REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/19201

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

DELPHIN LOUISA THWALA	First Applicant
GODFREY THWALA	Second Applicant
and	
FIRST NATIONAL BANK LIMITED	First Respondent
LUCAS MOLOBELE	Second Respondent
RACHEL PINKIE BODIBE	Third Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Fourth Respondent
REGISTRAR OF DEEDS, JOHANNESBURG	Fifth Respondent

J U D G M E N T

Delivered on:-

NORMAN, AJ:

Introduction

[1] The applicants have brought this application in terms of section 6(1) of the Deeds Registries Act 47 of 1937("the Act") to cancel the deeds register of transfer in respect of the second ,third and fourth respondents. The application relates to erf [.....], Registration Division IQ, Province of Gauteng, a property which was once registered in the name of the applicants ("the property"). They seek the following Orders:

> "*1. Ordering the Registrar of Deeds (Johannesburg) to cancel the title deed number T43716/2010 in respect of erf [.....], Registration Division IQ, Province of Gauteng, and to cancel all the rights accorded to the second respondent by virtue of the deed.*
>
> *2. Ordering the Registrar of Deeds (Johannesburg) to cancel the title deed number B32693/2010 in respect of erf [.....], Registration Division IQ, Province of Gauteng, and to cancel all the rights accorded to the fourth respondent by virtue of the deed.*
>
> *3. Ordering the Registrar of Deeds (Johannesburg) to cancel the title deed number T43717/2010 in respect of erf [.....], Registration Division IQ, Province of Gauteng, and to cancel all the rights accorded to the third respondent by virtue of the deed.*
>
> *4. Ordering the Registrar of Deeds (Johannesburg)to register the title deed in the names of the applicants in terms of section 6 (2) of the Deeds Registries Act 47 of 1937.*

5. *Directing that those parties opposing the relief sought in the above paragraphs to pay the costs of this application.*"

[2] The application is opposed by the second and third respondents. The first respondent filed a notice of intention to oppose but did not file an answering affidavit.

Background

[3] The applicants are married with three children. Their children were aged 18, 14 and 9, respectively, at the time of the launching of this application during May 2015. The applicants also take care of their niece and nephew who are aged 18 and 10, respectively. They are informal traders who operate a bunny chow shop in Soweto. They have been residing on the property since the year 2000. The property is, according to them, their only home.

[4] On 25 January 2001 the applicants obtained a loan in the amount of R54 000.00 from the first respondent to purchase the property. The first respondent registered a mortgage bond over the property. The applicants concede that from May 2002 they fell into arrears with their repayments after they lost their jobs. As a consequence thereof on 25 November 2002 the first respondent issued summons for the sum of R54 000.00. On 16 July 2003 default judgment was obtained in favour of the first respondent in the principal sum of R54 000.00, interest at the rate of 18.15 % per annum, first respondents costs in the sum of R650.00 and sheriff's costs of R260.00. It is common cause that in the judgment the property was not declared executable

but apparently there was an amendment or correction effected to the Order in 2013 and as a result thereof the property was declared specially executable. I shall deal with the 2013 Order later.

[5] On 23 October 2003 a scheduled sale in execution was cancelled at the request of the applicants. They submit that they made payments to the first respondent from October 2003 until 29 April 2010. The Applicants contend that although they continued to make payments, the first respondent did not abandon the default judgment against them.

[6] The applicants submit that after judgment had been obtained they paid to the first respondent all amounts outstanding on the judgment debt including interest and legal costs. That, according to the applicants, discharged their indebtedness to the first respondent in full.

[7] They contend that the monies that they were paying were not applied to the judgment debt by the first respondent but to an open bond account. By so doing, they submit, the first respondent added amounts to the bond amount that were extraneous to the judgment debt. They contend that the first respondent had no right to levy additional amounts to the bond amount once it obtained judgment. They further submit that all the payments that they made after granting of default judgment should have been applied towards the reduction of the judgment debt and not to the bond account which should have been closed after the default judgment was obtained.

[8] Some seven years later and on 29 April 2010 the property was sold at an auction to the second respondent for R112 000.00. At that time the applicants had paid an amount of R94 160.00 to the first respondent. Thereafter the first respondent proceeded to claim from the applicants the shortfall caused by the additional amounts which they contend were wrongfully levied .

[9] It appears that when the applicants found out about the impending sale on 28 April 2010, they attempted to negotiate with the first respondent without success. They brought an application to Court in an attempt to prevent the sale in execution without success as the application was heard after the sale had taken place. They brought an application interdicting the fifth respondent from transferring the property into the second respondent's name. It does not appear that that application was ever enrolled due to lack of funds on the part of the applicants.

[10] The second respondent then sold the property to the third respondent for R320 000.00. The third respondent obtained a loan from the fourth respondent and a bond was registered over the property in the amount of R288 000.00.

[11] Thereafter the applicants were served with eviction papers under case number 1745/2011 issued out of the Johannesburg Magistrate's Court.

[12] The Applicants then applied to this Court to have the sale in execution declared null and void and set aside. They were successful. The Order was

issued on 12 December 2013. It was in terms of this Order that the default judgment was amended or corrected and thus declared the property specially executable. They allege that after the grant of that order the first respondent did not seek any further monies from them and has not appealed the judgment. The Applicants contend that they do not owe the first respondent any additional amounts.

[13] The applicants further rely on Clauses 1, 5, 11, 17, 25 of the bond agreement for the submission that once the amounts secured by the mortgage bond are paid, they are entitled to the cancellation thereof. They submit that they have discharged the principal debt, the interest on it and all the costs associated with obtaining judgment.

[14] In the application the applicants contend that with the sale in execution having been declared null and void and set aside, it should follow that all the transfers arising from the sale in execution are without lawful basis. They submitted that on this basis they are entitled to an Order cancelling the unlawful transfers and to the revival of their registration as unencumbered owners of the property.

[15] They submit that the sale of the property to the second respondent was null and void. This, according to the applicants means that the second respondent was never a lawful owner of the property. He, therefore had no right to sell to the third respondent. They submit that this renders the subsequent sale and transfer to the third and fourth respondents null and

void. The applicants allege that third respondent persists in her eviction proceedings against them.

[16] The second and third respondents oppose the application on the basis that they were *bona fide* purchasers and that their title can only be impugned if the applicants can show *mala fides* on their part.

Issues

[17] At the hearing, Mr Wilson appeared for the applicants and Ms Scallan for the second and third respondents. There was no appearance for the first respondent. It appears from the papers that the first respondent even though it had requested an extension for the filing of its answering affidavit, it failed to do so.

[18] Mr Wilson conceded that the second and third respondents were *bona fide* purchasers.

[19] The main issue between the parties was whether as a result of the sale in execution having been declared null and void, the transfers to the bona fide purchasers had to be set aside. Mr Wilson argued that setting aside the transfers was a logical consequence of the Order issued in 2013. Ms Scallan on the other hand, submitted that this is a case where the remarks of the Full Bench of this Division in *Vosal Investments (Pty) Ltd v City of Johannessburg* 2010 (1) SA 595 (GSJ), namely, that the owner of immovable property is entitled to restoration of his property from a bona fide purchaser at a sale in

execution "*where a sale of property not followed by transfer is rendered a nullity by reason of the rescission of the judgment which alone gave it validity*". Ms Scallan submitted that this is a case where restoration to the applicants should not be allowed as they have failed to show any mala fides on the part of the *bona fide* purchasers. She contended that once a sale has been perfected by transfer it cannot be impugned unless there was proof of bad faith on the part of the purchaser. *In casu* the sale in execution was followed by transfer. Ms Scallan's submission cannot stand in the light of the circumstances of this case because if her argument is accepted a declaration that a sale in execution is null and void would be rendered "*toothless*" and academic. That, in my view, cannot be countenanced in a democratic state where the Constitution is supreme.

[20] Mr Wilson submitted that the first, second and third respondents were joined in the application which resulted in the 2013 Order which declared the sale in execution a nullity. None of the respondents have challenged that Order. He submitted that that Order and judgment still stand.

[21] In *Menqa And Another v Markom and Others* 2008 (2) SA 120 (SCA), the Court at page 128 paragraph 19 stated:

> "*As regards the question of the implications of these findings for a bona fide purchaser of property pursuant to such an invalid sale in execution, the court in Schloss emphasized that any exercise of public power has to be carried out in terms of a valid rule of law. The court approved of the finding of McCall AJ in Joosub to the effect that , where there was no sale in execution or where the sale in execution which purported to have taken place was a nullity, then it could not have served to pass any title to the property concerned to the purchaser or to any successor- in – title into whose name the property was subsequently transferred: 'The plaintiff [judgment debtor], as owner of the property, would be entitled to recover the [property] by way of rei vindicatio'.*"

[22] The second and third respondents on the other hand submitted that this case falls within the third scenario identified by the Court in *Knox v Mofokeng and Others* (2011/33437) [2012] ZAGPJHC 23, 2013 (4) SA 46 (GSJ) namely, that where the sale in execution has been perfected by registration of transfer of immovable property to a *bona fide* purchaser who had no knowledge of the judgment debtor's proceedings for the rescission of the judgment or where transfer of ownership has been effected prior to the institution of the rescission proceedings, the judgment debtor is not entitled to recover possession of the property in question, *unless it can be established that the judgment and /or the sale in execution constituted a nullity* (my emphasis).

[23] In my view, the last paragraph in the third scenario supports the applicants' case. It is an undisputed fact that when the first respondent decided to execute on the judgment debt it was some seven years later and the applicants had satisfied their judgment debt by the time the sale in execution took place. It is also undisputed that at the date of sale the applicants' bond account with the first respondent had a credit in the sum of R584.67. This means that the applicants had satisfied the principal debt. There was accordingly no lawful cause for the sale.

[24] Ms Scallan argued that the sale in execution followed upon a valid judgment which was taken correctly. This is correct, however, the purpose of the sale would have been to satisfy a judgment debt. When the sale took

place there was no debt because it had been satisfied. Therefore the first respondent had no remaining rights to execute on the property. That sale was declared null and void and set aside. The transfers that followed were equally null and void.

[25] In *Campbell v Botha and Others* 2009 (1) SA 238 (SCA) at 245 paragraph 20D, the Court dealt with a case where there was default judgment obtained against an unassisted minor and his property was sold at a sale in execution and the sheriff had failed to serve on the appellant either a warrant or the notice of attachment. The Court found that there was non-compliance with the law by the sheriff. It found that in those circumstances the sale was no more than a purported sale in execution. It also found that not having attached the property, the sheriff had no authority to conduct a sale and to transfer the property to the purchaser. As a consequence thereof the Court found that the applicant never lost his ownership of the property in question pursuant to the sale. The Court declared the applicant to be the owner of the property.

[26] In my view the remarks of the Court in the *Campbell case* apply equally herein. The only difference is that the judgment in the *Campbell case* was declared null and void whereas in this case one is dealing with a case where the validity of the judgment that had been satisfied prior to the sale, is not under attack. In my view where the judgment creditor has acted in the manner in which it did herein the *bona fide* purchaser principle does not even arise.

[27] Ms Scallan submitted that the applicants have failed to rescind the default judgment and on this basis alone they are not entitled to seek the relief they are seeking. In this regard she relied on the decision of the Constitutional Court in *Gundwana v Steko Development* 2011 (3) SA 608 CC at page 627 paragraphs [57] and [58].

[28] The facts in the *Gundwana* case are distinguishable from this case in that the applicant therein alleged that she continued to make payments on the bond over a period of approximately four years, and that the Bank accepted those payments without letting her know that they were inadequate or acceptable or that they had obtained default judgment against her. She argued that the Bank could not in those circumstances simply proceed in 2007 with an execution order on a writ obtained in 2003. She argued that this amounted to a compromise that novated the judgment debt, or if not, something less, that at least precluded execution without giving her some form of a hearing before proceeding. In this case when the sheriff proceeded with the sale in execution it was seven years after default judgment had been granted and at that point there was no longer a debt to be satisfied.

[29] Mr Wilson submitted that they are not raising any constitutional issues. However, it appears from the record that the interests that the applicants have in the property far exceed those that any subsequent purchaser may have. They are in occupation of the property with their children. This is their only home. They have paid for it in full. It was transferred to the other purchasers based on the sale in execution which was declared null and void.

[30] There is accordingly no justification in law for this Court to allow the deprivation of the applicants of their home by the unsatisfactory registrations following invalid sales, to stand.

Conclusion

[31] In the circumstances I find that the applicants never lost their ownership of the property in question pursuant to the sale. They are the owners of the property. The title deed to the property in question should be registered in the names of the applicants by the fifth respondent. It follows that all the other title deeds and or rights registered which relate to the second, third and fourth respondents should be cancelled.

[32] The fifth respondent is a public office bearer and can only act in terms of the law. Section 6 of the Deeds Registries Act 47 of 1937 provides:

> "**6 Registered deed not to be cancelled except upon an order of court**
>
> *(1) Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer , certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.*
>
> *(2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.*"

[33] The fifth respondent can only cancel a deed of transfer, grant or certificate of title upon being ordered to do so by Court. It is for that reason

that the applicants have, amongst other things, approached this Court. For the reasons advanced above I am satisfied that the applicants have made out a case for the relief they are seeking.

[34] On the issue of costs Mr Wilson submitted, correctly in my view, that the applicants are not seeking a cost order against the second and third respondents even if they are successful. Ms Scallan on the other hand submitted that the first respondent should be ordered to bear costs of this application. I am reluctant to do that first, because although a notice to oppose was filed by the first respondent it has not pursued its opposition. Ideally it should have withdrawn it but it did not. Second, it is not apparent from the record whether the notice of set down had been served on it. None of the parties had indicated that they will seek a cost order against it even though it has not actively opposed the matter. In the circumstances an Order that each party is to bear his or her own costs would be appropriate in this case.

[35] **I accordingly grant the following Order:**

35.1 The Registrar of Deeds (Johannesburg) be and is hereby ordered to cancel the title deed number T43716/2010 in respect of Erf [.....], Registration Division IQ, Province of Gauteng, and to cancel all the rights accorded to the second respondent (Mr Lucas Molobele) by virtue of the deed.

35.2 The Registrar of Deeds (Johannesburg) be and is hereby ordered to cancel the title deed number B32693/2010 in respect of Erf [.....], Registration Division IQ, Province of Gauteng, and to cancel all the rights accorded to the Fourth Respondent (Standard Bank of South Africa Limited) by virtue of the deed.

35.3 The Registrar of Deeds (Johannesburg) be and is hereby ordered to cancel the title deed number T43717/2010 in respect of Erf [.....], Registration Division IQ, Province of Gauteng, and to cancel all the rights accorded to the Third Respondent (Ms Rachel Pinkie Bodibe) by virtue of the deed.

35.4 The Registrar of Deeds (Johannesburg) be and is hereby ordered to register the title deed in the names of the Applicants, (Ms Delphin Louis Thwala and Mr Godfrey Thwala) in terms of section 6 (2) of the Deeds Registries Act 47 of 1937.

35.5 Each party is to bear his or her own costs.

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T V NORMAN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING : 03 FEBRUARY 2016

DATE OF JUDGMENT