REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 26398/2018

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

21/04/2026
DATE

SIGNATURE

In the matter between:

MANGALISO SAMUEL SKOSANA	1st Applicant
SUSAN ELENA SKOSANA	2nd Applicant
LENAH MATLAKALA KHUMALO	3rd Applicant

and

SHERIFF OF THE HIGH COURT, TSHWANE NORTH EAST	1st Respondent
EUGENE BOTHA	2nd Respondent
NEDBANK LIMITED	3rd Respondent

JUDGEMENT

MNGQIBISA-THUSI, J

[1] The applicants seek orders:

1.1 cancelling a sale agreement concluded between the first respondent, the Sheriff of the High Court, Pretoria North East, and the second respondent, Mr Eugene Botha, in respect of a property situated at Erf 1107 (aka 841 Flamink Street, Silverton, Extension 6, Pretoria) ("the property").

1.2 Cancelling the sale in execution held on 10 April 2018 in respect of the property.

1.3 Costs.

[2] Only the third respondent is opposing the application.

[3] On 26 June 2010 the first and second applicants ("the applicants") concluded a mortgage loan agreement with the third respondent in terms of which the third respondent granted the applicants a loan in the amount of R716, 700.00. In 2016 the applicants defaulted on their monthly instalments. As a result of the default, the third respondent issued summons and on 20 January 2017 a default judgment against the applicants was granted for payment of an amount of R652, 370.97; the special execution of the property and other ancillary relief.

[4] On 6 February 2017 the third respondent's attorney caused to be served writs of execution in the amount of R652, 370.97 at the applicants' chosen *domicilium* address being 878 Tiptol Street, Silverton Extension 5, Pretoria.

[5] In February 2017 the applicants lodged an application to rescind the default judgment and the application was set down for hearing on 4 September 2017. However, on 31 August 2017 the applicants and the third respondent concluded a written settlement agreement which was made an order of court on 4 September 2017.

[6] The settlement agreement reads in part as follows:

> "1. AD RESCISSION APPLICATION:
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> The applicants withdraw their rescission application and tender to pay the respondent's costs related to the opposition thereof, on an attorney and client scale.
>
> 2. AD MAIN ACTION:
>
> 2.1 The applicants admit being indebted to the respondent in the sum of R148, 515.14 (one hundred and forty eight thousand five hundred and fifteen rand and fourteen cents) as at 21 August 2017 ("the arrear indebted amount);
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> 2.2. The applicants undertake to settle the arrear indebted amount in instalments of R12, 000.00 (twelve thousand rand) per month, commencing on 30 September 2017, and thereafter on the last day of each month and every consecutive month;
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> 2.3. Pending fulfilment of the applicants' obligations referred to in paragraph 2.2 above, the respondent will not proceed with a sale in execution in respect of the immovable property, as contemplated in paragraph 4 of the default judgment granted on 20 January 2017 ("the default judgment");

2.4. Should the applicants fail and/or neglect to pay any of the instalments referred to in paragraph 2 above timeously or at all, the full outstanding contractual balance at the relevant time will then become due and payable immediately and the respondent will be entitled to proceed with a sale in execution in respect of the immovable property as contemplated in paragraph 4 of the default judgment.

3. SETTLEMENT AGREEMENT TO BE MADE AN ORDER OF COURT

The parties herewith agree that this settlement agreement be made an order of court on 4 September 2017".

[7] It is common cause that the applicants failed to comply with their obligations as set out in paragraph 2.2 of the settlement agreement. The only payments made by the applicants were for two amounts of R5, 000.00 in October and November 2017, respectively.

[8] In the meanwhile, on 30 November 2017, the applicants concluded a sale agreement with the third applicant in terms of which they sold the property for an amount of R 652, 370.27.

[9] During January/February 2018 the third respondent's attorneys made requests to the applicants to furnish it with bank guarantees in the amount of R 819, 844.24 as per its cancellation of agreement terms. This amount included the amount owed on the bond and other ancillary charges and fees. The applicants failed to provide the guarantee. The applicants undertook to do so by 8 February 2018, but failed to do so.

[10] The applicants provided the third respondent with two bond guarantees in the amounts of R533, 952.67 and R 10, 502.36, which guarantees the third

respondent refused to accept on the ground that the amount offered was insufficient.

[11] On 10 April 2018 the first respondent, acting on behalf of the third respondent, sold the property to the second respondent at a reserved price of R590, 000.00.

Point in limine

[12] At the hearing of this matter, the applicants raised as a preliminary point the third respondent's failure to apply for condonation in accordance with the uniform rules of court for the late filing of its notice to oppose and answering affidavit. It was submitted on behalf of the applicants that the notice and the answering affidavit should not be accepted as no condonation has been applied for and that the application should be treated as an unopposed application.

[13] It is common cause that the third respondent did not file an application for condonation of its non-compliance with the time frames set out in the Uniform Rules of Court. However, counsel for the third respondent sought condonation from the bar for the third respondent's non-compliance with the Rules.

[14] In exercising its discretion whether or not to grant condonation the court has to take into account (i) the degree of lateness or non-compliance; (ii) the explanation thereof; (iii) the prospects of success; (iv) the importance of the case; (v) the respondent's interest in the finality of the matter[1].

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[1] *Melanie v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 532 C-F, Dial Tech CC v Hudson & Another (2007) 28 ILJ 1237 (LC).

[15] I am of the view that in fairness to both parties, condonation should be granted as prayed for. There is no evidence shown that such condonation would cause unreasonable prejudice to the applicants.

[16] On behalf of the applicants it was submitted that the sale of the property should be set aside in that at the time the third respondent sold the property at an auction to the second respondent, it was aware that the applicants had already concluded a sale agreement for the property with the third applicant. It was further submitted that the delay in transferring the property to the third applicant was as a result of the third respondent including legal fees and other costs in the settlement amount, thereby increasing the amount of the guarantee the applicants were to provide to the third respondent before transfer of the property to the third applicant could be effected.

[17] Secondly it was submitted on behalf of the applicants that the writ of execution upon which the auction sale was based had expired. Counsel argued that for the auction sale to be valid, it was necessary for the third respondent to have applied for an extension of the validity of the writ of execution.

[18] On the issue of being aware of the prior sale of the property to the third applicant, on behalf of the third respondent it was submitted that even though the applicants and the third applicant had concluded a sale agreement, such agreement had to be accepted by the applicants' creditor. Further that since the applicants failed to furnish guarantees acceptable to the third respondent in order for it to cancel the original agreement, the applicants could not rely on the inadequate guarantees it provided.

[19] With regard to the warrant of execution, counsel for the defendant argued that in terms of Uniform Rule 66, a writ of execution issued by the High Court, unlike one issued by the Magistrates' Court does not lapse until the debt is extinguished. Further counsel argued that even if it is found that the third respondent did not fully comply with all the procedural steps for execution as set out in Uniform Rule 46, such non-compliance is not material and does not invalidate the auction sale. In this regard counsel relied on the decision in *Todd v First Rand Bank*[2] where the court stated the following:

> "[12] As this court pointed out in *Menqa*, because legislation (and I would add the rules of court) regulate the requirements that must be met for a valid sale in execution, resort to the Roman Dutch authorities is not always helpful. What is helpful, however, is the basic principle that non-fulfilment of a requirement will not vitiate a sale in execution if it does not 'go to the root of the matter'.... The enquiry entails a consideration of the reason for the formality, the extent of the non-compliance and the prejudice or potential prejudice to interested parties, especially the judgment debtor".

[20] In order for the applicants to succeed in setting aside the sale of the property to the second respondent, they have to show that:

(i) at the time the order declaring the property specially executable, there was an irregularity in the proceedings;

(ii) formal procedural requirements in terms of the law and the rules of court for the holding a valid the auction sale were not complied with; and

(iii) there was no valid underlying causa for the auction sale.

[21] The following facts are not in dispute:

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[2] Unreported Supreme Court Judgment, (497/11) [2013] ZASCA 61 (14 May 2013)

(i) that after the conclusion of a settlement agreement on 31 August 2017, the applicants failed to comply or inadequately complied with the terms of the settlement agreement.

(ii) that the applicants entered into a sale agreement of the property with the third applicant on 30 November 2017, of which the third respondent was aware;

(iii) that the property was sold to the second respondent at a public auction on 10 April 2018 at a reserve price of R590. 000.00;

(iv) that the third respondent had informed the applicants of its intention to sell the property at an auction sale unless the required guarantee was furnished;

(v) that the applicants failed to furnish the required guarantee;

(vi) that the property has not been transferred.

[22] A sale in execution can be set aside if the debtor has settled his debt. In the event that the property has already been sold and transferred to a bona fide third party, if the underlying causa of the judgment ordering execution is set aside, the debtor is entitled to have the property re-transferred to him.

[23] The applicants have conceded that they did not comply with the settlement reached with the third respondent with regard to the restructuring of their loan payments. Further, it is common cause that in terms of the settlement agreement, the writ of execution against the property was suspended on condition that the applicants comply with the terms of the settlement agreement. The settlement agreement further provided that should the applicants default on their repayments, the third respondent would be entitled to execute against

the property. The fact that the third respondent was aware of the sale agreement between the applicants and the third applicant does not assist them in that they failed, despite numerous enquiries by the third respondent, to furnish the third respondent with the required guarantees.

[24] Whilst admitting that it was aware of the sale agreement between the applicants and the third applicant, in its answering affidavit the third respondent alleges, which allegations are not disputed, that:

> "36.2 On 8 January 2018, Ms Yolanda Groenewald, to wit an employee of Hack Stupel & Ross Attorneys (i.e the third respondent's attorney of record) requested cancellation figures from the third respondent. Ms Groenewald received the required cancellation figures on 11 January, 2018, and same was thereafter sent to the conveyancing attorney on 12 January, 2018. Proof of dispatch of the cancellation figures is appended hereto, marked as **annexure "BNL8.1"**. The cancellation figures amounted to R819,844.24, plus interest calculated at a rate of 9.5% per annum on R800,417.24. The relevant cancellation figures which were issued by the third respondent is appended hereto, marked as "**annexure NBL8.2**".
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> 36.3 After the cancellation figures was sent to the conveyancing attorney, Ms. Groenewald provided Hack Stupel & Ross Attorneys' requirements for approval of a shortfall to the conveyancing attorney, as the conveyancing attorney indicated that there might be a shortfall. The relevant requirements were set out in an e-mail, dated 12 January 2018, a copy of which is appended hereto, marked as **annexure "NBL8.3"**.
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> 36.4 On 23 January, 2018, Hack Stupel & Ross Attorneys furnished its requirements for the upliftment of the interdict, as received from its legal department, to the conveyancing attorney. The relevant requirements with delineated in an e-mail dated 23 January 2018, a copy of which is appended hereto marked as **annexure "NBL8.4"**.
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> 36.5 Subsequently, the conveyancing attorney advised Ms. Groenewald in an e-mail dated 9 February, 2018, that she was awaiting the quotation from the electrician and furthermore that she received the rates

clearance figures as well. A copy of the relevant e-mail is appended hereto, marked as **annexure "NBL8.5"**.

36.6 On 2 February 2018, Hack Stupel & Ross Attorneys received an instruction to proceed with legal action, until the required guarantees were delivered. The relevant instruction was conveyed to the conveyancing attorney, by Ms. Groenewald.

36.7 On 6 February 2018, the conveyancing attorney informed Ms. Groenewald that the required guarantees would be ready by 8 February 2018. Notwithstanding the said undertaking, the third respondent did not receive same.

36.8 On 9 February 2018, the conveyancing attorney furnished its pro- forma statement of account to Hack Stupel & Ross Attorneys. However, the required guarantees were still not provided.

36.9 Subsequently, a sale date had been scheduled and obtained for 10 April 2018. On 14 February 2018, Ms. Groenewald advised the conveyancing attorney:

a) that the documentation was in order, but also informed her that they needed to make provision for legal costs;

b) of the scheduled sale date and furthermore advised her that the third respondent could possibly decline the offer, if same was too low; and

c) that she required that the guarantee to send same to the third respondent for approval, to get an answer from the third respondent.

36.10 On 15 February 2018, Ms. Groenewald provided the outstanding legal fees to the conveyancing attorney and informed her that this had to be taken into consideration on their statement of account and that a guarantee had to be issued for the amount available to the third respondent.

36.11 On 12 March 2018, Ms. Groenewald yet again and enquired from the conveyancing attorney (from whom she has not received anything save for the offer to purchase and rates figures) when the required guarantee would be furnished. Ms. Groenewald once again reminded the conveyancing attorney of the auction scheduled for 10 April 2018, and furthermore reminded her that the third respondent could decline the offer, should same be too low.

36.12 The conveyancing attorney advised that the applicants went to the municipality to request a discount on the rates figures, as same was according to them "*extremely high*"

36.13 On 23 March 2018, the cancellation instruction was revoked in light thereof that no guarantees were furnished.

36.14 On 9 April 2018 (i.e one day before the scheduled auction), the conveyancing attorney furnished guarantees in favour of the third respondent to Ms. Groenewald, for an amount of R533,952.67 and one for the cancellation costs and legal fees in the amount of R10,502.36.

36.15 On 9 April 2018, Ms. Groenewald advised the conveyancing attorney that the third respondent is not willing to accept the relevant guarantees, as same did not make provision for the amount available to the third respondent, and furthermore same failed to provide their updated pro-forma statement, which had to include the outstanding legal fees and upliftment fees.

36.16 Up until the stage when the sale took place, the conveyancing attorney failed to provide the third respondent with an updated guarantee and pro-forma statement".

[25] The applicants' failure to provide the required guarantees on time cannot prejudice the second respondent as a bona fide purchaser of the property. The applicants have not rescinded the underlying default judgment and for all intents and purposes it is extant and the third respondent was within its rights to enforce it.

[26] With regard to the validity of the writs of execution served on the applicants on 6 February 2017, the applicants' reliance on the decision of *September and another v Nedcor Bank Ltd and another*[3] is misplaced as that court dealt with the superannuation of a judgment in terms of the Magistrates' Court Rules and does not apply to writs of execution issued by the High Court. Uniform Rule 66(2) provides that:

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[3] 2005(1) SA 500 (CPD).

> "Writs of execution of a judgment once issued remain in force, and may, subject to the provisions of subparagraph (ii) of paragraph (c) of subsection 2 of section three of the Prescription Act, 1943 (Act 18 of 1943), or subparagraph (ii) of paragraph (a) of section 11 of the Prescription Act, 1969 (Act 68 of 1969), at any time be executed without being renewed until judgment has been satisfied in full".

[27] Therefore, there is no basis for the applicants' submission that the auction sale of the property was tainted by an invalid writ of execution.

[28] In the result the following order is made:

'The application is dismissed with costs'.

NP MNGQIBISA-THUSI
Judge of the High Court

Appearances

Applicants' instructing attorneys: Samalenge Attorneys

Third Respondent's instructing attorneys: Hack Stupel & Ross