

SOUTH AFRICA / JUDGMENT

## Phillip and Another v First Rand Bank Ltd t/a FNB Homeloans formerly First Rand Bank of South Africa Ltd and Others (628/09) [2010] ZAKZPHC 50 (1 September 2010)

[2010] ZAKZPHC 50

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Lopes

CASE / FILE NUMBER

628/09

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No 628/09

In the matter between :

Gerald Phillip 1st Applicant

Salima Phillip 2nd Applicant

and

First Rand Bank Limited trading inter alia

as FNB Homeloans formerly

First Rand Bank of South Africa Limited 1st Respondent

The Registrar of Deeds, KwaZulu-Natal 2nd Respondent

Trishan Heerall 3rd Respondent

The Sheriff of the High Court, Pietermaritzburg 4th Respondent

J U D G M E N T

Lopes J

- [1] The applicants in this application seek an order interdicting the first respondent from transferring certain immovable property which is registered in the names of the applicants into the name of the third respondent.
- [2] The applicants were the owners of their home which was situated at 448 Regina Road, Bombay Heights, Pietermaritzburg ("the property"). The first respondent held three mortgage bonds over the property.
- [3] The applicants fell into arrears with their repayments in terms of the bond and the first respondent obtained default judgment against them on the 30th November, 2005. That default judgment included an order declaring the property executable. The amount for which judgment was obtained was R156 790,77 together with interest and costs.
- [4] Pursuant to the order declaring the property executable, it was ultimately sold on the 12th December, 2008 to the third respondent for a purchase price of R200 000.
- [5] The applicants now wish to have the first respondent interdicted from having the property transferred into the name of the third respondent on the basis that :-

an arrangement had been concluded with the first respondent for payment of the arrears; and

the applicants were given no notice of the date of the sale by the first respondent; and

the fact that the property had previously been advertised for a sale which had later been cancelled, indicated that the first respondent did not intend to proceed with the sale and accordingly proper notice should have been given to the applicants; and

the sale of the property deprived the applicants of their constitutional right to housing in terms of the Constitution.

- [6] The first respondent delivered answering affidavits and the applicants have not filed any replying affidavits. In those circumstances I must regard the allegations of fact of the first respondent in its answering affidavit as being unanswered and unchallenged.

- [7] Dealing with the defences which were raised :

- a) The arrangement for payment of the arrears with the first respondent's representatives :

The suggestion which is made is that in those circumstances the property should not have been sold.

- [8] The allegation which is made regarding the conclusion of an arrangement is contained in paragraph 12 of the affidavit of the first applicant. He states :-

*"After service of the summons on my wife and upon obtaining default judgment and having the property declared executable, the first respondent did not proceed with the sale in execution as arrangements had been made for settlement of the arrears between us and the first respondent."*

- [9] In the first respondent's answering affidavit the deponent points out that following the grant of default judgment the applicants made sporadic payments which were inadequate to address the arrears which had arisen. They also did not deal with the full extent of the amount outstanding to the first respondent. The first respondent concedes that it did not proceed with the sale in execution immediately because sporadic payments were being made. Eventually as a result of payments no longer being made,
- on the 15th August, 2008 a sale in execution had been arranged which was cancelled because the first respondent had been unable to inform the applicants of the date.
- [10] In addition to the foregoing and on the 16th September, 2008 the second applicant contacted a former employee of the first respondent's erstwhile attorneys to make payment arrangements. The second applicant was advised to put her proposal in writing which she did not do.
- [11] Pursuant to these attempts and on the 1st October, 2008, Lara Stander a mortgage collector in the employee of the first respondent contacted the second applicant and informed her of the minimum payments requirements of the first respondent in order to prevent any sale in execution of the property. The second applicant undertook to contact her the following day which she did not do. In those circumstances no arrangement was concluded and the first respondent considered itself at large to continue with the sale in execution.
- [12] With regard to the alleged arrangement, the allegations have been made in the first applicant's founding affidavit in the baldest way possible providing no information whatsoever as to when the arrangement was made, the persons with whom the arrangement was made, the terms of the arrangement and whether or not the applicants had made any attempt to comply with the arrangement.
- [13] In the circumstances and given the lack of any particularity or a replying affidavit from the applicants, the making of an arrangement for the settling of arrears cannot in any way constitute a ground for preventing the property from being transferred into the name of the third respondent.

[14] b) Notice to the applicants :

It was suggested in argument by Mr Singh who appeared on behalf of the applicants that there was no proper notice given to the applicants of the sale which took place on the 12th December, 2008. Mr Singh conceded that the provisions of Rule 46 do not require service of the notice of sale on the applicants.

- [15] Notwithstanding the foregoing the second applicant was, however, informed by the first respondent that the sale was to take place. This was done by way of an SMS (a short message service) sent to the second applicant by the first respondent on the 10th December 2008, giving her the proposed sale date of the property.

[16] In addition to the foregoing there was publication of the intended sale in the Government Gazette and in a local newspaper on the 28th November, 2008. Given that :-

the applicants were aware of the default judgment taken against them; and

they knew that their property was liable to be sold unless they satisfied the judgment; and

the efforts that were made by the first respondent's employees to inform the applicants of what was required in order to avoid the sale;

there can be no suggestion that the respondent acted in any way which was unfairly prejudicial to the applicants in arranging, and having the property sold.

[17] c) The previous arrangements for a sale :

The fact that the property had previously been advertised for sale and that the sale had been withdrawn cannot assist the applicants. Those actions taken by the first respondent in fact operated in favour of the applicants and were in no way prejudicial to them. Given the conduct of the first respondent's representatives there can be no suggestion that they were not concerned to ensure that the applicants were aware of the sale date. The withdrawal of previous sales cannot assist the applicants in any way.

[18] d) The constitutional argument :

The applicants have suggested that their rights in terms of ss 25 and 26 of the Constitution have been offended against by the conduct of the first respondent in selling the property. S 25(1) of the Constitution provides :-

*“(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”*

[19] Reference is made in paragraph 20 of first applicant's founding affidavit that the first respondent could have taken steps to recover the arrears at the date of institution of the action by the use of a garnishee order against the salary of either of the applicants. This would have obviated the need for the sale of the property and ensured that the first respondent recovered the indebtedness to it.

[20] Whatever merit such an argument may have had was destroyed by the conduct of the applicants in this matter. Nowhere in the founding affidavits is any information provided to inform the Court of what the applicants did for a living and how much they were paid in their jobs. Nor is there any suggestion by them that they offered a garnishee order as part of their settlement arrangements with the first respondent.

- [21] In addition, and as pointed out by Mr Konstantinides who appeared for the first respondent, had the applicants wished to deal with their repayments on that basis, they should have opposed the order declaring the immovable property executable. Having failed to do so and having failed to make any suggestions to the first respondent as to how their indebtedness could be repaid, it does not seem to me that they can call in aid the assistance of a Court on the basis that their constitutional rights have in some way been prejudiced.
- [22] There is nothing to suggest that the applicants' rights to housing as contained in s 26 of the Constitution have been prejudiced.
- [23] It is indeed sad that the applicants are to lose any benefit which they may have attracted in having a property which they allege is valued at between R800 000 and R900 000 sold for approximately R200 000 to pay off an indebtedness of approximately that amount to the first respondent.
- [24] However, in the light of their conduct both during negotiations with the first respondent and in this application, they only have themselves to blame. Making sporadic payments and their inattention to their financial circumstances had the inevitable consequence that the first respondent lost patience with them (after three years!) and proceeded with the sale in execution. The loss of equity in the property was accordingly something for which the applicants were solely to blame.
- [25] It would seem that all proper steps were taken by the first respondent in following a lawful path to enable it to perfect its security. Having adopted a supine attitude for approximately three years the applicants can hardly complain when the first respondent enforced its rights. Indeed, since the sale took place a further 18 months have elapsed, and there is no record anywhere in the papers that the applicants took any steps to satisfy the remaining outstanding indebtedness. If the applicants wished to lay a constitutional foundation for their application it was necessary for them to have provided the facts upon which this was based. They have failed to do so.
- [26] In the circumstances the application is dismissed with costs, such costs to be calculated on the scale as between attorney and client.

Date of hearing : 30th August 2010

Date of judgment : 1st September 2010

Counsel for the applicant : S Singh (instructed by Surendra Singh & Associates)

Counsel for the respondent : N Konstantinides (instructed by von Klemperers)

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Prepared on 14 October 2026 · Esheria