 2016 in the above court, namely:

Portion 5 of Erf 6[...] K[...] T[...]

Registration Division I. R. Province of Gauteng

Measuring 2082 (Two Thousand and Eighty-Two) Square Metres

Held by Deed of Transfer No 1475/1996

Subject to the conditions therein contained

(Situated in the Magisterial District of Johannesburg North and according to the Local Authority, better known as **2[...] B[...] W[...] Street Kelvin 2090**, and hereinafter referred to as "the Mortgaged Property")
is cancelled.

2. The Purchaser/Respondent is ordered to pay the costs of this application on a scale as between attorney and client as well as the commission paid.

3. The Purchaser/Respondent is liable for any wasted costs suffered as a result of such cancellation, by any creditor whose name appears on the Sheriff's Plan of Distribution. Such wasted costs also include any Conveyancing costs and disbursements incurred by the execution creditor's attorneys of record.

4. The property which was the subject matter of the sale in execution may again be put up for sale.

Application to Reverse Sale in Execution

5. The application is dismissed.
6. The applicant is ordered to pay the costs of this application on a scale as between attorney and client.

MOKOSE J
Judge of the High Court
Gauteng Division, Pretoria

Heard: 6 March 2025

Judgment granted: 24 March 2025

Appearances

For the applicant in Rule 46(11): Adv W Du Preez

On instructions of: LGR Inc

For the respondent: In person

For the applicant in application to reverse sale in execution: In person

For First Respondent: Adv W Du Preez

On instructions of: LGR Inc