

SOUTH AFRICA / JUDGMENT

Frazenburg and Another v Rendall and Others (2018/11948) [2018] ZAGPJHC 631 (12 November 2018) [2018] ZAGPJHC 631

COURT

South Gauteng High Court, Johannesburg

BEFORE

Lagrange AJ

CASE / FILE NUMBER

2018/11948

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: 2018/11948

In

the matter between:

FRAZENBURG,

WILLEM

First

Applicant

FRAZENBURG,

VENESSA LEYSTTELL

Second

Applicant

and

RENDALL,

GEORDIE-GLENN

First

Respondent

THE

REGISTRAR OF DEEDS – JOHANNESBURG

Second

Respondent

STANDARD

BANK OF SOUTH AFRICA

Third

	Respondent
Coram:	Lagrange AJ
Heard:	25 October 2018
Delivered:	12 November 2018
Summary:	Vindication – fixed property sold in execution by bank despite agreement between mortgagee and bank on repayment of arrears – buyer purchasing property in good faith – order rescinding sale in execution only obtained after transfer to buyer – condonation application filed late in face of court order with perfunctory justification – buyer not entitled to costs.

JUDGMENT

LAGRANGE, J

Background

- [1] The former owners of the property in question (‘the Frazenburgs’), brought this application to rescind a previous sale in execution of their house in Westbury by their mortgagee bank (‘Standard’) to Rendall (‘Rendall’) and to restore their title to the property. Standard did not oppose the relief sought. However, in the event the sale of the property in execution, which it had set in motion, was nullified it sought to be restored to its position as mortgagor before the sale and transfer.
- [2] Previously, this matter was set down on the unopposed role on 17 April 2018, but Rendall put in a late appearance and obtained leave to file an answering affidavit by 8 May 2018. Notwithstanding the court order, the answering affidavit was delivered a week late, though on 10 May 2018 Rendall’s attorneys did serve a copy of the affidavit by email on the Frazenburgs’ attorney, two days’ later than prescribed by the court order. Rendall applied for condonation for non-compliance with filing its answering affidavit, which is dealt with first.

Condonation of the late filing of the answering affidavit

- [3] Rendall gave a poor excuse for non-compliance with the court order, namely the busy schedule of himself and his attorney. Clearly the court order was not a priority to them. Though this is not a justifiable excuse, the delay was short and the prejudice to the Frazenburgs’ not significant but the prejudice of not admitting the answering affidavit would be decisive as it sets out a strong defence to the Frazenburg’s claim. Accordingly, I am inclined to condone the late filing of the answering affidavit, but Rendall’s and his attorney’s disrespectful attitude to the court, as evidenced in the condonation application, will be dealt with under costs.

- [4] In 2009 the Frazenburgs acquired the property subject to a mortgage bond issued in favor of Standard.
- [5] On 31 August 2016 a default judgment in favour of Standard Bank in the amount of R109,000-00 was handed down and the Frazenburgs' property was declared executable.
- [6] It is undisputed that after default judgment was obtained the Frazenburgs entered into an agreement with the Standards' attorneys in terms of which they undertook to repay the debt within a period of six months. Payments were accordingly made from 13 November 2016 until 3 July 2017 and copies of proof of payment were provided to the Standard's attorneys.
- [7] However, in July 2017 the Frazenburgs received a notice from Rendall's attorneys calling on them to vacate the property. The letter alerted them that the property had been sold in execution on 28th of March 2017 to Rendall ('Rendell'), during the time they were busy paying off their arrears to Standard in terms of the agreement with Standard's attorneys.
- [8] On 13 December 2017 the Frazenburgs successfully rescinded the original default order, which had allowed Standard to proceed with the sale in execution. Subsequently, in January 2018 the Frazenburgs notified the bank and Rendall of the order and asked Rendall to consent to reversing the sale.
- [9] Rendall refused to agree to reverse the sale. He was only willing to do so if the Frazenburgs first compensated him for the damages he would suffer if the sale was to be reversed. Accordingly he claims that the application should be stayed pending a claim of damages to be instituted by himself. He also insists that he is entitled to proceed with the eviction applicants from the property.

Merits

- [10] The essential legal question for determination is whether the Frazenburgs are entitled to an order compelling Rendall to transfer the property back to them, in circumstances where Rendall alleges he was a bona fides purchaser of the property in circumstances where he had already taken transfer of the property by the time order allowing the sale in execution was rescinded.
- [11] Where transfer has already been effected by the time the judgment permitting sale and execution is rescinded, the former owner of the property is not entitled to have ownership of the property restored to them by the bona fide buyer unless the real underlying agreement of sale is invalid.[1]
- [12] Although the Frazenburgs alluded to another case involving Rendall in which he was held to have acted in bad faith, they did not make this allegation in the founding affidavit and have not set out a basis why Rendall should be held to have acted in bad faith in this case. Also, the fact that the letter they received in July 2017 calling on them to vacate the premises was dated 26 January

2017 is not persuasive evidence of bad faith on his part.

[13] The Frazenburgs made no allegation that the sale was void ab initio by reason of fraud or that it was invalid because the sheriff had not attached the property in compliance with Rule 46 of the Uniform Rules of Court. They appear also not to have sought to rely on sections 129(3)(a) and (b) read with s 129(4) of the National Credit Act[2] to reinstate the credit agreement before the sale in execution took place, as they might have.[3]

[14] In the circumstances, the applicants have not laid any basis for reversing the sale in execution of the property to Rendall.

Costs

[15] As mentioned above, Rendall's conduct in the late filing of his answering affidavit, though condoned, was disrespectful of the court and as a mark of the court's displeasure he will not be entitled to his costs of opposing the application.

Order.

1. The application is dismissed.
2. The parties are all liable for their own costs.

Lagrange J

Acting Judge of the High Court

APPEARANCES

Applicants:

B. Gradidge instructed by Nadeem Mahomed Attorneys.

First Respondent:

R. Bhima instructed by Swanepoel Van Zyl Attorneys.

[1] See Knox NO v Mofokeng and Others 2013

(4) SA 46 (GSJ) at 58 para 24.

[2] Act 34 of 2005.

[3] See Firststrand Bank Ltd v Nkata 2015 (4) SA 417 (SCA) at 424, para 23.

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