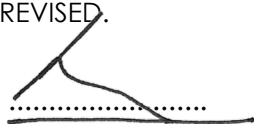




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 2018/47106

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
Signature:  Date: 20 January 2023	

In the matter between:

DAYALAN MUNSAMI

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LTD

First Respondent

SHERIFF RANDBURG SOUTH WEST

Second Respondent

REGISTRAR OF DEEDS JOHANNESBURG

Third Respondent

HAZEL IRENE KNOWLER

Fourth Respondent

JUDGMENT – LEAVE TO APPEAL

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

MOULTRIE AJ

- [1] The applicant seeks leave to appeal against the order made in my judgment delivered in this matter of 10 October 2022, in which I dismissed the applicant's application for the setting aside of the sale in execution and transfer to the fourth respondent of his primary residence ("the property") pursuant to a judgment granted to the first respondent ("the Bank") by his Lordship Mr Acting Justice Mtati on 9 May 2019.

- [2] The application for leave to appeal was originally set down for a "virtual" hearing at 09h00 on 30 November 2022. When the matter was called, there was no appearance for the applicant. Upon further investigation, it emerged that the attorneys for the applicant had not been notified of the hearing date by the Registrar's office, and the hearing date had not been endorsed on the electronic file in accordance with paragraph 110 of Practice Directive 2 of 2022.

- [3] I issued an order postponing the application for leave to appeal until 09h00 on 20 January 2023 via a videoconference. In accordance with paragraph 110 of Practice Directive 2 of 2022, the CaseLines electronic file was endorsed on 30 November 2023 (by means on a "widely shared note") with the date and time so determined, as well as the link to the virtual hearing.

- [4] When the matter was called on at 09h00 on 20 January 2023, there was no appearance for the applicant. I stood the matter down until 09h10, by which time the position had not changed. Following brief submissions by counsel for the first and fourth respondents, I issued an order dismissing the application for leave to appeal with costs, indicating that reasons for such refusal would follow. These are those reasons.

- [5] In deciding whether to grant leave to appeal, I am required to apply the provisions of section 17(1) of the Superior Courts Act, 10 of 2013. In the absence of any suggestion that subsections 17(1)(a)(ii), (b) or (c) apply,

leave to appeal may only be given where I am of the opinion that the appeal would have a reasonable prospect of success.

[6] The only conclusions reached by me in my judgment that are challenged in the application for leave to appeal are:

- (a) that the First Respondent was not required to move a separate Application in terms of Rule 46A;
- (b) that the provisions of Rule 46A were substantially complied with in the Summary Judgment application that served before Mtati AJ and in particular the service of the summary judgment application constituted service;
- (c) that there was no evidence to suggest that Mtati AJ did not consider that Rule 46A orders were warranted or that he failed to consider the information placed before him in relation to the special executability of the property and the issue of a reserve price; and
- (d) that Applicant failed to make any allegations pertaining to whether the Fourth Respondent's purchase of the property was in bad faith and that the sale was "*not without some inappropriate action*"

[7] For the reasons set out in my judgment, which I do not depart from in any respect, I am not persuaded that the applicants have reasonable prospects of success on appeal in relation to any of these aspects. To these reasons I only add the following.

[8] Even if it is assumed (i) that Mtati AJ did not consider that the Rule 46A orders were warranted; or (ii) that he failed to consider the information placed before him in relation to the special executability of the property set out in the particulars of claim and verified on oath in the summary judgment affidavit; or (iii) that the orders were irregular because they were sought as 'part' of the Summary Judgment application; that would be irrelevant to the current application in the absence of a successful rescission application. It was not open to me to overturn the order of Mtati AJ, and it remains

presumptively valid. The sale in execution of the property at auction without a reserve price also remains presumptively valid.

- [9] In any event, I can conceive of no basis upon which a rescission application, if brought, could have been successful:
- (a) I have not been referred to any case (nor have I been able to find any), in which it was held that that an applicant for summary judgment in relation to a residence is required to move a separate application in terms of Rule 46A. In fact, the precise opposite would appear to form part of the *ratio decidendi* in *ABSA Bank v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) at paras 11 to 29. Apart from the further judgments referred to in my judgment, I also refer in this regard to *First Rand Bank Limited vs Folscher and Another and Similar Matters* 2011 (4) 314 (GP) at paras 55 and 67.
 - (b) In my view, service of the summary judgment application on the applicant's attorneys constituted substantial compliance with the requirements of Rule 46A(3)(d), in the sense that the underlying purpose of the requirement of personal service was in fact met by service on the applicant's attorneys. There is no evidence that the applicant had terminated his attorney's mandate prior to the service of the application for summary judgment.
- [10] The required standard to be met for an applicant to impugn a sale in execution and consequent registration of transfer of immovable property is that the purchaser took transfer of the property in bad faith with knowledge of the alleged defect in the sale. The highwater mark of the applicant's case in this regard is that the property was sold by public auction without any reserve price for an amount far below its true value at a valid sale in execution which was held. Unfortunate as these facts may be, they do not support an inference of bad faith, nor indeed even an inference that the sale was "*not without some inappropriate action*" (which is in any event an insufficient basis upon which to found the relief sought

by the applicant).

[11] It is for these reasons that I dismissed the application for leave to appeal with costs.



RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 20 January 2023

JUDGMENT DELIVERED: 20 January 2023

APPEARANCES

For the Applicant: No appearance

For the 1st Respondent: S Jacobs of Stupel Berman Inc.

For the 4th Respondent: L Mhlanga instructed by Precious Muleya Inc.