IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 57489/2011

Date: 8/12/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

8/12/15 .....
DATE SIGNATURE

In the matter between:

DE FORTIER CARON	**APPLICANT**
AND	
FIRSTRAND BANK LIMITED	**FIRST RESPONDENT**
SHERIFF OF THE HIGH COURT, HALFWAY HOUSE-ALEXANDRA	**SECOND RESPONDENT**
CARTMELL, CLAUDE	**THIRD RESPONDENT**
CARTMELL, KEVIN	**FOURTH RESPONDENT**
REGISTRAR OF DEEDS, PRETORIA	**FIFTH RESPONDENT**

In Re:

FIRSTRAND BANK LIMITED **PLAINTIFF**

AND

DE FORTIER, CARON **DEFENDANT**

JUDGMENT

TOLMAY, J:

[1] This is an application for the cancellation of a sale in execution of an immovable property.

[2] The applicant is the registered owner of a property situated at 165 Allan Road, Glen Austen Agricultural Holdings Midrand (the property). This property is subject to a mortgage bond in favour of the first respondent. The applicant is operating a guesthouse business from the premises, and she is also residing on the premises. The applicant failed to pay her monthly instalments and that led to first respondent instituting foreclosure proceedings. On 2 February 2012 the first respondent obtained judgment against her which also authorised first respondent to have the property attached and sold in execution.

[3] After this the applicant consulted an attorney who negotiated a settlement with first respondent which was signed on 28 February 2012. Applicant states that the settlement agreement was beyond her means as a result she met her obligations in terms of the settlement agreement for March and April 2012 but failed to pay the required amount for May and June 2012. In July she paid an increased amount

but was still in arrears. After July 2012 she was unable to pay her full monthly instalment, a situation that has continued up to the hearing of this application.

[4] On 27 March 2012, and at a time during which she was still complying with the terms of the settlement agreement, the first respondent caused a writ of attachment to be issued against her which entitled it to attach the property and to have it sold in execution.

[5] The first respondent delayed executing on the writ for some 2 years. On 5 March 2014 the second respondent attached the property and gave notice thereof in writing. The second respondent also handed a notice of attachment of the property to an occupier, the applicant's ex-husband who was occupying a room on the premises. Applicant contacted the officials of first respondent to try and reach an agreement, but first respondent refused to restructure her payment. Applicant continued to make payments to the first respondent albeit not in the full amount. Due to the first respondent's refusal to restructure her payments applicant also approached other financial institutions and requested them to come to her assistance. They however indicated that they would only offer the required finance once the judgment against her name was rescinded.

[6] On 10 October 2014 the applicant received a call from one Haley Gewer representing a firm called SA Property Buyer who informed her

that the property had been advertised to be sold in execution on 28 October 2014 and she offered to purchase the property.

[7] After this applicant consulted with her attorney. The first respondent was informed in a letter from applicant's attorney that there were tenants on the property that have not received notice or service of either the writ of attachment or the notice of the intended sale. Applicant didn't inform her tenants about the situation as she said she didn't want to upset them.

[8] On 16 October 2014 second respondent delivered a Notice of Sale at applicant's home by handing it to her ex-husband. She was at work at the time. The applicant's attorney requested a stay of the sale in a letter dated 24 October 2014. The first respondent's attorney on 27 October 2014 replied and said that their instructions were to proceed with the sale on 28 October 2014.

[9] The applicant then in a letter dated 27 October 2014 alleged non-compliance with the Rules of Court, specifically rule 46. The legal representatives of the applicant and respondent did not agree on what is required by the rule and first respondent proceeded with the sale.

[10] On 29 October 2014 the first respondent informed the applicant that the property had been sold for R1 950 000-00 to third and fourth respondents. The amount for which judgment was obtained was

R1 484 235-00. Transfer has not taken place yet and third and fourth respondents were informed by the applicant that she would seek to set aside the sale. They are not opposing the application.

[11] Applicant's contention is that the writ and sale should be set aside due to non-compliance with Rule 46(3) and (7) of the Uniform Rules of Court.

[12] At the hearing of this application applicant tendered to pay the amount which she is in arrears with but only if the judgment is rescinded. Applicant is presently in arrears with more than R300 000-00. The first respondent was not willing to accept the offer due to applicant's history of non-compliance with her obligations towards first respondent.

[13] From a statement that was provided at the hearing it is clear that the applicant's monthly payments have been erratic over the years and there is in my view no possibility that if she pays the amount in arrears that she would in future pay her full monthly instalments.

SETTING ASIDE OF THE WRIT OF ATTACHMENT

(WARRANT OF EXECUTION)

[14] Applicant alleges that at the time that the writ was issued she was still complying with the settlement agreement entered into on 12 February 2012. She alleges that shortly after the writ was issued she fell in

arrears again. She therefore contends that the applicant could not have obtained a legally valid writ of attachment.

[15] It is common cause that the applicant did not comply with the terms of the settlement agreement. She only complied for the month of March and April 2012 and fell in arrears again during May 2012.

[16] Furthermore first respondent stated in the settlement agreement of 28 February 2012 that the agreement did not constitute a novation of the previous agreement nor should it be construed as a waiver of the first respondent's rights in terms of the single facility agreement. Consequently, in my view, a writ could have been issued prior to her breach. First respondent could not have executed on the writ if the applicant complied with the settlement, but she did not. The first respondent only executed on the writ some 2 years later and after prolonged non-compliance by the applicant. In the light of the applicant's failure to comply with the terms of the settlement agreement she can't rely on the terms of that agreement. Therefore there exists no valid reason for setting aside the warrant of execution.

NON-COMPLIANCE WITH RULE 46(3)(a)

[17] Rule 46(3)(a) states as follows:

"(3) (a) the mode of attachment of immovable property shall be by notice in writing by the sheriff served upon the owner thereof, and upon the registrar of deeds or other officer charged with the

registration of such immovable property, and if the property is in the occupation of some person other than the owner, also upon such occupier."

[18] Rule 46(2)(b) states that service shall be in accordance with rule 4.

[19] The applicant complains that there was no proper service of the notice of attachment. The notice was served on applicant's ex-husband who resided on the property. No service was affected on the tenants.

[20] Service on the ex-husband of the applicant on the premises in the absence of the applicant constitutes proper service on applicant as required by rule 4. There is no requirement that I could find, that service must have been personal. Furthermore the notice did come to the attention of the applicant, consequently the purpose of service has been fulfilled. Applicant also complains that the return is defective as it does not stipulate that her ex-husband was in charge of the premises. That complaint might have had merit if the notice did not come to the knowledge of the applicant. This formal defect in my view can't and should not affect the validity of the service.

[21] The applicant further states that the rule requires service on the tenants who resided on the premises. In this regard one should look at the wording of Rule 46(3)(a) to establish whether service on them is indeed required. The rule explicitly states that if the property is in the

occupation of some person other than the owner it must be served on that person too. (My emphasis)

[22] The Oxford Dictionary defines the term property in relation to immovable property as "*A building or buildings and the land belonging to it or them*". The applicant resided on the premises and was in occupation of the property that would include all the buildings on that property. Consequently I am of the view that the first respondent complied with the requirements of Rule 46(3)(a) pertaining to service of the notice of attachment.

NON-COMPLIANCE WITH RULE 46(7)(b)

[23] The relevant portion of Rule 46(7)(b) states as follows:

"*The execution creditor shall, after consultation with the sheriff conducting the sale, prepare a notice of sale containing a short description of the property, its situation and street number, if any....*"

The description in the Notice of Sale reads as follows:

"**Zoning**: Residential

Improvements: *The following information is furnished but not guaranteed: 5 bedrooms, 7 bathrooms, kitchen, open plan to dining room and living area, study, open area with a bar, 3 garages, swimming pool and lapa*"

[24] The notice was not quite accurate on some minor aspects but it also made no mention of the fact that there is a guesthouse business that generates an income. Nor does it make any reference to the cottage and flat situated on the premises. Applicant contends that these features could have attracted buyers who would have been willing to pay a higher price.

[25] It is trite that a notice of sale which contains no more than the technical designation of such land, as described in the title deed, does not comply with the provisions of the sub rule[1].

[26] In **Röntgen v Reichenberg**[2] the following was stated with reference to a description of a property which materially corresponds to the one *in casu:*

"in the light of the rationes decidendi in two cases, Messenger of the Magistrate's Court, Durban v Pillay 1952(3) SA 678 and First Consolidated Leasing Corporation Ltd v Theron and Others 1974(4) SA 244 (T), I do not think that any objection can be taken to the notices in either the Government Gazette or The Star. All that is required is:

"A short description of the property, its situation and street number, if any."

[1] Messenger of the Magistrate's Court Durban v Pillay 1952(3) SA 678 A; Kaleni v Transkei Development Corporation & Others 1997(4) SA 789 on 790G – 791F
[2] 1984(2) SA 181 (W) at 183H – 184A

It is only necessary to state that it is improved land and to indicate the type of improvement. The precision of a building contract specification is not required. Enough must be stated to identify the kind of property to be sold, bearing in mind that a prospective buyer will obviously want to inspect the property himself rather carefully, before committing himself to the payment of a few hundred thousand rand."

[27] The description must deal with the main characteristics of the property to be sold which might be expected to attract the interest of potential buyers. These include an express statement as to whether or not there are any improvements or buildings on the land in question and, where applicable, the town planning zone of the property and any special privileges or exemptions which might have been granted in respect of the property in terms of the relevant town planning scheme[3]. It is not necessary to provide a description of "enhancing attributes".[4]

[28] Whether the description of the property is adequate will depend on the circumstances of each case. In this instance the guest cottage and flat have not been mentioned. These improvements are substantial. If one adds to that the fact that a guest house business is operated from the premises these attributes, could have attracted more and higher bids. Due to the fact that these attributes were not mentioned the kind of property being sold was not identified. In my view therefore there was not proper compliance with rule 46(7)(b) .

[3] Rossiter v Rand Natal Trust Co Ltd 1984(1) SA 385 N at 389 A-H; Cumming v Bartlett NO 1991(4) SA 135 (E) at 141 C-D
[4] First Consolidated Leasing Corporation v Theron 1974(4) SA 244 T at 246

[29] Consequently the notice of sale should be set aside.

NON-COMPLIANCE WITH RULE 46(7)(e)

[30] Rule 46(7)(e) reads as follows:

"Not less than 10 days prior to the date of the sale, the sheriff conducting the sale shall affix one copy of the notice on the notice-board of the magistrate's court of the district in which the property is situate, or if the property be situate in the district in which the court out of which the writ issued is situate, then on the notice-board of such court, and one copy at or as near as may be to the place where the said sale is actually to take place".

[31] Applicant alleges that the second respondent failed to comply with this requirement.

[32] The first respondent merely denies non-compliance with the Rules, in its affidavit and second respondent who was tasked with the duty to comply with the rule merely confirms the content of the first respondent's deponent's affidavit. This response is not satisfactory as the fact of whether the notice of sale was put up timeously and according to the rules falls exclusively within the knowledge of the second respondent. Although applicant carries the all over onus to proof her case, the respondent had a duty to take the Court in its

confidence and supply details of compliance in the light of the allegation by the applicant.

[33] Due to the paucity of information given by second respondent I must conclude that there was non-compliance with this requirement. The wording of the rule is peremptory and failure to comply must lead to the sale being set aside.

[34] Consequently the sale should be set aside due to non-compliance with the rule.

CONCLUSION

[35] In the light of the non-compliance with Rule 46(7)(b) and (e) the notice of sale and the sale in execution of the property held on 28 October 2014 is invalid and should be set aside, and seeing that the applicant was substantially successful in the application the costs should be paid by first respondent.

[36] Consequently I make the following order:

36.1 The notice of sale of the property situated at 165 Allan Road, Glen Austen Agricultural Holdings Midrand (the property) is invalid and is set aside;

36.1 The sale in execution of the property held on 28 October 2014 is invalid and is set aside; and

36.2 The first respondent to pay the costs of the application.

R G TOLMAY
JUDGE OF THE HIGH COURT

APPLICANT'S ATTORNY'S

STANLEY BRASG & ASSOCIATES
PRETORIA

ADV: G V MEIJERS

DEFENFANTS ATTONRY'S

BEZUIDENTHOUT VAN ZYL & ASSOCIATES INC
PRETORIA

ADV M REINECKE

DATE OF HEARING: 23 NOVEMBER 2015

DATE OF JUDGMENT: 8 DECEMBER 2015