REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

25/1/2016
CASE NO: 61930/2012
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES

In the matter between:

MARTIN BREEDT	**APPLICANT**
and	
MELANI BREEDT	**FIRST RESPONDENT**
SHERIFF CENTURION WEST	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS	**THIRD RESPONDENT**
ALL FOR APPLIANCE SERVICES (PTY) LTD	**FOURTH RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] The applicant seeks an order to declare the auction held on 12 May 2014 and the subsequent agreement of sale in execution concluded between the second respondent and the fourth respondent, null and void for want of compliance with the court order of

10 September 2013. Ancillary to the said order, the applicant seeks a cost order, in regard to the additional costs and the wasted costs associated with the sale in execution, against the first respondent.

[2] Of the four respondents cited in the application, only the first respondent is opposing the application.

[3] The applicant and the first respondent were previously married. The marriage was dissolved by an order of court on 2 April 2012. As part of the divorce order, the applicant and the first respondent concluded a settlement agreement which was made an order of court. Forming part of the settlement agreement was a provision dealing specifically with the immovable property in question ("the property"). The property was originally registered in the names of both the applicant and the first respondent. Paragraph 4 of the settlement agreement, which dealt mainly with the property, was couched in the following words:

"VERDELING VAN BATES EN FINANSIELE REELINGS:

4.1. Woonhuis

4.1.1. Die woonhuis bekend as […] Tarentaal Nook, Zwartkop, Centurion, Gauteng, tans in beide partye se name geregistreer is, word die uitsluitende eiendom van die Eiser.

4.1.2. Die Verweerderes se onverdeelde halwe aandeel in the woonhuis sal op koste van die Eiser in sy naam geregistreer word binne 3 (drie) maande na datum van egskeiding.

4.1.3. Die Verweerders moet die dokumente, stukke of aktes wat betrekking mag he of die registrasie van haar onverdeelde halwe aandeel in die naam van die Eiser, op aanvraag aan die betrokke aktevervaardiger oorhandig.

4.1.4. Die Verweerderes is voorts verplig om op aanvrag alle dokumente wat nodig mag wees ten einde registrasie in die naam van die Eiser te bewerstellig, te onderteken.

4.1.5. Die Eiser betaal 'n bedrag van R475 000. 00 (VIER HONDERD VYF EN SEWENTIG DUISEND RAND) aan die Verweerderes ten registrasie van transport ter vergoeding van haar onverdeelde halwe aandeel in die

eiendom, vir welke deel die Eiser 'n verband oor die woonhuis sal registreer.

4.1.6. Die Verweerderes is geregtig om die woonhuis te okkupeer vir 'n periode van 3 (drie) kalendermaande na die datum van egskeiding ongeag of die Verweerderes se onverdeelde halwe aandeel reeds in die naam van die Eiser geregistreer is of nie.

4.1.7. Die Eiser is verplig om in die gemelde periode van 3 (drie) kalendermaande alle uitgawes ten aansien van die woonhuis te betaal, wat insluit erfbelasting, water en elektrisiteit en algemene instandhouding."

[4] Due to reasons, which the applicant refers to as financial constraints, the applicant was unable to obtain the necessary finance and unfortunately the agreement did not provide for circumstances where the applicant would not be in a position to obtain a loan. This resulted in the applicant not being able to comply with the provisions of the settlement agreement to transfer the first respondent's half share of the property into his name and pay the first respondent the agreed amount of R475 000. Despite efforts to find an amicable solution regarding the property, the applicant and the first respondent could not settle the matter which resulted in the first respondent launching an application relating to the property. On 10 September 2013, the parties eventually found each other and reached another settlement agreement which was made an order of court. The said court order read as follows:

"By agreement between the parties the following is made an Order of Court

1. Both parties shall immediately secure an independent valuation of the immovable property from two reputable estate agents within 7 days from date of this order and shall deliver a copy of such valuation to the other party's attorneys of record. For purposes of the order the average value of the two valuations shall be deemed to be the market related value.
2. Both parties shall be entitled to market the immovable property in the open market in an endeavour to procure a willing and able buyer for the immovable property at a market related price over a period of three months from the date of this order. Unless acceptable bank guarantees are received from a purchaser the provisions of paragraph 3 *infra* shall apply.

3. The Second Respondent (the sheriff and second respondent in the present application as well) shall be authorised to sell the immovable property, after the lapse of the three months period referred to in paragraph 2 *supra* to sell the immovable property by public auction for a market related value. For purposes of this paragraph the market related value shall be the lower of the two valuations referred to in paragraph 1 *supra.* The Second Respondent shall continue this process until the immovable property is sold.
4. From the net proceeds arising from the sale of the immovable property the Applicant shall be paid the amount of R475 000-00 together with interest or the aforesaid amount at a rate of 15,5% per annum calculated from 3 July 2012 to date of payment.
5. Both parties undertake to sign all documentation necessary to effect transfer of the immovable property into the name/s of the purchaser/s failing which the Second Respondent is authorised to sign all such documentation on behalf of the defaulting party at such party's costs.
6. First Respondent shall be obliged to allow the applicant's estate agent/s to market the immovable property and must co-operate with the said agents
7. The First Respondent is ordered to pay the Applicant's costs from lodgement of this application up until January 2013 when the counter-application was lodged."

[5] It appears from the papers that both the applicant and the first respondent were able to secure independent valuation of the property. From the said valuations the market related value was determined at R1 400 000. It also appears that both the applicant and the first respondent attempted to market the property in the open market for the agreed market related value, with no success. There is evidence that the applicant provided the first respondent with no less than two proposed offers to purchase the property but none of the two offers materialised.

[6] Consequently, the first respondent approached the sheriff (the second respondent in the present application) as mandated by the court order of 10 September 2013, to have the property sold on auction. The first respondent's evidence is that she was advised by the sheriff that in order for him (the sheriff) to sell the property in a public auction he requires a writ of execution to be issued for the amount of R475 000. On the basis of the writ of execution issued by the first respondent the property was attached and

thereafter sold in execution through the sheriff's auction process. The conditions of the sale in execution provided for a reserve price of R 1 400 000. The property was auctioned off the first round at the reserve price of R1 400 000. When there were no bids reaching the reserve price the sheriff proceeded to auction the property again, with no reserve price. The property was eventually sold to the highest bidder, being the fourth respondent at a price of R1 181 000 which is an amount far less than the agreed market related price of R1 400 000.

[7] It is common cause that even though the applicant was aware of the intended sale in execution he was not at the sale when the property was sold in execution.

[8] The applicant's submission is that the sale in execution was premised on a fatally defective process employed by the first respondent. According to the applicant, the court order of 10 September 2013 entitles the first respondent to share in the proceeds of the property when realised in the open market at the agreed market related value. The amount of R475 000 can, thus, not be considered as a debt owed by the applicant to the first respondent. The applicant further submits that the court order of 10 September 2013 specifically deals with the method for determination of the market related value and how the property was to be sold, which is peremptory. The contention being that the court order does not provide for the market related value to be discarded merely because the market related price could not be attained. On those grounds, the applicant argues for the sale to be declared null and void. In the alternative, the applicant contends that the sale may be proceeded with, as long as the first respondent agrees that the amount of R219 000, which is the difference between the reserve price of R1 400 000 and the sale price of R1 181 000, should be deducted in his favour from the proceeds of the sale.

[9] The crux of this application is whether the applicant is entitled to claim that the sale in execution is null and void. The underlying question being whether the first and second respondents were entitled to sell the property for an amount less than the market value (reserve price) having regard to the court order of 10 September 2013.

[10] The content and interpretation of the court order of 10 September 2013 seems to be the point of dispute in this application. Firstly, the question is, whether the first

respondent employed a defective process when selling the property. I do not think so.

[11] A sale in execution is a public auction held by a sheriff. Sheriff's auctions are sold with no reserves. Property at a public auction generally sells for a market related price. In a sale in execution the debtor normally does not have a say in the final selling price.

[12] It is quite clear from the reading of the court order of 10 September 2013 that a sheriff (the second respondent in this application) was authorised to sell the property by public auction should the applicant and/or the first respondent fail to market the property within three months after the court order was granted. It is not in dispute that none of the two was able to do so. The first respondent acted correctly in approaching the sheriff to sell the property. The court order also states clearly that the property must be sold on a public auction. In terms of the uniform rules of court, the sheriff can auction property when authorised in terms of a writ of execution and this is the process followed by the first respondent. Even though it was not correct for the property to be sold through a writ of execution, however, in the ultimate end, the property was sold by public auction. This is what was intended by the applicant and the first respondent.

[13] Secondly, the question is whether the last sentence of paragraph 3 of the court order which read as follows:

> "The Second Respondent shall continue this process until the immovable property is sold."

should be interpreted to mean that the second respondent shall continue with the process, selling the property at the same price (the agreed market related value) over and over again, despite the fact that the property might never be sold at a reserve price of R1 400 000.

[14] The applicant's submission is that the court order of 10 September 2013 allowed for the sale of the property at the agreed market related price and that the property should not have been sold at no other price except that one. The applicant's argument seems, in my view, to ignore the fact that a judgment or order of court should have a practical effect or result. As such, to give the sentence quoted in paragraph 13 of this judgment a meaning that 'the second respondent should continue with the process, selling the property at the same price (the agreed market related value) over and over

again, despite the fact that the property might never be sold at a reserve price of R1 400 000' would, in my opinion, amount to an absurdity and would render this order *brutum fulmen.*

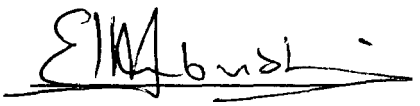
[15] The evidence before me indicates that the property will never be sold at the agreed market related value of R1 400 000. The applicant, himself, was unable to obtain a bond over the property, for a mere amount of R475 000, even though the property is unencumbered. The evidence is that the property has been on sale since at least 10 September 2013 and no sale could be made. The applicant and the first respondent had, in terms of the court order, an opportunity of at least three months within which to market the property on the open market place and at the agreed market related price of R1 400 000, none was able to get a buyer for the property. There is evidence that the applicant presented the first respondent with no less than two proposed offers to purchase the property but none of the offers materialised.

[16] It appears common cause from the papers that even if the property should be placed on auction again, at the reserve price of R1 400 000, it is more than probable that the reserve price would receive no bids. The property was auctioned twice at the last auction, though on the same day, and there were no bids obtained for the reserve price. The evidence, as *per* the applicant's counter-application to the application launched by the first respondent, indicates that the applicant was prepared to have the property sold by auction at a reserve price of R1 100 000. From this evidence it can be safely inferred that the applicant was more than prepared to accept that the property could not be sold at a higher amount. There is no evidence that indicates that the property would in the near future be sold at a higher price than that offered by the fourth respondent.

[17] I hold the view that to continue with this same process over and over again, where it is evident that the reserve price will not be reached, would only be prejudicial to the first respondent. The applicant continues to enjoy the benefit of the property by occupation of the house whilst the first respondent cannot enjoy the benefit of her half share of the property. The value of the half share of the property which was agreed to be R475 000 in 2012 has, by now, devaluated and the amount presently is no longer worth the same value.

[18] To, therefore, declare the sale null and void, as prayed for by the applicant, and restart the auction process afresh would be a costly exercise in futility and unfairness to the first respondent. The applicant had the benefit of occupation for far too long than he should have at the expense of the first respondent. He cannot be heard to complain that he will suffer damages at the amount of R219 000 if the property is sold at the amount of R1 181 000. In order to ensure that the interest of justice and fairness are served I have no alternative but to allow the transfer of the property to the fourth respondent to be proceeded with.

[19] In the circumstances, the application is dismissed with costs.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE : 26 November 2015
DATE OF JUDGMENT: 25 January 2016
APPLICANT'S COUNSEL : Adv C. Zietsman
APPLICANT'S ATTORNEYS: Anton Rudman Attorneys
FIRST RESPONDENTS' COUNSEL : Adv C. Van Schalkwyk
FIRST RESPONDENTS' ATTORNEY:Venn & Muller Attorneys