


IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

28/11/13  
Case Number: 47132/2009

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO
(3)	REVISED.
20 Nov 2013	
DATE	SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2013 -11- 28
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

**FIRSTRAND BANK**

**APPLICANT**

and

**MONDLI LELIE MOPHULENG**

**1<sup>ST</sup> RESPONDENT**

**NTOMBIZODWA ANNA-MARIE**

**2<sup>ND</sup> RESPONDENT**

Coram: **CAMBANIS AJ**

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**JUDGMENT**

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Delivered on: November 2013

CAMBANIS AJ

1. This is an application to authorise execution of a default judgment against immovable property which has previously been declared specially executable by the Honourable Deputy Judge President van der Merwe (as he then was) on 27<sup>th</sup> October 2011 granted by J on the 9<sup>th</sup> March 2010. Judgement by default.
2. The Applicant firstly applies for the late filing of its replying affidavit for late filing is apparent from the history of this matter.
3. The Applicant launched this application during December 2011 and it was set down to be heard on the 20<sup>th</sup> January 2012.
4. The second respondent filed an opposing affidavit to this application on the 9<sup>th</sup> January 2012, and simultaneously launched an application for rescission of the default judgment and the order declaring the immovable property especially executable.
5. This application was therefore postponed sine die on the 20<sup>th</sup> January 2012 by the Honourable Mr Justice Mavundla.
6. The Honourable Mr Justice Msinmeki dismissed the recession application on the 16<sup>th</sup> November 2012, I accept that given the history, it was possible for the Applicant to file its replying affidavit

timorously even though its reply is almost a year and 3 months late.

My task is made much easier due to the fact that the alleged reasons for the respondents default was fully and extensively canvassed at the recession application where it was found that the respondents do not have a defence on the merits of this matter.

Second respondent alleges that the house was defective. The house was built by a developer not by the Applicant who is a bank that merely provided money to the respondent in order that they might purchase the house.

7. The Applicant seeks payment of monies outstanding and due to the Application on the basis of a mortgage loan agreement between the Applicant and the respondents.
8. At the time of deposition to the replying affidavit, the respondent was 46.04 instalments in arrears, which amounts to R161049.70. The respondents have never paid any instalment towards the loan since the loan was granted. They are almost 4 years in default. The recession application was brought 2 years after the default judgment on 9<sup>th</sup> March 2010. S?S was served on 14<sup>th</sup> August 2009 – agreed to hold the matter in abeyance.

*"She has not offered to pay a reduced sum or any sum at all; has living in the house without paying a cent to the respondent; has never suggested that she is not the owner of the property or that the property should never have been transferred to her or that the agreement be cancelled. She never repaid the deposits and claimed recompense from the developer. This according to the respondent demonstrates an act of mala fides on the part of the second Applicant. The contention in my view, is sound and has merit" I agree.*

9. I am indebted to Advocate E.J van Rooyen for the Applicant for his assistance in this matter especially in circumstances where the second respondent (or the first respondent) was not represented at the hearing. At the hearing, he informed me that he had had certain telephonic communications with the second respondent on the morning of the hearing of this matter. I was presented with a lot of detail but suffice to say that second respondent claimed to not have received Notice of Set down in this matter. I was also advised that my brothers, who handed down the previous three judgments prior to the hearing of this matter, had been reported to the Judicial Service Commission by the second respondent. I will return to this aspect later. Mr van Rooyan Steenkamp meticulously took me through a series of the Sheriffs Returns of services in the various applications referred to previously which

had been served at second respondents domicilium citandi; et executandi: being Stand 7838, Cosmo City namely the address of her primary residence which is the subject of this application. She obviously received service of these previous court papers because she acted on them, for example with the S?S she negotiated that the proceeding be held in abeyance. Likewise with this application there was a series of returns of service commencing on the 30<sup>th</sup> April 2013 for service of the Notice of Motion, finally on 3<sup>rd</sup> July 2013. It was served at 7838 Cosmo City, the chosen domicilium. "Upon Zinani, a friend who resides at 7839 Cosmo City". The replying affidavit was well as the Notice of Set Down was similarly served by the sheriff on 3<sup>rd</sup> July 2013. The Notice of Set Down was also sent per registered post on the 21<sup>st</sup> June 2013.

10. After the hearing of this matter I reserve judgment and was due to deliver judgment on the 20<sup>th</sup> August 2013. On the preceding afternoon, my clerk was telephoned by the second Applicant who apparently had a threatening attitude. The call was put through to me and I was told not to hand down judgment because she had not received a Notice of Set Down. She claimed to have proof that she did not receive the Notice of Set down. I requested her to email her proof. I did not receive the proof but instead received copies of her various complaints to the JSC.

11. I am satisfied and find that the second respondent did receive Notice of Set Down by way of service by the Sheriff and by registered post as is evidenced in the papers. I am fortified in this finding but the second respondent's inability to furnish proof to the contrary.

12. In the circumstances the following order is made:

12.1 That the Applicant is authorised to execute the judgment under case number 47132/09 against the immovable property of the respondents, which is also her primary residence and which has previously been declared specially executable;

12.2 That in terms of Rule 46 the Registrar is authorised to issue a Warrant of Execution against the immovable property of the respondents', to obtain an attachment over the property and ultimate sale in execution of the property known as:

ERF 7838 COSMO CITY EXTENTION 6 TOWNSHIP,  
Registration Division IQ, Province of Gauteng, MEASURING:  
388 (three hundred and eighty eight) square metres and  
held by Deed of Transfer No T035109/08;

12.3 Applicant's unopposed application for the late filing of its replying affidavit is granted.

A handwritten signature in black ink, appearing to be 'C. Cambanis', written over a horizontal line.

C. Cambanis Acting Judge of the High Court

Delivered on: November 2013