

SOUTH AFRICA / JUDGMENT

Ehlers N.O and Others v Land and Agricultural Development Bank Of South Africa and Others (2919/2016) [2018] ZALMPPHC 64 (31 August 2018)

[2018] ZALMPPHC 64

COURT

Limpopo High Court, Polokwane

BEFORE

EM Makgoba

CASE / FILE NUMBER

2919/2016

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)

NOT REPORTABLE

(2)

OF INTEREST TO OTHER

JUDGES

(3)

REVISED

CASE NO: 2919/2016

31/8/2018

In

the matter between:

GERT HENDRIK EHLERS
N.O
FIRST APPLICANT
DANIEL MATTHYS CHRISTOFFEL
EHLERS N.O
SECOND APPLICANT
DANIEL FREDERICK EHLERS
N.O
THIRD APPLICANT
(In their capacities as the
Trustees for the time
being of The Emberbe Trust,
Registration
number: IT20074/2000)
and
LAND AND AGRICULTURAL.
DEVELOPMENT
FIRST RESPONDENT
BANK OF SOUTH AFRICA
THE SHERIFF OF THE HIGH COURTR,
BOCHUM
SECOND
RESPONDENT
(Known to the Applicants as Mr.
Ramaala)
CORFUSCORE (PTY)
LIMITED
THIRD RESPONDENT
(Registration Number:
2014/049788/07)
REGISTRAR
OF DEEDS, POLOKWANE
FOURTH
RESPONDENT
ABSA BANK
LIMITED
FIFTH
RESPONDENT/ INTERVENING PARTY

JUDGMENT

MAKGOBA JP

[1] On the 16 August 2018 and upon hearing arguments by the parties I pronounced an order dismissing the application with costs and

indicated that my reasons for judgment would follow in due course.

[2] What follows are the reasons for the order.

Introduction

- [3] This matter is in essence an application by the Applicants to set aside a sale in execution held on 19 January 2018 by the Second Respondent, along with various other forms of relief. The Applicants in their capacities as the duly appointed trustees of the Emberbe Trust IT20074/200 ("the Trust") apply for various forms of relief, including the setting aside of the sale in execution of the trust's farms which occurred on 19 January 2018.
- [4] The Applicant's notice of motion was formulated in the following terms:
- 4.1. That the warrant of execution issued under the above case number, and the subsequent attachment of the immovable properties situated at [...], Limpopo Province (hereinafter collectively referred to as "The Farms") executed by the Second Respondent on 6 November 2017 , be set aside;
 - 4.2. That the sales in execution of the Farms which sales were conducted by the Second Respondent on the 19th January 2018 , be set aside;
 - 4.3. That the transfer to the Third Respondent, subsequent to the aforesaid sale in execution, be set aside;
 - 4.4. Authorising the Applicants to sell the farms via private treaty.
- [5] The aforesaid relief is premised on the alleged irregularity of the sale in execution, which was conducted by the Sheriff for the district of Bochum, the Second Respondent. The alleged irregularity is based on the fact that the Second Respondent had no authority to execute court processes in the area of Baltimore, in which the trust's farms are situated, as the Sheriff for the district of Mokopane was awarded the area of Baltimore as his "service area".
- [6] The Applicant submit that in the event it is found that the Second Respondent had the authority, the First and Second Respondents failed to comply with the statutory requirements pertaining to a sale in execution of the immovable properties in that:
- 6.1. Notice of attachment was served on the Registrar of Deeds, Pretoria as supposed to the Registrar of Deeds, Polokwane.
 - 6.2. The notice of attachment was not served on the occupiers of the trust's immovable properties.
- [7] The First Respondent opposes the application of the Trust on the basis that:
- 7.1. The Applicants lack locus standi to launch the present application;
 - 7.2. The trust farms were sold by the correct Sheriff as advised by the Board of Sheriffs;
 - 7.3. The Second Respondent in any event held an ad hoc appointment authorizing him to conduct the auction;

7.4. To the extent that the Second Respondent was not the correct Sheriff to attend to service of the writ of execution and the subsequent execution sale, any non-compliance with the provisions of Rule 46 of the Uniform Rules of Court are condonable by the Court.

[8] The Second Respondent opposes the application on the basis that:

8.1. The trust farms which fall within the Baltimore area, have been allocated to the Second Respondent by the Minister of Justice as his service area;

8.2. The trust farms are situated within the district of Bochum for which the Second Respondent is the appointed Sheriff;

8.3. The dispute with regard to the service areas of the Second Respondent and the Sheriff of Mokopane was settled long ago by the task team for Sheriffs, which instructed that the Second Respondent should serve the farms within the area of Baltimore.

[9] The Third Respondent opposes the application on the basis that:

9.1. There exists no legal and factual basis for the relief sought by the Trust;

9.2. The Third Respondent as bona fide purchaser performed all obligations in terms of the conditions of sale, delivered guarantees and has taken steps to implement the sale. That the farms have since been transferred and registered in the Third Respondent's names;

9.3. In addition to aforesaid, ABSA Bank Limited, being the Third Respondent's financier who holds a first ranking mortgage bond over the farms, have launched an application to intervene in the Trust's application.

ABSA Bank Limited as an Intervening Party

[10] ABSA Bank Limited came into these proceedings as an Intervening Party and was accordingly admitted as the Fifth Respondent. ABSA Bank is the holder of a first mortgage bond over the farms. It financed the Third Respondent's acquisition of the farms, the mortgage bond serving as security for the loan.

The decisive criterion for leave to intervene is that the party seeking such leave must have a direct and substantial interest in the subject matter of the litigation. What is required is a legal interest in the subject matter of the litigation that may be prejudicially affected by the judgment of the Court - *United Watch & Diamond Co v. Disa Hotels* 1972(4) SA 409 (C) and *Standard Bank of SA Ltd v. Swartland Municipality* 2011 (5) SA 257 (SCA) at 259E - 260A.

[11] In my view ABSA's legal interest in the present case is plain; should the relief sought by the Applicants be granted, ASSA Bank stands to lose its security for advance of R 31 Million. It is astonishing that the Applicants, despite being aware of the mortgage bond in ABSA's favour, do not even deal with ABSA's rights at all. Neither do they seek cancellation of the mortgage bond. ABSA's application is accordingly granted and it is admitted as the Fifth Respondent in these proceedings.

Factual Matrix

[12] The Applicants, in their capacities as trustees of the Emberbe Trust had obtained a long term loan from the First Respondent ("Landbank")

secured by a mortgage bond registered in favour of the First Respondent over the three farms, Bonteberg 85, Kalkfontein 84 and

S'Gravenhage 100 all situated at Baltimore, Limpopo Province.

Following the Applicants' failure to repay the loan debt, the First Respondent on the 11 October 2016 obtained default judgment in this Court against the Applicants for payment of the amount of R 20 946 355.20 plus interest at the rate of 12.5 % per annum. Simultaneously with the granting of the judgment the First Respondent obtained an order declaring the farming properties executable towards payment of the judgment debt.

[13] The First Respondent, as execution creditor, proceeded with execution steps against the Applicants resulting in the farming properties being judicially attached in terms of a warrant of execution. The Second Respondent (as the Sheriff of the High Court, Bochum) attached and, on 19 January 2018 sold the farms in execution to the Third Respondent for an aggregate sum of R 31 Million plus VAT at 14 % in the sum of R 4.34 Million.

[14] On 31 January 2018 the Fifth Respondent (ABSA) provided guarantees for payment to the transferring attorneys in the sum of R 31 Million in respect of the purchase price of the farming properties. Transfer of the farms by the Second Respondent to the Third Respondent was registered on 30 April 2018. The Fifth Respondent (ABSA) was not aware of the current disputes until June 2018, long after registration of the mortgage bond in its favour over the farms.

[15] The following facts can be accepted as common cause for purpose of this application, either through the admission thereof by the parties, or the fact that they stand uncontested:

15.1. The appointment of the Second Respondent as Sheriff for the magisterial district of Bochum;

15.2. The immovable properties (farming properties) fall within the magisterial district of Bochum;

15.3. The validity of the default judgment obtained against the Applicants on the 11 October 2016 is unchallenged;

15.4. The Second Respondent attended to the attachment of the immovable properties as well as the sale in execution of the properties;

15.5. A warrant of execution was issued in terms of which the Second Respondent was directed to attach the Applicants' immovable properties. The Second Respondent proceeded to serve the writ of execution on the Applicants on 3 November 2018;

15.6. The said immovable properties were subsequently sold by the Second Respondent on 19 January 2018.

Issues for Determination

[16] There is a dispute between the Applicants and the First to Third Respondents in relation to the service areas of the Second Respondent

(as Sheriff for Bochum) and the Sheriff for Mokopane. The Applicants content that, although the farms are in the district of Bochum, they fall in the service area of Mokopane and that the latter ought to have conducted the sale in execution.

[17] The following issues stand to be adjudicated by this Court:

17.1. Whether the Applicants, as judgment debtors, have the necessary locus standi to launch the present application;

17.2. Whether the Applicants have established that the sale in execution held by the Sheriff, Bochum, the Second Respondent, held on 19 January 2018, is null and void;

17.3. Did the Second Respondent have the required authority to execute the warrant of execution;

17.4. Did the Second Respondent have the required authority to arrange a sale and proceed with the sale in execution;

17.5. Did a valid transfer of the properties to the Third Respondent take place in view of the alleged Second Respondent's lack of authority;

17.6. Whether the Applicants have made out a case for the ancillary relief as set out in their Notice of Motion.

Second Respondent's Authority to attach and sell the Properties

[18] The Applicants argue that the second Respondent, as Sheriff for the district of Bochum, was not authorised to attach the property and proceed with the execution steps for the reason that the three farms executed against are apparently not situated in his "service

area". The argument is extended to say that the Sheriff for Mokopane is the person authorised to attach and proceed to attach and proceed with execution for the reason that the three farms are in his "service area".

[19] This argument and / or submission by the Applicants is misconceived in that emphasis is made on "service area" of a Sheriff and not a "district" for which the Sheriff has been appointed and the district in which the property subject to attachment and execution is situated. The actual and true wording of Uniform Rule 46(2) is the following:

"(2) The attachment of the immovable property shall be made by any Sheriff of the district in which the property is situated, upon a writ corresponding substantially with Form 20 of the First Schedule"

The applicable wording of Uniform Rule 46(2) indicates specifically that attachment shall only be made by a Sheriff for the district where the immovable property is situated.

This simply means that a Sheriff who is not appointed for the district where the immovable property is situated (physically) shall not be entitled to attach such immovable property.

[20] Nowhere in Uniform Rule 46 can any reference be found to the term "service area" but all references are clearly made to "district". The argument proffered by the Applicants would require the Sheriff of Mokopane to proceed with the attachment and sale in execution in a district where he does not hold an appointment. This will have the effect that the sale in execution is conducted outside the district where the immovable property is physically situated. Any such attempt will fall foul of the provisions of Uniform Rule 46(4)(b) which provides that:

"After attachment, any sale in execution shall take place in the district in which the attached property is situated and shall be conducted by the Sheriff of such district who first attached the property."

[21] In casu it is common cause that the three farms are situated in the district of Bochum and furthermore Mr Ramaala is the duly appointed Sheriff for the district of Bochum. The fact that during the course of the dispute as to the rightful sheriff to attach and sell the property, Mr Ramaala was appointed by the Registrar of this Court as an ad hoc Sheriff, and on the eve of the sale in execution, does not take this matter any further. Such step was embarked upon ex abundanti cautella. The fact of the matter is that Mr Ramaala is the duly appointed Sheriff for Bochum, the district in which the three farms are situated.

[22] In the result I make a finding that the Sheriff for Bochum, that is the Second Respondent, had the authority to attach and sell the farming properties in execution.

Validity of Second Respondent's Auction

[23] The First Respondent submits that in order for the Applicants to succeed to set aside the sale in execution conducted by the Second Respondent on 19 January 2018, it is required to establish that the Second Respondent's auction was fatally defective and not in compliance with the provisions of Rule 46 of the Uniform Rules of Court. The appropriate provisions of the aforesaid Rule 46 are as follows:

"46(2) The attachment of the immovable property shall be made by any Sheriff of the district in which the property is situated, upon a writ corresponding substantially with Form 20 of the First Schedule." "46(3)(a) Notice of attachment, corresponding substantially with Form 20A of the First Schedule, shall be served by the Sheriff upon the owner of the immovable property and upon the Registrar of Deeds or other officer charged with the registration of such property, and if the property is occupied by some person other than the owner, also upon such occupier."

"46(4)(b) After attachment, any sale in execution shall take place in the district in which the attached immovable property is situated and shall be conducted by the Sheriff of such district who first attached the property: Provided that the Sheriff of the first instance and subject to the provisions of paragraph (d) of subrule (8) may on good cause shown authorize such sale to be conducted elsewhere and by another Sheriff."

[24] In *Campbell v Botha and Other* 2009 (1) SA 239 (SCA) at par 8

Streicher JA held that:

"An attachment is effected by way of a notice by the Sheriff served together with a copy of the warrant of execution upon the execution debtor as owner, upon the Register of Deeds, upon all registered holders of bonds registered against the property, if the property is in the occupation of some person other than the execution debtor, also upon such occupier and upon the local authority in whose area the property is situated. Whatever the position may be if service is not effected on any of the interested persons there can, in my view, never be said to have been an attachment where neither the warrant nor the notice of attachment had been served on or brought to the notice of the owner."

In the present case the Applicants do not deny that the warrant of execution was served on them by the Second Respondent. Furthermore the Applicants do not deny that the notice of attachment was sent to the Registrar of Deeds, Pretoria. The Applicants' main contention herein is that with effect from 4 April 2017, all properties situated in Limpopo Province resort under the Deeds Office for Polokwane and not Pretoria.

[25] The question arises as to whether the dispatch of the notice to Pretoria instead of Polokwane renders the attachment and subsequent sale in execution null and void. The First Respondent submits that the Second Respondent's failure to dispatch the notice of attachment to the Registrar of Deeds, Polokwane is a defect that can be condoned by this Court and which does not render the auction null and void. I agree.

In *Marais v Aldridge and Others* 1976 (1) SA 746 (T) it was held that even if there has been no substantial compliance with Rule 45(8)(c)(i)(a) in regard to the giving of a notice of attachment to all interested parties, the Court would condone any such failure to comply with the Rules under the inherent jurisdiction of the Court or under the provisions of Rule 27(3) of the Uniform Rules as there had been no possible prejudice to the Applicant by virtue of such non-compliance with the Rule.

In my view the Second Respondent's notice to the Registrar of Deeds, Pretoria as opposed to the Registrar of Deeds, Polokwane, similarly have caused no conceivable prejudice to the Applicants, and is consequently condoned by this Court.

Applicants' lack of locus standi

- [26] The First Respondent submits that the Applicants do not possess the necessary *locus standi* to launch the present proceedings. Reliance in this regard was placed on the case of *Hiralal v Naicker and Another* 2009 (1) SA 636 (D) where it was held that in the execution process the execution debtor has no role and that once the property had been attached it was placed beyond the reach of the Applicant.
- [27] In the *Hiralal* case *supra*, reference was made to the Appellate Division case of *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at 558 where Kotze JA stated:
- "An arrest effected on property in execution of a judgment creates a *pignus praetorium* or to speak more correctly, a *pignus judiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court. They pass out of the estate of the judgment debtor...."
- [28] Based on the aforesaid authorities, I am of the view that in bringing the present application the Applicants attempted to usurp the role of the Sheriff (the Second Respondent) which they are not entitled to do. The Applicants as execution debtor in these proceedings have no role in the execution process. Accordingly their application should not be entertained.

Conclusion

- [29] For all the reasons stated above, I come to the conclusion that the attachment executed by the Second Respondent and the subsequent sale in execution held by the Second Respondent on 19 January 2018 were all done in accordance with the provisions of Rule 46 of the Uniform Rules of Court. To the extent that it may be found that there was non-compliance with any provision of the aforesaid rule, such non-compliance did not cause the Applicants any prejudice and is consequently condoned by this Court.
- [30] In the result the application is dismissed with costs, such costs to include costs of two Counsel where employed.

EM MAKGOBA

JUDGE PRESIDENT OF THE

HIGH COURT, LIMPOPO

DIVISION, POLOKWANE

APPEARANCES

Application heard on : 16 August 2018

Order pronounced on : 16 August 2018

Written Judgment submitted on: 31 August 2018

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Instructed by

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(Intervening Party)

Instructed by

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Prepared on 11 October 2026 · Esheria