IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

25.6.2009

DATE SIGNATURE

CASE NO: 08/31825

In the matter between:

POTGIETER **Applicant**

and

GREENHOUSE FUNDING **Respondent**

J U D G M E N T

LAMONT, J:

[1] This is an application for leave to appeal against the judgment and order I made previously in this matter.

[2] The application for leave to appeal was launched late. There has been a proper explanation for the delay and I ruled that the matter be heard.

[3] The original application was an application for the following relief:

> "1. *... allowing the matter to be heard as one of urgency ...*
>
> 2. *Interdicting the second respondent from selling the property known as ...*
>
> 3. *That the sale in execution of the property known as ... be stayed immediately.*
>
> 4. *That the orders referred to in paragraphs 2 and 3 above shall remain in force pending the conclusion of an application which the applicant intends instituting for an order:-*
>
> 4.1 *setting aside the default judgment ...*
>
> 4.2 *declaring the writ of execution ... to be null and void and of no force and effect ...*
>
> 5. *The applicant shall institute the application referred to in paragraph 4 above within 20 (twenty) days of the grant of this order ..."*

[3] The urgency in the matter was that the property was due to be sold the day after the matter was heard. It is apparent that the essential relief the applicant sought was the stay of the sale

pending the institution of the appropriate rescission application (and other relief not relevant to the present matter).

[4] At the hearing the applicant submitted that the respondent had applied for a debt review in terms of section 86 of the National Credit Act No. 34 of 2005 (the Act) and that in consequence the respondent was not entitled to have instituted action and sought and obtained the judgment founding the writ.

[5] The respondent had taken what I ruled to be an appropriate step under section 129 of the Act prior to the application for a debt review. In the course of the judgment I handed down dismissing the application I found that the applicant had no reasonable prospects of the application for rescission succeeding in that basis. For that reason I dismissed the application with costs

[6] I am advised from the Bar that pursuant to the sale in execution the property was duly sold. No rescission application has been brought.

[7] I am advised by the applicant that the applicant has no other basis to obtain a rescission than that which served before me and which I found was inadequate to found an application for rescission. It is apparent from the judgment I earlier gave that my finding is

not one which creates *res judicata* on the issue of the rescission. It is merely a finding made by me *en passant* and as part of the reasoning of the application which served before me to stay the sale in execution. The respondents' counsel accepted that the statement that I made in regard to the rescission was not one which entitled it to raise the question of *res judicata*.

[8] The respondent when the application served before me today raised the issue that the order which I had made did not dispose of an issue in the matter and accordingly submitted that the order was not appealable.

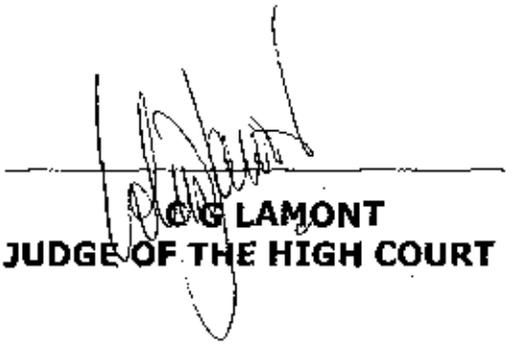
[9] If the appeal is allowed then the only order which can be made in substitution for the order which I made would be an order giving effect to the prayers staying the sale pending the finalization of the rescission application to be instituted.

[10] Such an order in my view would have no practical effect or result. Accordingly, by reason of the provisions of section 21A of the Supreme Court Act 59 of 1959 the application for leave to appeal falls to be dismissed.

[11] The question of whether or not the rescission application if it is brought is to be considered afresh by the judge hearing that

application needs to be considered. My statement in the previous judgment will have no effect on his reasoning. Accordingly, the order which I made is in any event not an appealable one. There may be other reasons why the rescission application should fail or succeed. The decision assuming it to be final and definitive on the point of law accordingly is not final in the matter. See *Maize Board v Tiger Oats Ltd and Others* 2002 (6) SA 635 (SCA) at 373 para [12]. Accordingly, I hold that the order which I made is not appealable. It follows that the application for leave to appeal falls to be dismissed with costs. The order which I make is:

Application for leave to appeal dismissed with costs.



C G LAMONT
JUDGE OF THE HIGH COURT