IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 59792/2009

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

....
DATE SIGNATURE

DATE: 2/10/2015

In the matter between

MORRIS MOKASE	First Applicant
MARTINA LILLY MOKASE	Second Applicant

and

FIRST RAND BANK LIMITED	First Respondent
DJ SCHOONRAAD	Second Respondent
VILJOEN QUINN INCORPORATED	Third Respondent
REGINALD LEBOGANG MAAKE	Fourth Respondent
BONISWA NTEBOGENG MAAKE	Fifth Respondent
REGISTRAR OF DEEDS	Sixth Respondent
SHERIFF PRETORIA WEST	Seventh Respondent

ABSA BANK LIMITED Eighth Respondent

J U D G M E N T

MALI AJ:

[1] This is an application for an order to declare the sale in execution held on 30 April 2009 null and void; that the first respondent be ordered to reinstate and also reregister the mortgage bond it had with the applicants prior to the sale in execution; that the sixth respondent be ordered to revert transfer of property Erf […] Danville Extension 5 Township (" the property") to its previous owners, the applicants; and that the sixth respondent be ordered to cancel the passing of transfer of the aforementioned property in the name of fourth and fifth respondents so registered on 15 September 2009.

THE PARTIES

[2] The first and second applicants at the time of the institution of the application were married to each other in community of property. The applicants are currently divorced.

[3] First respondent is the banking institution which had a mortgage bond registered in favour of the applicants over Erf […] Danville Extension 5 Township, Registration Division Gauteng Province, situated at […], Extension 5 Pretoria West ("the property").

[4] Second respondent is the party who purchased the property at an auction. Third respondent is the attorney of the second respondent.

[5] Fourth and fifth respondents purchased the property from the second respondent.

[6] Sixth respondent is the Registrar of Deeds. It effected the registration of the property in the name of fourth and fifth respondents.

[7] Seventh respondent is the Sheriff of Pretoria West who conducted the sale in execution of the property.

[8] Eighth respondent is a banking institution and has a mortgage bond registered over the property in its favour because of the fourth and fifth respondents' indebtedness to it.

BACKGROUND

[9] The applicants entered into a written mortgage loan agreement with the first respondent. On 11 December 2008, the first respondent obtained judgment declaring the property especially executable. The property subject to the said mortgage loan was sold in a sale in execution to the second respondent on 30 April 2009.

[10] The sale was at the instance of the first respondent due to the applicant's failure to make payment. The applicants were granted an opportunity to

effect payment in order to stop the sale in execution but they omitted to pay within the stipulated time. Subsequently, the fourth and fifth respondents, having been financed by the eighth respondent, bought the property from the second respondent.

[11] The fourth and fifth respondents thereafter approached the applicants in order to take occupation of their property.

[12] On 29 September 2009, the applicants launched an urgent application in this honourable court on an *ex parte* basis against the respondents. They then obtained an interim order without a return date. The order had the effect of interdicting all respondents from evicting the applicants from the property. It also directed that all other prayers should be dealt with in the main application.

[13] The other prayers were the following:

13.1 that the second and third respondents be ordered to reimburse the applicants an amount of R20 000 paid into the second/third respondent's account on 5 May 2009;

13.2 that the seventh respondent be ordered to produce and file the proof of all documents relating to the sale in execution of the property;

13.3 that the first respondent be ordered to produce and file with this honourable court, proof of when guarantees were furnished by the second respondent, if any; and

13.4 that the first respondent be ordered to furnish this honourable court with information as to who ordered that the cancellation of the sale in execution be withdrawn and why.

[14] Subsequent to the service of the abovementioned order, the first respondent and the second and third respondents filed their opposition to the relief sought. The second to fifth respondents launched an urgent counter application in terms of which the second to fifth respondents sought to have the order of 29 September 2009 set aside and rescinded. The applicants opposed the urgent counter application. On 11 November 2009, the urgent counter application was struck off the roll. Subsequently the first respondent delivered an answering affidavit in opposition to the relief sought by the applicants in the main application. The applicants failed to file the replying affidavits and/or take any further steps. This application has been enrolled by the first respondent for the final adjudication of this matter or the main application.

[15] The first applicant is an attorney by profession. He appeared in person and the second applicant was legally represented. The second, third, sixth and seventh respondents were not represented or did not appear at all. On

behalf of the eighth respondent, the first respondent's counsel indicated that the eighth respondent would abide by the arguments of the first respondent.

[16] The second applicant applied for condonation in respect of the late filing of the replying affidavit. In the interests of justice I condoned the said late filing by the second applicant. The first applicant insisted with non- filing of the replying affidavit. During the proceedings he tried to argue from the bar without acknowledging that he waived his right to reply.

[17] The issue to be determined is whether the interim order of 29 September 2009 should be made final and that the applicants be granted the prayers sought as stipulated in paragraph 13 above.

LAW

[18] Rule 46 (13) of the Uniform Rules of Court provides that:

> *"The sheriff conducting the sale shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him or her shall be as valid and effectual as if he or she were the owner of the property."*

Section 129 (3) and (4) of the National Credit Act 34 of 2005 read as follows:

"(3) Subject to subsection (4), a consumer [i.e. a person in the position of the debtor] may -

(a) at any time before the credit provider [i.e. a person in the position of the bank] has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and

(b) after complying with para (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

(4) A consumer may not re-instate a credit agreement after -

(a) the sale of any property pursuant to -

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123."

[19] In **Firstrand Bank Limited v Nkata [2015] All SA 264 (SCA)** page 271 at clause [23] it was held as follows:

> *"Section 129(3)(b) read with 129(3)(a), together with section 129(4) of the NCA give the consumer the right to 're-instate' a credit agreement and 'resume possession' of the property in question (the equivalent of 'redemption' at common law) by paying the credit provider all amounts that are overdue, together with 'default charges' and 'reasonable costs of enforcing the agreement', but does not alter the common law consequence of 'the axe falling' upon the sale in execution. At common law one could, up to the time of the sale, redeem ownership and possession by discharging the full amount of the debt. Now, under the NCA, ownership and possession can be redeemed merely by paying the amount overdue, together with charges and costs. The Rubicon has been and remains the sale in execution. The NCA has not changed this. On the contrary, it has expressly provided that a consumer may not 're-instate' a credit agreement after the execution of a court order enforcing the agreement."*

At page 276-277 at clause [37](a) it was further stated that

> *"As Innes J keenly recognised long ago in Walker v Syfret NO, 1911 AD 141, when it comes to finding the point of no return in matters concerning the enforcement of a transaction, the interests of innocent third parties are paramount. He said: '[N] o authority directly in point has*

been quoted to us, but the matter seems clear upon principle.' This provides another clue in the process of analysis of what 'execution' in section 129(4)(b) might mean".

At page 279 paragraph 44(c) the court held

"The provisions of section 129(4)(b) of the NCA are peremptory. In clear terms they provide that a consumer may not re-instate a credit agreement after the execution of any court order enforcing that agreement. Reinstatement can only occur prior to a sale in execution at a public auction… The short answer for a consumer in distress is that she must timeously re-instate the credit agreement and, where this is required by the circumstances, apply for and successfully obtain a rescission of the judgment and the setting aside of the writ of attachment and a stay of execution before that sale has taken place in order to avoid the fall of the axe."

[20] The case of the first applicant is that the sale in execution wherein the property was sold by the first respondent to the second respondent was erroneous. The first applicant stated that he was in arrears of R80 000.00 with his bond payments with the first respondent and, as a result, the first respondent obtained a judgment against the applicants in December 2008.

[21] Between 28 and 29 April 2009, before the day of the sale in execution, the first applicant tried to deposit a sum of R90 000.00 into the first respondent's

institution to avoid the sale in execution. He could not succeed for two consecutive days because of the first respondent's faulty banking system. He only managed to effect the payment on 30 April 2009 at 10h26, apparently after the hammer had fallen.

[22] He further stated that he was in constant contact with the employees of the first respondent who were aware of the problems leading to the first applicant not making the payment timeously.

[23] The first applicant submitted that, on the same evening of 30 April 2009, he learnt that the property was bought by the second respondent. He then contacted the second respondent who confirmed having bought the property on auction. On 4 May 2009, the first applicant met the second respondent and his attorney, the third respondent. As agreed between the three of them, the first applicant deposited an amount of R20 000 to the account of the third respondent. This was in order for the second respondent not to proceed with the purchase of the property.

[24] The first applicant thereafter contacted the attorneys of the first respondent who informed him that the sale in execution was being cancelled and he never heard from the first and second respondents afterwards.

[25] On 16 September 2009, the first applicant was informed by the second respondent that the property was sold to the fourth and fifth respondents. He then contacted Schoeman of the first respondent who later referred him

to Marieke of the first respondent who informed him that she had instructions to transfer the property into the name of the fourth and fifth respondents. It is very strange that the applicants, in particular the first applicant who was a practising attorney at the time, took no action to confirm the cancellation of the sale in execution by the first respondent between May and September 2009.

[26] Counsel for second applicant submitted that the second applicant stood by the submissions of the first applicant.

[27] The first respondent's case is that the *ex parte* application was set down fraudulently. It further stated that the payment of R90 000 was made on 30 April 2009, after the conclusion of the sale in execution. The sale in execution was valid as all conditions contained therein were fulfilled and the immovable property was transferred to the second respondent.

[28] First respondent's counsel further argued that the property was subsequently transferred from the second respondent to the fourth and fifth respondents on 15 September 2009.

[29] The second applicant's reply is mainly a reference to what she was told by the first applicant. She did not file any confirmatory affidavit of the first applicant. As alluded to above the first applicant failed to file a replying affidavit. Therefore, the first respondent's answering affidavit stands uncontested by the first applicant before this court.

[30] Fourth and fifth respondents' undisputed argument is that they bought the property lawfully in a valid sale transaction. They have been paying for the property for the past six years and have been severely prejudiced. They cannot occupy their own property that they have been paying for. They are prohibited by the applicants to take occupation of same. They still stay at a rented property which has created added financial pressure. This caused them to default on the instalments with the eighth respondent. The eighth respondent has since issued summons in the sum of R800 000 against them. They attribute this to the applicants' conduct.

[31] The fourth and fifth respondents are innocent third parties. Even in respect of other respondents the law is trite that the applicants cannot reinstate the registration of the property subsequent to the sale in execution.

[32] I find that the sale by the first respondent to the second respondent and later to the fourth and fifth respondents is valid and binding. Furthermore, there is nothing untoward about the participation of the third, sixth, seventh and eighth respondents in the sale, finance and registration of the property. In my view, the applicants' claim, in the event there is any left in respect of the reimbursement of R20 000, should be directed against the second respondent in a separate action.

[33] Having regard to the above, I find no legal basis for the applicants' main application.

COSTS

[34] The respondents argued that the applicants' application should be dismissed with costs on an attorney and client scale. This is because the applicants instituted the application and failed to file a replying affidavit for a period of six years thereby abusing the court process. The first respondent had to finally set down the applicants' application whilst the applicants enjoyed staying in the property belonging to the fourth and fifth respondents. The applicants did not even apply for rescission of judgment against the first respondent. The applicants' application is *mala fide* and the fourth and fifth respondents, the rightful owners of the property, have been extremely prejudiced.

[35] The first applicant's counter- argument is that his delays were caused by the respondents' counter application, that the respondents once withdrew attorneys-of-record and, furthermore, that the copies of the court file had at one stage gone missing. The counter application was dismissed in 2011. The applicants could not explain their inaction since then. The first applicant, as the officer of the court, should have known and exercised his options to bring the matter to finality. As stated above, in *Nkata* the interests of innocent third parties are paramount.

[36] It is trite law that attorney and client and/or punitive costs cannot be justified merely as a form of compensation for damages suffered. In **Mudzimu v Chinhoyi Municipality and another 1986 (3) SA page 140** it was stated:

"The words ' from the conduct of the losing party' in the dictum of Tindall JA or in Nel v Wateberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597 at 607 do not mean that virtually any misbehaviour on the part of the losing party sanctions the imposition of costs at the higher level of attorney and client costs. The basis of such an award is that the litigant's conduct has amounted to an abuse of the Court process, and his actions have thereby brought about additional and unwarranted expense to the other party. If he is guilty of offensive behaviour towards the Court or its officials, or towards any other person, this is irrelevant as far as costs are concerned, if it does not have the effect of causing additional and unwarranted expense." (my underlining)

Having regard to the above, there is justification for costs on attorney and client scale.

ORDER

[37] In the result I order as follows:

1. **That the order granted by this Honourable Court on 29 September 2009, is discharged.**

2. **That the application by the first and second applicants is dismissed;**

3. **That the first and second applicants are ordered to pay the costs of this application on an opposed attorney and client scale, jointly and severally , the one paying, the other to be absolved , which costs will include any and all reserved costs.**

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MALI AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

APPEARANCES

First Applicant:	In person
Counsel for the Second Applicant:	Mr AM Nduna (Attorney)
Counsel for the First Respondent:	Adv L van Tonder
Instructed by:	Lowndes Dlamini Attorneys
Counsel for the Fourth and Fifth Respondent:	Adv Schoeman
Instructed by:	JB Hassbroek Attorneys

No appearance for the second, third, sixth, seventh and eighth respondents

Date of Hearing:	7 September 2015
Date of Judgment:	02 October 2015