
SOUTH AFRICA / JUDGMENT

Silverstone and Another v Absa Bank Limited and Others (66156/2012) [2017] ZAGPPHC 314 (5 July 2017) [2017] ZAGPPHC 314

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

66156/2012

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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 66156/2012

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

5 July 2017

SILVERSTONE COLIN WAYNE FIRST APPLICANT

SILVERSTONE NURIT SECOND APPELLANT

And

ABSA BANK LIMITED FIRST RESPONDENT

CYNTHIA PILLAY SECOND RESPONDENT

REGISTRAR OF DEEDS, PRETORIA THIRD RESPONDENT

JUDGMENT

KHUMALO J

- [1] The Applicants, Mr Colin W and Mrs Nurit Silverstone, 1st and 2nd Applicant respectively (referred to as "the Silverstones") are on an urgent basis applying for an order interdicting Absa Bank, the 1st Respondent, from proceeding with the transfer of a property described as Erf [...] Gallor Manor Extension Township, Registration

Division I R, the province of Gauteng, measuring 2162, Held under Deed of Transfer T106672/2004 ("the property") into the name of the 2nd Respondent, and setting aside the registration of transfer of the property to Absa Bank pending the final outcome of the Application to rescind a default judgment Absa obtained on 11 August 2016.

- [2] The rescission application is set down to be heard in the immediate future in the above honourable court. It was launched by the Silverstones on 21 November 2016, within two months of the judgment being granted. They then attempted, to obtain an urgent interdict to prevent Absa from proceeding with the sale of the property in execution until the rescission application is finalised, to no avail. They had approached the court for the interdict by way of an urgent application on 28 November 2016. The sale was scheduled to take place on 29 November 2016. The application was struck from the roll for lack of urgency. The Silverstones' endeavours did not deter Absa from proceeding on 29 November 2016 with the sale in execution of the property. Absa purchased the property.
- [3] The Silverstones allege that prior to and after their failed attempt to launch the urgent application Absa, through its attorneys, gave them an unequivocal undertaking that they will instruct the sheriff at the sale in execution of the property to notify the potential purchasers about the Application for rescission of the default judgment and that the transfer of the property would not proceed until the rescission application has been finalised. Hence, even after their urgent application was struck off the roll, Absa still confirmed the operation of the undertaking. They therefore allege to not have been perturbed when Absa continued with the sale.
- [4] Absa denies the allegations, contending that the undertaking was given to prevent the Silverstones from proceeding with the urgent application and since they nevertheless proceeded with their urgent Application, the undertaking fell away. The sale of the property in execution therefore proceeded on 29 November 2016. The subsequent transfer of the property to itself was consequently not in breach of the undertaking. It argued that the undertaking was not accepted by the Silverstones which they indicated by going ahead with the urgent application anyway.
- [5] The issue the court has to determine is whether or not there was an undertaking, if so whether such undertaking was revoked.
- [6] The Silverstones have alleged that the terms of the undertaking are articulated in the correspondence between their attorneys,

specifically in an email sent by the Absa attorneys to their attorneys on the morning of the 28th November 2016, the date of the

urgent application that read:

"We wish to confirm that instructions will be given to the sheriff of the High Court, Halfway house as follows:

1. That it be announced at the scheduled sale in execution that the property is sold subject to the outcome of the rescission application which was filed on our offices on 21 November 2016:
2. This is to inform possible purchasers that transfer will be delayed until such time as the rescission application has been adjudicated on; and **
3. If your clients are successful in the rescission application then the sale will no longer be valid and enforceable by the sheriff or execution purchaser;
4. This is essentially what your client wishes to achieve by the urgent application as their rights will only be adversely affected after the transfer of the property.**

In view of the above kindly confirm if your client wishes to proceed with the urgent application. (my emphasis)

- [7] The Silverstones attorneys in reply to the e-mail indicated that they have noted the undertaking the attorneys made on behalf of their client, Absa. They however proceeded to raise concerns with regard to the undertaking vis a vis the terms and conditions of sale as advertised by the sheriff. They indicated that they, notwithstanding their concern, note the undertaking but would nevertheless be proceeding with the urgent application for an order interdicting the sale of the property prior the finalisation of the rescission

application. Even though an undertaking not to proceed with the transfer was given they wanted to prevent also the conditional sale, which endeavour was not successful as already indicated.

- [8] The Silverstones allege that the undertaking not to transfer remained binding even after their application to prevent the sale was struck off the urgent roll. Absa attorneys confirmed the understanding in an e-mail they sent on the date of the sale in execution, a day after the urgent application was struck off the roll. The e-mail read as follows:

"We refer to the e-mail below and confirm the following:

The urgent application was argued before Raulinga J in the High Court, Gauteng Division, Pretoria yesterday afternoon.

The matter was struck off the roll for lack of urgency with costs. In view of the aforesaid the sale in execution shall proceed on even date.

Shabera from our office will inform the sheriff to announce to all prospective execution purchasers that your clients have filed a rescission application and that our clients are opposing same."

[9] The letters are common cause. They were not disputed by the Absa attorneys.

[10] On or about May 2017 their tenant who is in occupation of the property furnished them with a letter he received from Absa's

attorneys which notified him that they no longer have a legal right over the property as the property was transferred to Absa on 27 February 2017 following the sale on 29 November 2016. Absa had subsequently sold the property and the conveyancers were in the

process of registering the transfer to its new owner, the 2nd Respondent. When their attorneys sought clarity from Absa attorneys

they were told that the undertaking was subject to their withdrawal of their urgent application. They deny that it was. No response was also received to their request to Absa attorneys to agree that the transfer of 27 February 2017 will be cancelled by 30 May

2017. They as a result approached the court for an urgent interdict to stop the transfer and for the setting aside of the earlier transfer to Absa.

[11] Absa in its answering affidavit opposing the application persisted in its allegation that for the reason that the property is now registered in its name Silverstones are no longer owners of the property and therefore have no right that they can enforce against it.

[12] It also persisted with its allegation that the proposal in the form of an undertaking was made to appease the Silverstones' fears and prompt them to withdraw their urgent application to stop the sale, which they nevertheless persisted with. Absa argues that even if it were not so, the undertaking does not bestow real rights on the Applicants as it gives rise only to a possible contractual claim against Absa.

[13] Furthermore its argued on behalf of Absa that the undertaking did not extend beyond the sale in execution on 29 November 2016 and did not apply to any further sales after that date. So the undertaking did not restrict the rights of the property owner (who is Absa itself). It argues that the 2nd Respondent has been furnished with the relevant correspondence and the founding affidavit therefore is aware of the dispute and pending rescission application. It therefore argued that the effect of the undertaking was fulfilled.

[14] Lastly its argued that the Silverstones' reliance on the undertaking is misplaced as nothing in its term prevented the sale or the transfer of ownership to a third party (beyond Absa). Also interpreted it does not extend beyond instructions to the sheriff on the Sale in Execution of 29 November 2016.

- [15] Absa therefore firstly denies that there was an undertaking and then again argue that if there was an undertaking It was not unequivocal and did not prevent the sale or transfer of the property.
- [16] In reply the Silvertones confirm that the announcement was made at the sale in execution and the potential execution purchasers informed that the registration of transfer will follow the finalisation of the rescission of judgment which if granted the sale will be cancellation.
- [17] Absa's denial of the existence of an undertaking is clearly in contradiction to the e-mails they sent to the Silverstones'

attorneys on 28 and 29 November 2016. Reading those e-mails it clearly sets out what Absa was undertaking, as correctly referred to by the Silverstones it is crystal clear that the purpose of the announcement was to inform the potential execution purchasers that transfer would not take place until finalisation of the rescission that has been brought about by the Silverstones. Absa went as far as to confirm after the urgent Application was struck off the roll that it will proceed as per terms of the undertaking and did in fact get the sheriff to pronounce just before proceeding with the sale in execution of the property. It therefore cannot be true that its intention was only to appease the Silverstones not to proceed with the urgent application and when they continued they regarded the undertaking as cancelled. Their conduct is inconsistent with that assertion.

- [18] The purpose of the announcement is articulated in their e-mail of the 28 November 2016 where the attorneys advised that "the purpose of the announcement is "to inform possible purchasers that transfer will be delayed until such time as the rescission

application has been adjudicated on" and that "If your clients are successful in the rescission application then the sale will no longer be valid and enforceable by the sheriff or execution purchaser". It is therefore disingenuous of Absa to allege that they were not prevented from taking transfer of the property and to sell it to the third party. The sale of the property in execution was not definite but subject to the rescission application being dismissed and therefore did not confer any right upon the purchaser either to transfer the property to itself or to sell it to a third party. The validity of the sale remained uncertain.

- [19] In *Simpson v Klein NO & Others*, Kriegler J, although in a different context, articulated that: "In the case of immovables, however, ownership in the attached property cannot pass during the sale in execution. It only passes subsequently upon formal transfer of the property by the deputy sheriff to the purchaser in execution."

- [20] I therefore find the undertaking made on behalf of Absa to be unambiguous and from its wording unequivocal, very clear of its

purpose and fully binding between the parties. Absa having drafted the terms of the undertaking was very much aware of the limitation of its right over the property and has got itself to blame for the consequences resulting from its breach of the undertaking. The

actions it persisted with, that is the sale to the 2nd Respondent and the intended imminent transfer it is adamant must proceed notwithstanding the pending rescission application, are not only a crusade of further breaches of the undertaking but to the dire detriment and prejudice of the Silverstones as they will not have any claim against the 2nd Respondent.

[21] In Christie's law of Contract 7th Edition by G B Bradfield p253, regarding definite conditions applicable to agreements (or undertakings) it is stated that the fact that a contract is fully operative does not, however give the parties such full liberty of action as they would have if the contract were unconditional. They are bound by the contract not to do anything inconsistent with the resolutive condition. So, for example, a proposed sale by a purchaser to a third party could undoubtedly (assuming damages would not be an adequate remedy in the circumstances) be interdicted by the original seller, because if carried through it would deprive the original seller of the pes of recovering the merx if the resolutive condition were fulfilled. In *Cyster v Du Toit* 1932 CPD 345; a messenger of the court who sold the property in execution subject to a resolutive condition was held not entitled to pay the

proceeds of the sale to the execution creditor while the validity of the sale remained uncertain: see *McHardy v Olifant* 1905 ORC 42.

[22] The Silverstone have made a proper case for the interdict order sought. They have a prima facie right to protect by reason of their application for rescission of the default judgment. Absa recognised such right by agreeing that its sale of the property in execution would be subject to the outcome of the rescission application. Thus the parties subverted the common-law consequence of "the axe falling" upon the sale in execution. The sale of the property in execution to Absa was not absolute, being indefinite, Absa as a result did not possess any right to transfer ownership of the property to itself prior to the outcome of the rescission application and as a result the registration of the transfer was not bona fide and invalid. The Silverstones will inherently suffer irreparable harm if Absa is not interdicted from proceeding with the transfer of the property to the 2nd Respondent.

[23] Under the circumstances I make the following order, that:

1. The First Respondent (Absa Bank) is interdicted from proceeding with the transfer of the property described as Erf [...] Gallor Manor Extension Township, Registration Division I R, the province of Gauteng, measuring 2162, Held under Deed of Transfer T106672/2004 ("the property") into the name of the 2nd Respondent,
2. The determination of the validity of transfer of the property to Absa bank is suspended pending the final outcome of the application to rescind the default judgment obtained on 11August 2016.
3. The First Respondent is to pay the costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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