

SOUTH AFRICA / JUDGMENT

Nkanyani v Nedbank Limited and Others (20832/12) [2017] ZAGPPHC 178 (14 March 2017) [2017] ZAGPPHC 178

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

20832/12

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 20832/12

DATE: 14/3/2017

REPORTABLE: NO
OF
INTEREST, JOINTLY OTHERS

JUDGES: NO
In

the matter between: MBAZIMA
JOSEPH
NKANYANI
APPLICANT
and
NEDBANK
LIMITED
1ST
RESPONDENT
MMOLEDI
ADAM 2ND
RESPONDENT
THE
REGISTRAR OF
DEEDS 3RD
RESPONDENT

JUDGMENT

RANCHODJ:

Introduction

- [1] The applicant seeks an order setting aside the sale-in-execution of certain immovable property described as Erf [...] Thulani Township, Dobsonville ('the property') pursuant to its sale by the Sheriff of the High Court on the instructions of the first respondent. The applicant was previously the owner of the property.
- [2] The property was purchased by the first respondent at a sale-in- execution and it then sold it to the second respondent. The applicant therefore also seeks a setting aside of the transfer of the property into the name of the second respondent. The second respondent has not entered an appearance.
- [3] The applicant also seeks an order for costs against the first respondent.
- [4] In the alternative, the applicant seeks an order compelling the first respondent to tax its bills of costs and to account to the applicant for the money received from the sale-in-execution together with an order for costs of the application.

Background

- [5] The applicant says he purchased the property for R5 824.00 from the Gauteng Provincial Government on 2 April 2000 and it was subsequently transferred into his name on 3 March 2003. The property is colloquially known as an 'RDP house'. There was no mortgage bond registered over the property.

- [6] On 14 March 2007, the applicant purchased an Inyathi 2.2l motor vehicle for which he obtained finance from the first respondent. The amount of the loan was R174 838.56, which included finance charges as the vehicle was purchased on the basis of an Instalment Sale Agreement.
- [7] The applicant says he "made payments to the first respondent but unfortunately fell ill and could no longer work and consequently fell into arrears with the re-payments." He does not say when he fell ill nor how much he had paid until then.
- [8] Applicant returned the motor vehicle to the first respondent. He also does not say when he returned the vehicle. He was told that the vehicle would be sold and the proceeds set off against the balance owing by him. The applicant says he assumed that his debt had been settled in full as he did not hear from the first respondent again after he returned the vehicle.
- [9] It is common cause or not in dispute that the vehicle was indeed sold by the first respondent. What is in dispute is whether the first respondent properly accounted to the applicant in this regard. I will revert to that aspect presently.
- [10] The applicant says further that he also does not recall having received the summons in this matter and was 'amazed' to find that on 6 March 2012 his furniture had been attached by the Sheriff and that the Notice of Attachment did not have a case number, not the names of the parties nor even the name of the court from which it was issued. His furniture was removed and he believes it was sold in execution.
- [11] The summons in the present matter was issued only on 16 April 2012 and service effected on 20 April 2012 by affixing to the principal door - which is after attachment of applicant's goods on 6 March
2012. The first respondent says the attachment of the applicant's goods and possibly a sale- in- execution must be in relation to a different matter in which the first respondent was not a party. I agree. Hence that warrant of execution and attachment are not relevant in this matter.
- [12] Insofar as the present matter is concerned, as I said, the summons was issued on 16 April 2012. The applicant says during August, 2014 he received a warrant of execution in terms of which the property was attached by the Sheriff. However, says the applicant, the defendant cited therein is a Josef Erasmus Labuschagne and not himself. The affidavit in support of the application for a warrant of execution similarly had Mr Labuschagne's name in the heading instead of that of the applicant.

[13] The applicant raises a further issue and that is that when the later affidavit was filed by the first respondent's attorney to rectify the incorrect heading it appears that the second page of the earlier affidavit was attached to the new first page which reflected the correct defendant, namely, the applicant. A comparison of the two second pages show that they are identical in that the respective signatures of the deponent and that of the commissioner of oaths are identical on the two pages and appear in

exactly the same place in relation to the typed portions above which the signatures appear.

[14] It is highly improbable that if the later affidavit was sworn to before the same commissioner of oaths that their signatures would appear in exactly the same way and at exactly the same place as in the earlier affidavit.

[15] The first respondent does not pertinently deal with this issue except to say that when it became aware of the error in the names it rectified it. This rather vague and general response is to be deprecated. It seems to me that in all probability when the first respondent's attorneys realised the mistake they merely substituted the first page of the affidavit with one containing the correct heading. The question that arises is whether it affected the validity of the warrant of execution that was issued.

[16] The content of the substituted page is exactly the same as that in the earlier one. It is only the incorrect name in the heading that was changed. It could be argued that the reference in the contents of the affidavit to Labuschagne in stead of the applicant means the deponent confirmed the wrong party to have been indebted to the first respondent. That is indeed so and the prudent thing the first respondent's attorney should have done was to file another affidavit explaining the error rather than merely substitute the first page. Having said that I do not think it detracts from the material facts i.e. inter a/ia, the case number; the description of the property; the amount of the judgment debt and when judgment was obtained.

[17] In my view, the warrant of execution should not, in the circumstances of this case, be set aside for that reason. The warrant of execution obtained

after rectification of the name of the defendant or judgment debtor was served on 8 September 2014 on an occupant of the premises, i.e. a Mr Maluleka.

[18] In the light of these facts it could not be said, as the applicant contends, that the sale in execution was based on the incorrect warrant of execution which was served on him in August

2014. The correct writ of attachment was served on the applicant on 8 September 2014 and the sale- in-execution took place thereafter.

[19] The next arrow in the applicant's bow is that the Sheriff's nulla bona return in respect of movable property cannot be correct. He disputes the Sheriff's return of service wherein it is stated that he could not find any attachable assets to satisfy the judgment debt. He also questions how the Sheriff could say in the one and the same return of service "Reason for non- service" which means there was no service and then also say he renders a null bona return.

[20] It is necessary to quote the Sheriff's comments in full:

"REASON FOR NON-SERVICE:

That on 27th day of June 2014 at 10:15 at [...] BLOCK

[...], DOORNKOP, DOBSONVILLE, ROODEPOORT the WARRANT OF

EXECUTION could not be executed as the defendant was taken to his homeland in Limpopo as he was very ill as informed by Mr Maluleke, occupant cell no: 079-856-0320.

No attachable assets could be found to satisfy the judgement debt.

I THEREFOR RENDER A NULLA BONA RETURN AND STATE THAT THE EXECUTION DEBTOR HAS NO ATTACHABLE ASSETS AT THIS GIVEN ADDRESS."

[21] It seems to me that what the Sheriff is saying is that as the applicant was not at the premises he could not serve the writ on him hence the reason for non-service. The Sheriff says he could find no attachable assets to satisfy the judgment debt. That clearly implies that he searched for attachable assets and the applicant's contentions that the return of service does not state that he asked Mr Maluleke to point out property belonging to the applicant nor what steps he took to ascertain who owned the property are all speculative. There is also no confirmatory affidavit from Mr Maluleke in this regard.

[22] But what is important is that the applicant says that all his movable assets were previously attached by what appears to be a different creditor and probably sold in execution. Hence the probabilities are that he had no movable assets for the Sheriff to attach. He in fact admits that, as he put it, most of the furniture was lent to him by his son.

[23] Yet another arrow strung to the applicant's bow is that he was not aware of the sale-in-execution of the (immovable) property. This can clearly not be the case. He was represented by attorneys Magezi Mabuyangwe at least after the property was attached. This is apparent from the attorney's letter dated 4 November 2014 (the sale took place on 7 November 2014) in which attorney Mabuyangwe states:

'DEAR SIR/MADAM

RE: STAY OF WARRANT OF EXECUTION: IMMOVABLE PROPERTY NEDBANK/NKANYANE
MBAZIMA JOSEPH

REF: 43138440001

The above matter refers and kindly be advised that we act on behalf of our client Mr Mbazima Joseph Nkanyane.

Our instructions are that he is the indebted to your client Nedbank limited in the amount of the R61 467.88 [sixty one thousand four hundred and sixty seven and eighty eight cents].

Further to our instructions is that he acknowledges same.

We confirm further that his property is about to be auctioned on the 071h day of November 2014.

We therefore request that the execution of his property be stayed so as to arrange settlement of the debt or pending settlement.'

[24] The applicant further asserts that it was not clear from the condition of sale-in-execution whether it was to be held on the 7th or 9th of November 2014 as the '7' was written in manuscript above the typed '9' and the latter was not properly deleted.

[25] The notices in the Government Gazette and the Citizen newspaper reflect the correct date, that is, 7th November 2014. More importantly, insofar as the applicant is concerned he must have been aware that it was arranged for the 7th and not the 9th as his attorney clearly says so in the abovementioned letter addressed to the first respondent's attorneys.

[26] The applicant also alleges that a condition of the sale-in-execution was that bids were to be made in increments of not less than R150 000 above the preceding bid. The first respondent itself bid at the sale as did the second respondent who was apparently the only other potential buyer there. The property was sold to the first respondent for R140 000 (who thereafter sold it to the second respondent for R131 000). The applicant contends that the sale to the first respondent was invalid because clause 2 of the conditions of sale states that no bid of less than R150 000 in value above the preceding bid will be accepted. Hence, so contends the applicant, the sale for R140 000 was invalid.

[27] The first respondent says it had the right to waive the condition as no bids were forthcoming for the amount of R150 000. During argument, applicant's attorney seems to have accepted this submission by first respondent's counsel but argued that the property was sold at below its market value. However, these were mere assertions of the applicant with no professional valuator's report to back them up. The first respondent has provided a professional valuator's report which places the market value of the property at R70 000. Comparable sales of two similar properties about a year earlier were R50 000 and R30 000 respectively. The applicant's assertion that the property (an RDP house) is worth about R250 000 without any objective valuation in support cannot in the circumstances be accepted.

[28] In my view, the applicant has failed to make out a case for the relief he seeks in the main claim.

[29] I turn then to the alternative claim.

[30] It is clear from the papers that the first respondent had not rendered a proper account to the applicant for the proceeds of the sale of the motor vehicle and the sale-in-execution of the immovable property to date. Counsel for the first respondent conceded as much. Counsel also conceded that the purported account attached to the answering affidavit was incomprehensible and that a proper account should be rendered by the first respondent to the applicant. That it has failed to do so up to now is unconscionable conduct on its part.

[31] There is the question of costs.

[32] The applicant has partially succeeded and that only in respect of a claim for a proper accounting. The first respondent has substantially succeeded in resisting the claim for setting aside the warrant of execution and transfer of the property to the second respondent. However, it is apparent that the first respondent's attorneys did not provide a proper explanation regarding the error in the names of the judgment debtor. If the first respondent had properly accounted to the applicant immediately after the sale-in-execution in 2014 perhaps much of his litigation could have been avoided. An appropriate order would be that each party bear his or its own costs in relation to the main claim and the respondent pay the costs of the alternative claim. The matter fell within the jurisdiction of the Magistrate's Court.

[33] I make the following order:

33.1 The application for setting aside the sale-in-execution of the property described as Erf [...] Thulani Township, is dismissed.

33.2 The application for the setting aside of the transfer of the property registered by the third respondent from the first respondent to the second respondent is dismissed.

33.3 The first respondent is ordered to have all legal costs charged in the action taken against the applicant by it under case number 20832/2012 taxed or assessed by the relevant Law Society or taxing master of the magistrate's court, as the case may be, on the appropriate magistrate's court scale, and to pay any excess monies due to the applicant from the proceeds of the sale-in-execution after deducting the capital amount claimed in the warrant of execution together with interest and taxed or assessed costs.

33.4 There is no order as to costs of the main application.

33.5 The first respondent is to pay the costs of the applicant in the application pertaining to the alternative claim.

RANCHOD J

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant : Attorney B. Clayton

Instructed by

: Brian C Clayton & Co

Counsel on behalf of First Respondent : Adv N. Strathern

Instructed by

: Aucamp & Cronje

Date heard

: 6 & 7 March 2017

Date delivered

: 14 March 2017

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