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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 72065/12

DATE: 23 February 2016

SILTEAM INVESTMENT CC

Applicant

NEDBANK LIMITED

First Respondent

SHERIFF, MIDRAND

Second Respondent

JUDGMENT

MABUSE J:

[1] This matter came before me as an urgent application in which by notice of motion issued by the Registrar of this Court on 21 July 2014, the applicant, a close

corporation as envisaged by the Close Corporation Act No. 69 of 1984, approached this Court and sought the following order:

"a) *Enrolling this application as an Urgent Application and dispensing with Applicants non-compliance with the rules relating to time, forms, service and notices as may be necessary;*

b) *Condoning the Applicant's non-compliance with the practice directions of this Court;*

c) *The Respondents, their employees and/or agents be interdicted from auctioning*

PORTION 1 OF ERF 453 GLEN AUSTIN AGRICULTURAL HOLDINGS EXTENSION 3 REGISTRATION DIVISION i.R. GAUTENG PROVINCE MEASURING 8565 SZUARE METRES HELD BY DEED OF TRANSFER [T9.....]

PHYSICAL ADDRESS: 58 STAG ROAD, GLEN AUSTIN AGRUCULTURAL HOLDINGS, HALFWAY HOUSE ZONING: RESIDENTIAL

Pending the recession of default judgment granted against the applicant;

d) *In the event that this application is opposed, costs be granted against the opposing;*

e) *That the First Applicant is granted such other or alternative relief as the Court may deem fit in the circumstances. "*

[2] The Court, having heard parties, dismissed the application without giving reasons. The applicant now seeks reasons for the order that the Court made on the relevant date and these are therefore the reasons. Needless to say this application was opposed by the first respondent, a public company and bank duly registered in terms of the relevant statutes of this country.

[3] The purpose of the application was to forestall the sale in execution of the applicant's aforementioned property. The said sale had been arranged to take place the following day after the hearing of this application. It had been organized at the instance of the first respondent which was armed with a default judgment it had obtain against the applicant and another entity

known as TWM Transport Services CC.

[4] The applicant relied on the affidavit of one Thomas Mathabathe, an adult business man and a sole member of the applicant. According to his testimony, he became aware on 16 July 2014 through a notice of sale in execution that the property that he used or referred to as his and his family's primary residence would be sold at the aforementioned sale in execution. He immediately contacted his attorneys of record on the afternoon of 17 July 2014. After he had told his attorneys that he had not been served with a copy of the summons, the attorneys took steps to establish the facts behind the service of a copy of the summons. Their and his discovery was that a copy of the summons was served by affixing it to the door or gate and that, according to a court file, judgment by default was granted against the applicant on 19 April 2013.

[5] On the above basis, the deponent contends that good cause existed why the applicant failed to comply with the practice directions of this Court. He opined that this Court should condone the applicant's failure to comply with the practice directives of this Court.

[6] This application, as indicated earlier, was opposed by Mr. Rip who appeared for the first respondent. There was no appearance for the second respondent. Mr. Rip bemoaned the fact that the application had been brought on an *ex parte* basis. It would appear that the applicant had planned to obtain the order in terms of which the sale in execution was stopped without having afforded the first respondent an opportunity to put its case before the Court. The application was therefore brought improperly before the Court.

[7] Secondly, the property in question belonged to the applicant and not to the deponent. In the premises it was unheard of for the deponent to state that the applicant's property constituted his primary residence. The property did not belong to him and his family but to the close corporation. The close corporation does not have a primary residence. The law with regard to

adequate housing did not apply to juristic persons. The deponent was not the first respondent's judgment debtor. The law with regard to adequate housing does not apply to juristic persons.

The deponent was not the first respondent's judgment debtor. In *Firstrand Bank v Folscher* 2011(4) SA 314 GNP at page 329 paragraph 31 the term "judgment debtor" was defined as follows:

*"(31) The term "judgment debtor" as understood, for instance, in Saunderson (supra) paragraph 3 refers to an individual, a person. It is therefore the primary residence owned by a person that falls within the per view*** of the rule. "*

The word "person" as used in the above paragraph refers to a natural person.

"(32) Immovable property owned by a Company, a Close Corporation ora Trust, of which the member, shareholder or beneficiary is the beneficial occupier, is not protected by the amended rule requiring judicial oversight by way of an order of Court authorising a writ of execution, even if the immovable property is the shareholder's member's or beneficiary's only residence. "

[8] Mr. Mathabathe conceded during the argument that the applicant had been properly served with a copy of the summons and that such service took place on 7 January 2013.

[9] The deponent contended that he had made some payments towards the liquidation of the debt. Despite such payments there was still a huge balance of R1,548,000.00 outstanding by the applicant. It was not the deponent's case that the applicant had settled the debts in full or had complied with the obligations or had made proper and acceptable arrangements with the first respondent for the liquidation of the debt.

[10] Although the applicant was aware of the default judgment granted against it, there was no application for a rescission of the said judgment before the Court. No explanation has been furnished why no steps were taken to bring an application for rescission of the said judgment simultaneously with this application.

[11] It is therefore for the above reasons that the Court made the order it did on 21 July

2014.

P.M. MABUSE JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv. Khumalo

Instructed by: P Mhlongo Attorneys

c/o Mabunda Attorneys Counsel for the First Respondent: Adv. Rip

Instructed by: Van der Merwe Du Toit Inc.

Date of Order: 21 July 2014