

SOUTH AFRICA / JUDGMENT

Naidu and Another v Standard Bank of South Africa Limited (3201/2016) [2017] ZAKZDHC 48 (22 December 2017)

[2017] ZAKZDHC 48

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Madondo DJP

CASE / FILE NUMBER

3201/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU

NATAL DIVISION, DURBAN

CASE

NO: 3201/2016

In

the matter between:

STRINIVASEN
NAIDU FIRST
APPLICANT
VATHARAN
NAIDU SECOND
APPLICANT
AND
STANDARD
BANK OF SOUTH AFRICA
LIMITED RESPONDENT

JUDGMENT**MADONDO DJP**

- [1] The applicants seek an order setting aside the sale in execution of a property situated at [...] H Avenue, Glenwood (the property), which took place on 16 March 2016.
- [2] The applicants ground their application, firstly, on that they did not receive the notice of sale; secondly, the description of the property in the notice of sale was inadequate and therefore not in compliance with the provisions of Rule 46(7) (b) of the Uniform Rules of Court; and thirdly, that the purchase price for which the respondent sold the property was below its market value, as a consequence, the applicants contend that the sale in execution of the property was invalid.

FACTUAL**BACKGROUND**

- [3] The applicants are co-owners of the property in question. During 2007 the applicants and the respondent entered into a home loan agreement in terms of which the respondent loaned and advanced to the applicants the amount of R2 052000. In order to secure the debt of the applicants the respondent registered a mortgage bond over the property in its favour.
- [4] The essential terms of the loan agreement were, firstly that the applicants had to repay the loaned amount to the respondent with interest over a period of time in monthly instalments. Secondly, should the applicants fail to pay any amount by due date, the full amount then owing would become due and payable and the respondent would be entitled at its option, to institute proceedings against the applicants for the recovery of the amount owed and for an order declaring mortgaged property executable.
- [5] The applicants failed to make payments in terms of the loan agreement and the respondent issued summons against them. The applicants,

notwithstanding the fact that they were defending the matter, consented to judgment on 8 August 2011. As a result, the respondent

obtained judgment against them by consent. In terms of that judgment the applicants undertook to pay the full outstanding arrears on or before 8 August 2011, failing which the respondent should proceed with the execution of the judgment, which would include an order declaring the property specifically executable.

- [6] The applicants failed to honour their undertaking. However, during November 2014 the applicant lodged an urgent application for an order staying the sale in execution. The court directed them to bring rescission application within 30 days from the date of the order. The applicant failed to comply with the court order and they eventually abandoned the rescission application. The applicants had last made payment on 18 March 2014 and they

remain in occupation of the property. The amount in arrears is R683687-89, and the balance on the mortgage is R2 124 236.69.

- [7] Subsequently a further sale in execution was arranged for 16 March 2016, and on this date the respondent purchased the price at R1 690 000. The respondent did not evaluate the property and they applicants contend that the respondent sold the property for the purchase price which was below its market value. The respondent concedes that the property was not evaluated and avers that that was due to the obstructive conduct of the applicants in that they denied its valuer access on to the property.
- [8] The applicants contend that as there had been non-compliance with the provisions of Rule 46, which according to the applicants constituted a material defect in the process, the sale in execution in question should be declared null and void.
- [9] The respondent alleges that the applicants filed a valuation affidavit without any formal application to court for leave to file such affidavit as envisaged in Rule 6(5)(e). The respondent submits that the court can only allow further affidavits where there is good reason to do so.
- [10] The applicants did not file a replying affidavit and had failed to file a consolidated index. The respondent had therefore taken upon itself to file an index, paginate the papers and place the matter on the opposed roll for hearing.

ISSUE

- [11] The issue, for determination is whether or not the sale in execution of 16 March 2016 was valid.
- [12] The applicants ground their claim of the invalidity of the sale in execution on the provisions of Rule 46(7) (b) of the Uniform Rules of Court which provides:

‘7(b)The execution creditor shall after consultation with the sheriff, prepare notice of sale containing a short description of the property, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the sheriff’
- [13] Sub-rule (7)(b) on which the applicants rely for their claim that the judgment creditor has a duty to serve notice to the judgment debtor before the sale in execution takes place, does not impose such duty on the judgment creditor. Only Rule 46(5)(a) which requires the judgment creditor to cause notice, in writing, of the intended sale to be served by the registered post upon the preferent creditor, if his address is known. Before an immovable property subject to any claim preferent to that of the execution creditor is sold in execution. However, such sub-rule will not benefit the judgment since it was not designed for its protection at all. See *Impendle Property CC v Comrie* and another 1993(3) 706(N).

- [14] The judgment creditor is only obliged to serve a notice of attachment of property on the owner (Rule 46(3)). Nevertheless, it appears from the Return of Service that the respondent served the notice of sale on the applicants by affixing it to their principal gate, and which in terms of the provisions of Rule 4 constitutes sufficient service.
- [15] It is the sole responsibility of the executor creditor to prepare a notice of sale containing a short description of the property and to see to it that the notice contains the time and place for the holding of the sale. The provision is peremptory and the main characteristics of the property that might attract the interests of the purchasers should be set out. The notice need not contain a description of the enhancing qualities of the property.
- [16] The applicants contend that the notice of sale was not in compliance with the provisions of sub-rule 7(b) since it omitted to mention the improvements on the property; i.e. it comprises of 4 separate buildings constituted of good quality materials; the main building is a double story and it is an up-market area and that it has a double garage. This is followed by the whole range of the alleged omissions which I do not find it necessary to make mention of here.
- [17] The applicants have argued that as the respondent had failed to meet the essential formalities for sale, the sale in execution was therefore invalid and the sheriff did not have the necessary authority to transfer the property in the name of the respondent.
- [18] Sub-rule 7(b) requires the respondent to give a short description of the property in question. Describing the property as having the main building is sufficient to indicate that the property has more than one building. The basic principle of law is that non-fulfilment of a requirement will vitiate a sale in execution only if it goes to the root of the matter. In *Todd v First Rand Bank Ltd* [2013] 3 All SA 500 (SCA) para 21 Lewis JA said that the determination of whether or not the non-compliance with the sub-rule has gone to the root of the matter, 'entails an enquiry whether the failure to observe a requirement defeats the purpose of the rule or sub-rule and that the prejudice would be suffered by the debtor if absolute compliance were not required.'
- [19] In my judgment the respondent has discharged its responsibility to prepare a notice of sale containing a short description of the property, its precise situation and to see to it that the notice contains the time and place for the holding of the sale. This case is distinguishable from the case of *Messenger of the Magistrate's Court, Durban v Pillay* 1952(3) SA 678(AD) at 683 H where advertisement contained no description of the property nor of its precise situation at most it contained a reference to the record of the Surveyor-General and the Registrar of Deeds. That the main building is a double story, the property is in an up-market and that it has a double garage were additional details only necessary to enhance the qualities of the property for marketing purposes. These would be established by the potential buyers during the inspection of the property. The failure to state these features in my view cannot render the sale in execution invalid.

- [20] The court in Todd case held that the requirement that ‘there be strict compliance with every requirement of rule 7 (b) for a sale in execution to be valid, would limit the ability of a court to ensure that the interests of justice and fairness are served.’ In the present case, the respondent, in my view, substantially complied with the requirement of the sub-rule 7(b), and it cannot be said that the applicants were prejudiced by the omission of the additional information only necessary to enhance the qualities of the property for marketing purposes. In *Chasfre Investments (Pty) Ltd v Majavie and Others* 1971(1) SA 2109 (C) at 222F the court held that ‘the purpose of the requirement of the Rule that a short description of the property should be published is to inform the public what is being sold with the object of attracting bidders so as to obtain a higher price as possible for the property.’
- [21] The description given in the sale notice was in my opinion sufficient to apprise the potential buyers of the sale. Ms Friedman, for the respondent, has correctly submitted that the description of the property was adequate and all the material features or main characteristics, which might reasonably be expected to attract the interest of potential purchasers were inserted.
- [22] In my view, addition of the details that the property has a large garden, basement, an addition a small room and that there is an office block including all other alleged omissions would render the sale notice failing to meet the requirement that it should contain a short description. Consequently, the applicants have not made any case for the conclusion that the omission in question has defeated the purpose of the sub-rule.
- [23] The applicants aver that the property in question was not evaluated and as a result the property in question was sold below a fair market price, to the prejudice of the applicants. The respondent alleges that by their conduct the applicants had deliberately prevented it or made it impossible for it to have the property evaluated. According to the respondent the applicants consented to judgment in 2011 and had, since then, frustrated the completion of the execution process and continued to reside in the property without pay in satisfaction of the respondent’s debt. They intended to continue their stay on the property for another period without pay.
- [24] The applicants have sneaked into the proceedings the evaluation affidavit without the leave of court. Nor have they asked for condonation for such unauthorised tender of the evaluation affidavit before court. In the submission of the respondent the evaluation affidavit the applicants have tendered in court is not properly before court.
- [25] According to the evaluated affidavit the applicant filed in this court dated 24 March 2016, on a forced sale the property was expected to fetch R2 100 000. Whereas on open market the value of the property would be R 3 700 000. The respondent purchased the property in question at R 1 690 000. The applicants claim to have, as a result, suffered a great loss.
- [26] In *Chasfre Investments (Pty) Ltd* case, at 222G Watermeyer J, with regard to who suffers when the property is sold at a lower price at the sale in execution, said:

‘The persons who would provisionally be interested in the property being sold for an adequate price would be creditors ranking in priority to the judgment creditor, the judgment creditor himself, all other creditors who had lodged warrants of execution and the judgment debtor.’

[27] This is a dispute of fact as to what caused the respondent to fail to evaluate the property which could not be resolved on the papers. According to the respondent the applicants frustrated its effort to have the property evaluated. This court is in terms of the Plascon Evans rule obliged to accept the version of the respondent. See *Plascon Evans Paint v Riebeeck Paints* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 H – I.

[28] The applicants merely filed an evaluation affidavit on their own frolic without having sought and obtained the leave of court.

Nor have they asked this court for condonation for filing a fifth affidavit. In *Hand Trading v JR209 Investments* 2013(1) SA 161 (SCA) PARA 11 Erasmus AJA said:

‘Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.’

[29] In the present matter the applicants have not made any case for the permission of the evaluation affidavit in question and this Court has therefore no reason to allow it. I accordingly, rule that the evaluation affidavit is not properly before this Court and as a consequence it should be regarded as *pro non scripto*. The applicants are in this regard left to pursue conventional remedies by way of the action proceedings if they are of the view that they have suffered a loss, i.e. a difference between the selling price and the fair market price, as a result of the respondent’s conduct in selling the property below its fair market price.

ORDER

[30] In the result I make the following order:

The application is dismissed with costs.

JUDGMENT

RESERVED: 9 NOVEMBER 2017

JUDGMENT

DELIVERED: 22 December 2017

FOR THE APPLICANTS: M NAIDOO

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Prepared on 11 October 2026 · Esheria