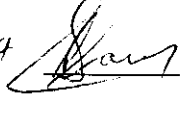


2/4/2014

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED
1/4/2014	
DATE	SIGNATURE

CASE NO: 695/10

In the matter between:

2/4/2014

OSCAR JABU MTHIMUNYE

APPLICANT

and

THE SHERIFF OF THE HIGH COURT

FIRST RESPONDENT

PRETORIA SOUTH WEST

LERATO MASIGO

SECOND RESPONDENT

IN RE:

ABSA BANK LIMITED

PLAINTIFF

AND

BGF MARX

DEFENDANT

JUDGMENT

BAM J

1. On 25 January 2013 an order was granted by Matojane J in this court, cancelling a sale in execution that was held by the Sheriff, first respondent,

on 23 August 2012. The applicant now applies for the rescission of that order.

2. The salient facts are as follows:

- (i) On 23 August 2012, consequent upon a judgment for the execution of immovable property, situated at 22 Lotus Gardens, at a sale in execution held by the Sheriff, the applicant purchased the property.
- (ii) On 25 January 2013, upon an application by the Sheriff in terms of the provisions of Rule 46(11) for the cancelling of the said sale in execution, such order was granted by Matojane J in chambers.
- (iii) Subsequently, on 4 April 2013, the Sheriff held another sale in execution and sold the property to the second respondent.

3. The sole ground upon which the applicant based this application is the allegation that the order for the cancellation of the sale was erroneously granted by Matojane J, in that the application by the Sheriff was not served on him and he had no knowledge of the process.

4. In my view the applicant faces the following problems:

- (i) On 7 September 2012 a registered letter was posted to the applicant by the attorneys representing the Sheriff, informing the applicant that he has failed to comply with paragraphs 6 and 8 of the conditions of sale, and that in the event of the applicant not complying with those conditions within 7 days, the sale would be cancelled. The applicant admitted that the document was sent to the correct address, but denied having received it. It is however admitted in the second respondent's answering affidavit that the letter was returned to sender.

- (ii) The second respondent, in par 9.4 of her answering affidavit stated that on 4 April 2013 the applicant was present at the second auction and that he was aware that the first sale was cancelled. This was admitted by the applicant.
- (iii) Rule 46(11) provides that a sale may be cancelled by a judge summarily on the report of the sheriff after due notice to the purchaser. The Rule does not provide that the Sheriff should serve the application on the purchaser. "*Due notice*" is clearly sufficient.
- (iv) On 7 January 2013 the Sheriff filed the application with the Registrar accompanied by the required affidavit and supporting documents, and on 25 January 2013 the application was granted.
- (v) No irregularity pertaining to the application in terms of Rule 46(11) appears from the papers.
- (vi) The applicant did not state in his founding affidavit that the contents of the application for the cancellation of the sale lodged by the Sheriff was wrong or misleading in any way.
- (vii) The letter dated 15 April 2013, attached as OJM3 to the applicant's founding affidavit, addressed by the applicant's attorneys of record to MD Mitchell Attorneys, indicates that the applicant was at that stage already aware of the cancellation order granted by Mtonjane J on 25 January 2013. This is consistent with the applicant's admission that he was indeed present on 4 April during the second sale and that he was on that day made aware of the cancellation of the first sale.

5. This application is apparently brought in terms of the provisions of Rule 42. It is not accompanied by an application for condonation or an affidavit explaining the delay of almost three months. This issue was not addressed in the applicant's founding affidavit at all.
6. Even if the cancellation of the sale may be considered as an order of court that can be set aside in terms of Rule 42, contrary to what was decided by Sutherland J in the South Gauteng High Court in the matter of *STANDARD BANK v NDLOVU and MNGADI*, Case No 33229/2010, (from which decision I may differ), the applicant failed to establish the required grounds to succeed with his application.
7. Accordingly I make the following order:

The application is dismissed with costs.



A J BAM

JUDGE OF THE HIGH COURT

28 March 2014