REPUBLIC OF SOUTH AFRICA

**SOUTH GAUTENG HIGH COURT**
**JOHANNESBURG**

**CASE NO: 2912/2013**

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

2013-04-26
DATE

SIGNATURE

In the matter between:

**JOHN SEFAKO MOKOLO** Applicant

and

**INVESTEC BANK LIMITED** Respondent

*In re*:

**KWAZULU-NATAL HIGH COURT, DURBAN**

**CASE NO: 09/8898**

In the matter between:

**INVESTEC BANK LIMITED** Applicant

and

**MOKOLO JOHN SEFAKO** Respondent

**JUDGMENT**

**KGOMO, J:**

INTRODUCTION

[1] On 28 January 2013 the applicant in this Court, John Sefako Mokolo, launched an urgent application against the respondent, Investec Bank Limited for a stay of execution of or holding of a sale in execution that was to be conducted by the Sheriff of Protea East, Acardia on 30 January 2013 at 10h00. The date of hearing of the urgent application was 29 January 2013 at 10h00.

[2] When the matter served in court on 29 January 2013, my brother, Mokgoatlheng J issued the following order:

> "...
> 1. *The Application is postponed sine die.*
> 2. *The Respondent* [Investec] *is to file an Answering Affidavit by 26 February 2013.*
> 3. *The Applicant* [Mr Moloko] (sic) *is to file a Replying Affidavit by no later than 12 March 2013.*
> 4. *The Respondent undertakes not to proceed with any sale in execution of the property known as section No 1 as shown and more fully described on Sectional Plan No SS 73/1995 in the scheme known as FG 338 in respect of land and buildings situate at Faeri Glen, Extension 24 Township, City of Tshwane Metropolitan Municipality, held by Deed of Transfer No ST*

*64211/2002 situate at Unit 1, 941 Vasval Street, Faerie Glen, on 30 January 2013 until the final determination of this application.*

5. *The costs of the application are reserved."*

[3] The applicant, a non-legal person (i.e. neither an attorney or advocate or having any legal qualification) is representing himself and advise to him that it may be very risky to continue doing so could not persuade him to obtain or acquire or procure a duly and properly qualified legal representative to assist him. He had terminated the services of his previous legal representatives.

[4] The reason for the postponement of the matter was because there had been no sufficient time or occasion between the time the application was served on the respondent and the date it served in court on 29 January 2013 for the respondent to prepare and serve any opposing papers.

[5] The requisite affidavits were indeed exchanged and this matter was argued before me on 27 March 2013. I reserved my ruling until 26 April 2013 after listening to issues that were not only perplexing or worrying, but also required that I have enough opportunity to go back into the history of this dispute.

[6] I have done so and after affording the parties again on 26 April 2013 to add to or expatiate on whatever arguments and/or submissions they made before me on 27 March 2013, I am ready with my judgment.

THE ISSUES IN DISPUTE

[7] Essentially, the applicant was seeking an interdict to stop the sale in execution of immovable property situated 941 Vasvat Street, Faerie Glen, Pretoria, specifically Unit 1 ("*the property*") which was going on sale pursuant to a judgment of the KwaZulu-Natal High Court, Durban obtained by the respondent against the applicant on 28 September 2009 ("*the judgment*").

[8] Accordingly, this Court is now called upon to decide whether the respondent should be interdicted from executing in terms of that judgment. The applicant is still appearing in person. I should repeat here, that I again warned the applicant of the possible folly of going it alone against the applicant's formidable senior counsel. He insisted he wanted to represent himself.

[9] It is the respondent's contention that no case has been made out for a stay of execution and further that the application is vexatious and an abuse of court process.

HISTORICAL BACKGROUND AND FACTUAL MATRIX

[10] The respondent obtained judgment by default against the applicant in the KwaZulu-Natal High Court on 28 September 2009. The court (Durban) also declared the property as well as other immovable properties owned by the applicant specially executable. The judgment was for payment of various

amounts outstanding and due by the applicant to the respondent pursuant to three lending agreements, the total indebtedness whereof amounting to R1 859 215,69 plus interest thereon at agreed upon rates calculated from 26 May 2009, as well as for costs of suit.

[11] On 5 October 2009 a warrant of execution was issued out of the KwaZulu-Natal High Court for payment of the said judgment debt.

[12] On 25 March 2010 the respondent's attorneys sent an e-mail to the applicant in terms of which he was fully apprised of what happened in that court, the judgment obtained against him and the warrant of execution issued pursuant thereto.

[13] A sale in execution of the property was set for 25 August 2010.

[14] On 29 July 2010, with knowledge of the sale in execution, the applicant brought an application for the rescission of the judgment – 4 months after the period within which he could or ought to have brought it had elapsed. The respondent opposed the application for rescission in the normal cause. Believing in the futility of that application the respondent notified the applicant that regardless of same, the sale in execution would still be proceeded with on 25 August 2010. This notification was made to him on 11 August 2010.

[15] On 24 August 2010, i.e. the day before the sale in execution, the applicant brought an urgent application to stay the sale. The applicant again opposed this urgent application. However, on the date of this application serving before court the parties entered into settlement negotiations and a deed of settlement was signed by and between the parties on 24 August 2010.

[16] It is the respondent's case and common cause that this deed of settlement governs the relationship between the parties. It is in the nature of a "*pactum de non petendo* and makes provision for the liquidation of the judgment debt in instalments. The terms are clear and unambiguous.

[17] For completeness sake, the salient features of the deed of settlement are as follows:

17.1 the period to period amounts due and payable by the applicant were clearly set out;

17.2 it was agreed that should the applicant fail to make payment of the instalments agreed upon in the deed of settlement timeously when due or at all, then the applicant would be entitled to:

17.2.1 issue writs for the recovery of the amounts due in terms of the judgment;

17.2.2 pursue and realise any security which it may hold for the judgment debt and its underlying *causae*;

17.2.3 issue a writ for the attachment and sale in execution of the property;

17.2.4 at its sole and exclusive election, immediately proceed to dispose of the property;

17.3 it was made clear that the deed of settlement did not constitute a variation of the judgment or a novation thereof; further that no relaxation or indulgence granted to the respondent, whether as recorded in the deed of settlements or otherwise, shall constitute a waiver of any of the respondent's rights, whether in terms of the judgment or in law as well as that neither shall the same constitute an estoppel which may be raised against the applicant.

[18] It is common cause that the applicant repeatedly and regularly defaulted on the deed of settlement. Several e-mails were exchanged between the parties wherein the applicant was reminded of his obligations under the agreement and apprised of the arrears. The applicant also sent e-mails acknowledging his indebtedness and the arrears. By 21 January 2013 the applicant was in arrears in the amount of R97 600,45 as per the

agreement in respect of one account; R15 500,00 in respect of a second account.

[19] The respondent re-scheduled the sale in execution for Wednesday, 30 January 2013 ultimately.

[20] On 15 January 2013, i.e. two weeks before the date of the sale, the applicant sent a letter (e-mail) to the respondent acknowledging receipt of the re-issued warrant of execution. Instead of tendering or making payments to bring his account up to date, the applicant indicated that he was going to ask the "*Ethics Committee*" to investigate these accounts and the respondent's conduct.

[21] On 22 January 2013 and by e-mail, the respondent's attorneys sent a response to the applicant, affording him another opportunity to meet his indebtedness under the deed of settlement. At this stage, his arrears had reached the amount of R175 000,00.

[22] The applicant's response to the indulgence afforded him was a communication stating:

> "*... I am applying for an urgent interdict in this matter ...*"

[23] Instead of immediately bringing the threatened urgent application the applicant sent a further e-mail to the applicant on 25 January 2013 proposing

that the agreement be varied to allow him to make reduced payments. He threatened that if the respondent did not agree to his proposal, he would bring a second urgent application for the stay of this second sale in execution.

[24] The respondent replied to him on the same date that the sale in execution would definitely proceed on 30 January 2013.

[25] The applicant procrastinated for three (3) more days and only launched the urgent application that precipitated these present proceedings on 28 January 2013, its date of hearing being 29 January 2013, i.e. a day before the date of sale.

[26] As stated above, Mokgoatlheng J issued the order mentioned in paragraph [2] above.

[27] The respondent argued and submitted that from the history of this matter, it was clear, on the applicant's version alone, let alone their's, that he was given numerous indulgences in relation to his indebtedness in terms of the judgment debt. They (respondents) further submitted that there exists no basis for any further stay of execution.

APPLICANT'S FURTHER PREVARICATIONS

[28] The applicant conceded in this Court that his application for the rescission of judgment was refused by the competent court. That regardless,

the applicant is now re-bringing that issue that has already been determined : He is raising arguments attacking that self-same judgment that was obtained on 28 September 2009 and which he failed to rescind. He is relying on some calculations that he has made, that go far back as the year 2007.

[29] It is common cause that the applicant has had knowledge of the judgment since March 2010 at the latest or at least. At the time of the hearing of the application for rescission the applicant chose to enter into the *pactum de non petendo*, re-negotiating terms of settlement of the judgment debt. He has clearly acquiesced therein. He does not dispute that he is in arrears with his payment and thus did not comply with the clear terms of the settlement agreement.

[30] The applicant again attempted another ruse to delay an outcome in this application. He applied to the court from the bar for this matter to be transferred from the South Gauteng High Court to another jurisdiction. Unfortunately he did not have cogent reasons or acceptable grounds why such a request should be entertained. He wisely did not pursue this aspect.

CONCLUSIVE ANALYSIS

[31] The applicant is a qualified engineer in full time employment. He also has a commercial degree. This information comes out of his replying affidavit. I formed a definite opinion from the totality of his rambling and somewhat bewildering assertions in the papers that the applicant is attempting to pass

himself off as being impecunious. The facts points otherwise. He has more than one fixed property in wealthy or sought after areas in different parts of South Africa. Certainly he is not capable of budgeting correctly so as to afford what he has acquired or he is chewing more than he can swallow. He has options open to him to solve this problem : he could have arranged with his creditors to put some or all his immovable assets on the market in closed tenders or sales with reserve prices, paid off his indebtedness and start afresh, this time ensuring that he cut his suit according to the cloth available. That can be achieved through openness to the creditors and negotiations. Certainly creditors are interested in settlements of moneys owed to them, not undeterminable amounts that may be expected from sales in executions.

[32] It is clear from the papers herein that the respondent granted the applicant various indulgences, even going to extents of agreeing debt re-scheduling as is apparent from the deed of settlement herein.

[33] The applicant has developed a habit of lying in wait and unexpectedly and at the eleventh hour approaching the court on an urgent basis to interdict or stop procedural steps undertaken by the respondent. Surely that cannot be fair? Fairness is not only reserved for consumers. Service providers, financial service providers and employers also expect that they be treated fairly when their dealings with consumers or clients "*get stuck in a groove*". As such this Court is expected to look at both sides herein and decide whether justice would not only have been done but also should be seen as having been done in its decision whether or not to grant the applicant's prayers to interdict or

stop the execution of the judgment the respondent obtained in the KwaZulu-Natal High Court.

[34] The validity or soundness of the judgment cannot be doubted or assailed.

[35] Another *maxim* that should be given effect to is the oft quoted:

"... *pacta sunt servanda* ...".

Agreements are there to be respected and acted upon.

[36] The applicant is belatedly in my view seeking to attack the original judgment which dates way back to 28 September 2009. It is my view and finding that it is too late for that. In any event I specifically asked the applicant what happened to his endeavours to rescind that judgment. His answer was definitive : his application was dismissed.

[37] It is my finding that the applicant has not made out a case for rescission of judgment or stopping of in execution. In the same breath, it is my considered view and finding that the settlement agreement he subsequently cobbled with the respondent is indicative of the fact that he in fact acquiesced in or with that judgment. He even made payments, albeit erratically, in compliance with or under that settlement agreement for over 2 years.

[38] Repeating for the sake of emphasis, even at the very latest, the applicant became aware of the judgment since March 2010. He should fall by the way-side of this aspect alone even if he could still be accommodated on the rescission issue or stopping of the sale. The issue of transferring the case to another jurisdiction is a non-starter.

[39] The applicant does not dispute the fact that he is in arrears with his repayments even when the settlement agreement is regarded as the trigger event.

[40] I do not find any cogent reason(s) why the judgment should be suspended.

[41] The applicant's complaint or concern that if the execution of the property is allowed he will be burdened with additional hardship(s) of increased monthly expenditure caused by rented accommodation is not sufficient to tilt the scales in his favour in this application.

[42] On the totality of the evidence and circumstances herein, this application stands to be dismissed, not only the application to interdict sale in execution of the attached properties, but also the application to transfer this matter to another court.

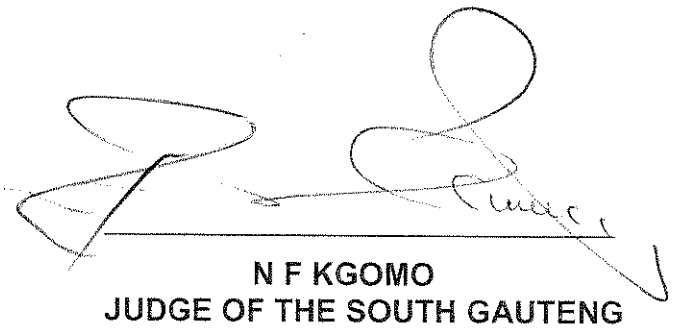
COSTS

[43] This is a typical case where costs should follow the suit.

ORDER

[44] The following order is made:

> "*The applications are dismissed with costs including the costs reserved by the urgent court on 29 January 2013.*"



**N F KGOMO**
**JUDGE OF THE SOUTH GAUTENG**
**HIGH COURT, JOHANNESBURG**

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|---|---|
| FOR THE APPLICANT | SELF |
| FOR THE RESPONDENT | ADV D C FISHER SC |
| DATE OF ARGUMENT | 27 MARCH 2013 |
| DATE OF JUDGMENT | 26 APRIL 2013 |