REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

3/7/13.

CASE NO: 23766/2008

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

3/7/2013 DATE

SIGNATURE

In the matter between:

MASHEGO FREDERICK MALEKA	**1ST APPLICANT**
ZANELE ELLEN MALEKA	**2ND APPLICANT**
and	
NEDBANK LIMITED	**1ST RESPONDENT**
THE SHERIFF – PRETORIA NORTH	**2ND RESPONDENT**
MPHO MARIA MONAGENG	**3RD RESPONDENT**
DEEDS REGISTRY	**4TH RESPONDENT**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] This is an opposed application in terms of which the applicants sought an order declaring the sale in execution of their residential property (the property) held on 23 February 2012 to be invalid and to be set aside. The property was purchased by the 3rd respondent and has been transferred into her name. The application further sought to order the 4th respondent to de-register and transfer back the ownership of the property from the 3rd respondent to the applicants.

[2] When the applicants launched the application the order requested against the 4th respondent was for the 4th respondent to be interdicted from registering and transferring the ownership of the property from the applicants to the 3rd respondent and/or any third party. This prayer was amended when the applicants became aware that the property has already been transferred into the name of the 3rd respondent.

[3] During argument, the 1st respondent's counsel contended that the amendment should not be considered because it was not served on the 3rd respondent. My view is that in the interest of justice and in order to bring these proceedings to finality, the amendment should be granted. Neither the 1st respondent nor the 3rd respondent would be prejudiced by such non service. The 3rd respondent is not opposing the application and I do not think she would have opposed the application even if the amendment was served on her.

[4] The 1st respondent is opposing the application. There is no substantive relief sought against the second, third and fourth respondents, and they have been cited to the extent of any interest they might have in the matter. They are not opposing the application.

[5] The applicants based their case on the following grounds:

a. that the 1st respondent should have considered the changed agreement between the parties before selling the property, and

b. that the court was not given an opportunity to decide after consideration of all relevant circumstances, whether authorised execution of the immovable property is justified.

THE FACTUAL MATRIX

[6] Pursuant a court order against the applicants granted on 13 August 2008 the applicants' residential property was declared executable. That order was granted consequent to the applicants' failure to pay a home loan bond agreement with the 1st respondent over the purchase of the property.

[7] For a period of about four years the 1st respondent did not sell the property in execution allowing the applicants to first make nominal payments towards the

reduction of their arrears. Later when the applicants fell in arrears with their payments again, the 1st respondent arranged that they sign a Nedbank Assisted Sale Agreement (the NAS).

[8] Through the NAS, the applicants mandated the 1st respondent to employ an agent who was to facilitate the sale of the property. In terms of the NAS the mandate was intended to expire and was renewable after every 100 days. No sale resulted from this mandate. At the expiry of the 100 days for different reasons provided by the parties, the mandate was not extended and the account of the applicants was formally withdrawn from the NAS option.

[9] A sale in execution was as a result scheduled for 23 February 2012. The applicants were informed on 22nd February 2012 of the impending sale in execution. They were also informed of the 1st respondent's requirements for the stay of the sale in execution. The 1st respondent required an upfront payment of 40% of the indebted amount to stay the sale and the balance to be payable 'in six months period from that day'. The applicants were unable to make the required upfront payment and on the scheduled date the property was sold in execution. Despite various attempts by the applicants' legal representative to settle the matter the property was eventually transferred into the name of the 3rd respondent on 6 June 2012.

THE CHANGED AGREEMENT BETWEEN THE PARTIES

[10] The applicants' contention is that the sale in execution was carried out despite the NAS and the oral agreement between the parties. According to their counsel, the applicants had entered into an oral agreement with the 1st respondent, through its agent, in respect of which arrangements were negotiated to pay off the amount due by the applicants. The applicants should have been given an opportunity to make payments before further action was taken against them. There was also an oral agreement that the applicants would have the right to purchase the property again in the event it is sold. The applicants were, however, not given an opportunity to exercise this right, so it was argued.

[11] According to the applicants' counsel, in terms of the NAS, the applicants were supposed to have been given an opportunity to sign the extended mandate. His argument is that the 1st respondent should have given the applicants notice of its intention to remove them from the NAS option. There was a duty on the 1st respondent to verify why the mandate had not been extended before it could take action against the applicants The applicants received the mandate late because of delay in the postal service and by the time they returned it the 1st respondent had already removed them from the NAS option, so the argument went.

[12] The 1st respondent's counsel in resisting this ground contended that the applicants failed to show any *bona fides* on their part in that they undertook to pay off their indebtedness to the 1st respondent from the proceeds of the sale of

one of their immovable properties but they failed to do so. At the time of the hearing of the application their last payment was on 25 May 2010.

[13] As regards the NAS option, he argued that the 1st respondent had followed all the procedures and there were no irregularities on its part. The NAS lapsed and the applicants failed to extend the mandate. Consequently the 1st respondent was entitled to recover the money owed from the applicants.

[14] To my mind, there was no duty on the 1st respondent to go out of its way to find out why the applicants had not extended the mandate. The parties had agreed that the agreement would be for a period of 100 days. When the 100 days expired the duty was on the applicants to ensure that the mandate was extended. The first respondent waited for a period of forty days, which to me is reasonable, before taking further action against the applicants. The applicants were given sufficient time within which to extend the mandate and they failed to do so. When they did not receive notification from the 1st respondent to extend the mandate, they should have approached the first respondent and enquired about the extension.

[15] There was no legitimate expectation as the applicants' counsel suggested in argument. The mandate had expired and the NAS was no longer binding on the 1st respondent. The applicants were aware and/ ought to have known that the mandate had expired and should have taken measures to ensure that it was extended before the 1st respondent took steps against them. I am thus

satisfied that the 1st respondent was entitled in such circumstances to take further steps against the applicants.

EXECUTION OF THE IMMOVABLE PROPERTY NOT JUSTIFIED

[16] The applicants contended that, when declaring the property executable and when the warrant of execution was issued, the court was not given the opportunity to consider the guidelines set out in **JAFTHA v SCHOEMAN & OTHERS; VAN ROOYEN v STOLTZ & OTHERS** 2005 (2) SA 140 (CC).

[17] According to the applicants the 1st respondent had simply executed the applicants' property based on a four year old execution order and failed to consider the parties' changed agreement and the aforesaid guidelines. The 1st respondent was duty bound to afford the court an opportunity to consider the guidelines afresh irrespective of the order obtained in 2008. The sale in execution of their property was therefore unjustifiable in light of section 26 of the Constitution.

THE APPLICABLE LAW

[18] The guidelines set out in

[19] Section 26 of the Constitution provides that –

"Housing –

(1) Everyone has the right to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[20] The only way to determine whether the right to adequate housing has been compromised is to require judicial oversight in all cases of execution against immovable property. This oversight is required also in the absence of formal opposition and where the debtor is in default or where he or she is ignorant of his or her rights.

[21] The sole purpose of requiring judicial oversight in all cases of execution against immovable property is to prevent the infringement of the right to adequate housing. See **MKHIZE v UMVOTI MUNICIPALITY** (628/2010) [2011] ZASCA 184 (30 September 2011) at para [20]

[22] Judicial oversight is therefore constitutionally required so that the judicial officer can "engage in the balancing process" and "consider all the relevant circumstances of a case" to determine whether there is a good cause to order

execution against the immovable property concerned. See **JAFTHA v SCHOEMAN & OTHERS; VAN ROOYEN v STOLTZ & OTHERS** above at paras [42] – [43] and [55].

[23] The absence of judicial oversight imperils a defendant's fundamental right of access to adequate housing contained in section 26 (1) of the Constitution. The warrant of execution issued without the required judicial oversight is invalid as it had taken place in breach of the defendant's constitutional rights. The resultant sale in execution, on the same reasons, is also invalid and a nullity. See **MENQA & ANOTHER v MARKOM & OTHERS** 2008 (2) SA 120 (SCA) at para [21].

ANALYSIS OF EVIDENCE

[24] In this instance, the court granted summary judgment against the applicants and in the same judgment ordered the immovable property executable.

[25] It is common cause that the sale in execution was pursuant to a valid judgment granted against the applicants by default on the 13 August 2008. One would infer that the warrant of execution which was subsequently issued by the registrar of the High Court was consequent to the said court order which declared the property executable.

[26] The applicants' contention is that firstly, the court declared the property executable without drawing the applicants' attention and/or itself to the provisions of section 26 of the Constitution. According to the 1st applicant in the founding affidavit, there was no enquiry as to whether the applicants' right and that of their family to housing would be adversely affected by the execution of the applicants' house. Secondly, considering the fact that the order against the applicant had been granted more than four years ago, the warrant of execution was issued without judicial oversight – a procedure held by the Constitutional Court in the **JAFTHA** - judgment to be unconstitutional if the warrant of execution would infringe the judgment debtor's rights to access to adequate housing in terms of section 26 of the Constitution and would therefore have to be justified.

[27] There is reason to believe that the applicants and their family's section 26 (1) right of access to adequate housing might have been infringed. The 1st applicant averred in the founding affidavit that the property is the only registered property that they have and they may be homeless together with their school going minor children should the property be sold in execution. According the 1st applicant before the warrant of execution was issued the court did not satisfy itself that the applicants will not lack adequate housing if their property was sold in execution.

[28] On the perusal of the record there is no indication how the court came to the conclusion declaring the property executable. The application for summary judgment read as follows:

"KINDLY TAKE NOTICE that Application will be made to this Honourable Court on **WEDNESDAY THE 13TH AUGUST 2008 at 10H00** or as soon thereafter as Counsel may be heard for Summary Judgment to be entered against the 1st and 2nd Defendants, jointly and severally, the one paying the other to be absolved, as follows:-

1. Payment of the sum of R273, 511.11;

2. Interest at the rate of 13,80% per annum as from the 2nd May 2008 to date of payment

3. An Order Declaring :-

   ERF 767 SOSHANGUVE BLOCK GG PRETORIA; REGISTRATION DIVISION: JR MEASURING 312 SQUARE METRES; HELD BY VIRTUE OF DEED OF TRANSFER T31022/2008 *(t31022/2002),* **executable;**

4. Costs of Suit

5. Further and alternative relief.

AND FURTHER TAKE NOTICE that the Affidavit of KAYOORI CHIBA and the Covering Mortgage Bond annexed thereto will be used in support of this application.

TAKE FURTHER notice that should the Defendants intend opposing this Application, the Defendants' attention is drawn to the provisions of Rule 32 of the Rules of the above Honourable Court insofar as the filing of an answering affidavit is concerned."

[29] Attached to the application for summary judgment is the affidavit by the said KAYOORI CHIBA and a copy of the Covering Mortgage Bond. The affidavit sets out only the requirements of rule 32 of the Rules. Nothing is stated about what is required in the **JAFTHA** - judgment. It is therefore not apparent from the record itself what the court considered to come to the conclusion declaring the property executable. The reasons provided to the court at the hearing of the summary judgment application, if any, are also not enunciated in the 1st respondent's answering affidavit. The court should have ordered execution after having considered all relevant circumstances, which appears not to be the case in this instance.

[30] I am prepared to accept that although the guidelines enunciated in the **JAFTHA** - judgment were in place in 2008 when the property was declared executable, they were, however, not yet streamlined. There was no set procedure to follow when declaring a property executable.

[31] Fast forward to 2012. The guidelines in the **JAFTHA** - judgment had been streamlined by then. Rule 46 (1) was amended in 2010 to give effect to the guidelines. The rule reads that –

> "(1) (a) No writ of execution against the immovable property of any judgment debtor shall issue until –
>
> (i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said

person has not sufficient movable property to satisfy the writ; or

(ii) such immovable property shall have been declared to be specifically executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.

(b) . . ."

[32] It is not in dispute that the property in question is the residential property of the applicants and that the property is their primary residence. It is also common cause that the court did not consider all the relevant circumstances before the writ was issued. It is common cause that, at the time of the sale in execution, at least four years had expired since the property was declared executable. It is indeed so that probabilities are that within that time period the applicants' circumstances might have changed. I am thus of the view that the applicants are correct, the court should have considered their circumstances before the writ was issued to determine whether at that time the property was executable or not. To my mind, by failing to give the court that opportunity, the applicants' fundamental right to adequate housing were infringed.

[33] The warrant of execution in the circumstances of this case, in my view, is tantamount to a re-issued warrant of execution. The court in **MENQA & ANOTHER v MARKOM & OTHERS** above at para [15] found a re-issued warrant of execution to have been issued by the clerk of the court and that it was thus issued without judicial oversight. Judicial oversight must be provided at the point of sale in execution against immovable property. Remember, as already stated, the sole purpose of requiring judicial oversight in all cases of execution against immovable property is to prevent the infringement of the right to adequate housing. A sale in execution of immovable property must not infringe this right as well.

[34] In my judgment the warrant of execution in this instance is invalid as it was issued without judicial oversight required by the Constitutional Court in the **JAFTHA** – judgment. The absence of this procedural safeguard jeopardized the applicants' right to adequate housing. The sale in execution to the 3rd respondent is also invalid for the same reason.

RE-REGISTRATION OF THE PROPERTY

[35] In the light of the **MENQA & ANOTHER v MARKOM & OTHERS** - judgment above, I cannot order the 4th respondent to de-register the property and transfer it in the name of the applicants. Similarly as in this instance, that court found the sale in execution to be void *ab initio* but did not order the registrar to transfer the property back into the name of the appellant. The

reasons advanced by that court were that by simply directing the Registrar of Deeds to re-register the property in the name of the appellant would neither be 'appropriate relief' as required by section 38 of the Constitution, nor would it be a 'just and equitable order' in terms of section 172 (1) (b) of the Constitution. In coming to that conclusion, that court considered the fact that the respondent had paid off the mortgage bond amount which was owed by the appellant. It also considered the fact that by ordering re-registration in the name of the appellant, the appellant would be unjustly enriched and the respondent would be left out of pocket, it then concluded that the property be recovered in vindicatory proceedings. Equally so, the appellants will have to recover the property in vindicatory proceedings.

COSTS

[36] As the successful party the applicants are entitled to the costs of this application which shall include the costs of the sale in execution.

ORDER

[37] In the premises I make the following order:

a. the sale in execution held on the 23 February 2012 and the subsequent transfer of the property to the 3rd respondent is declared null and void.

b. the 1st respondent is to pay the costs of this application including the costs of the sale in execution.

E. M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearances:

HEARD ON THE	: 30 MAY 2013
DATE OF JUDGMENT	: JUNE 2013
APPLICANTS' COUNSEL	: ADV MALOAA
APPLICANTS' ATTORNEY	: MAHLANGU MASHOKO ATTORNEYS
1ST RESPONDENT'S COUNSEL	: ADV VAN DER HEVER
1ST RESPONDENT'S ATTORNEY	: HACK STUPEL & ROSS