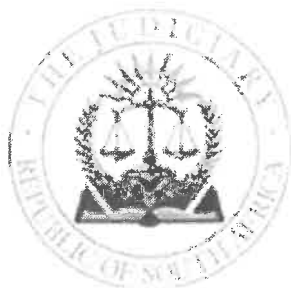


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

ON 8 AUGUST 2019, BEFORE HIS LORDSHIP MR JUSTICE VAN DER LINDE

CASE NO: 2019/25535

In the matter between:

Sekgala, Rammutlana Boelie

Applicant

and

Body Corporate Glenhurst

First Respondent

Sheriff of the High Court (Sandton North)

Second Respondent

Samuel "Sam" Mandlase

Third Respondent

Judgment

Van der Linde, J:

- [1] In this week's urgent motion court comes an application by the applicant who appears in person for the urgent declaration of a sale in execution of his Jeep vehicle on 15 July 2019 to have been invalid and of no force and effect. Ancillary relief is sought, including that the vehicle is to be returned to him. The application had come before me in the week of 23 July 2019 but I struck it from the roll for non-appearance. When later the matter was raised later before me then and an explanation given for the non-appearance, I was disinclined to re-enroll the matter because it seemed to me that relief could not be granted without the purchaser of the vehicle having been joined to the proceedings.
- [2] At that time the third respondent purchaser of the vehicle was purported to have been joined as "unnamed auction sale purchaser". At the time, the applicant explained to me that he was unable to obtain the identity of the third respondent because the Deputy Sheriff who conducted the sale in execution did not give him or could not give him the name of the purchaser.
- [3] I remained unpersuaded that I should hear the application for the setting aside of the sale in execution without the purchaser having been joined. I had in mind the provisions of s.70 of Magistrates' Courts Act 32 of 1944 in terms of which: *"A sale in execution by the messenger shall not, in the case of immovable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect."* It seemed to me that the purchaser was a necessary party and that no relief could be granted if the purchaser was not joined.
- [4] There were other problems too, including that the service of the papers on the body corporate was not by the Deputy Sheriff but by the applicant himself. I was not prepared to condone the fact that the papers had not been served by the Deputy Sheriff whose function it is to explain

– amongst other things – what are the papers were all about. The matter thus remained struck from the roll.

[5] The applicant has now re-enrolled the matter and has provided amongst other things a return of service *“of notice of re-enrolment”* by the Deputy Sheriff on *“the place of business of the body corporate”*. The notice of pre-enrolment was served on a *“clerk”*. The body corporate is the legal entity that controls and administers a sectional title scheme known as *“Glenhurst”*. A sectional title scheme does not usually have a *“place of business”*, and that is disconcerting for a reason that will appear below. Further, the return of service does not convey that the original notice of motion dated 19 July 2019 with its founding affidavit and annexures, nor the subsequent amended notice of motion with its founding affidavit, were served on the body corporate.

[6] I mentioned that the service, which is inadequate given that the papers all are required to be served and not only the notice of re-enrolment, is disconcerting; this is the reason. The notice of pre-enrolment has attached to it what is called an *“explanatory/supplementary founding affidavit”*. Assuming that that affidavit it is admitted to the proceedings, there are therefore in all three sets of affidavits, because the original founding affidavit dated 19 July 2019 was followed up by a subsequent founding affidavit attached to the amended notice of motion dated 31 July 2019, and then there is this *“explanatory affidavit”* dated 31 July 2019 as well.

[7] More importantly, from the perspective of the full papers having to be served on the body corporate, is the following. The original founding affidavit discloses that the applicant owns two sectional title units in the scheme. He was sued in 2016 in the Magistrates’ Court for outstanding levies. Default judgement was granted against him. He applied to rescind the judgement on the basis that, according to him, the summons *“did not disclose a cause of action for want of essential allegations in its particulars of claim.”*

[8] The rescission application was dismissed on 24 May 2017. The applicant noted an appeal against the dismissal of the rescission application, to the High Court, and that appeal was

opposed by the body corporate. The full bench of this division struck the appeal from the roll. The applicant applied for leave to appeal the striking off, to the Supreme Court of Appeal, but this application was dismissed. Thereafter the applicant applied to the Constitutional Court for leave to appeal, and according to the affidavit that application remains pending.

[9] The applicant argues that by virtue of section 18 (1) of the Superior Courts Act 10 of 2013 the judgement pursuant to which the Deputy Sheriff had in the meanwhile attached and sold his Jeep in execution, was suspended all along. I will deal with that submission presently, but merely point out, at this juncture, that the body corporate has a real and substantial interest in any order that this court may make on the present application, and they should therefore be properly served with all the papers. The order which I make below reflects this need.

[10] Before dealing with the applicant's argument about suspension of the judgement, I need also point out that another concern I had was the identity of the purchaser of the vehicle. As stated, when the matter was first heard by me in the urgent court two weeks ago, I was told that the applicant could not establish the identity of the purchaser. However, in the "*explanatory affidavit*" the purchaser is now identified by name and address. In this affidavit the applicant says that he was told by the Deputy Sheriff that the vehicle was sold to Mr Samuel Mandlase, and his home address was also furnished as well as his cell phone number.

[11] In this latest affidavit the applicant says that he made contact with the purchaser who told him that he had in fact bought the vehicle and have paid the purchase price for it. In these circumstances I am concerned that the purchaser has not joined to oppose the relief ardently claimed. The return of service that was handed to me yesterday reflects that the amended notice of motion and founding affidavit was served on the purchaser, "*by delivering it at the main board at the given address.*"

[12] That is a form of service which is not envisaged by the rule 4[1](a)(v) to which the return refers. That rule envisages that in the case of a corporation or company, service may be effected by delivering a copy to a responsible employee, or "*by affixing a copy to the main door of such*

office". Even if this incorrect reference may be ignored, the problem is still that there is no provision for "*delivering*" (as it happens, incomplete papers) to any "*main door*". If there is no-one on whom personally to serve the documents, then the least that is required is that the (full set of) papers are to be affixed to the main door, and not simply "*delivered*" at the main door. It follows that service on the purchaser has not taken place in accordance with the rules.

[13]The role of the purchaser is critical in these proceedings. Section 70 to which I have referred above underscores this. In the order in which I make below, I require that personal service of all the papers be effected on the purchaser. The current state of the law concerning the interface between this section and non-compliance with statutory requirements for a proper sale in execution, is a matter of considerable debate. See the minority judgement of Cloete, JA in *Menqa and Another v Markom and Others*, 2008(2) SA 120 (SCA). This is a matter in respect of which full argument would be required before a court gives judgement on it. The order below seeks to elicit further facts that may be relevant to the consideration of this issue.

[14]There is one matter left with which it is appropriate now to deal, and that is the argument about the applicability of section 18. The High Court judgement which the applicant seeks to appeal was a judgement striking his appeal from the Magistrates Court from the roll. If that striking off order should be regarded as a final order, and therefore that its operation and execution was suspended pending the appeal now to the Constitutional court (a consequence which I do not accept is necessarily correct), then – given that the appeal was against the dismissal of an application for a rescission of judgement – there is in any event nothing which could be executed upon. It would have been different if the appeal to the High Court had been an appeal against the default judgement in the Magistrates Court. But that was not the case.

[15]In the result I make the following order:

- (a) The application is postponed sine die and may not be enrolled, except a court otherwise directs, before the remainder of this order will have been complied with.

- (b) The applicant must apply on motion, served personally by the deputy-sheriff on the third respondent, and to be heard at the same time as the date for which this matter is re-enrolled, for the joinder to the main application of the purchaser of the vehicle at the sale in execution.
- (c) The main application as well as all subsequent papers must be served by the Deputy-Sheriff on the body corporate at its registered address, and on the third respondent personally.
- (d) The applicant must file a supplementary founding affidavit which must deal with the following matters raised in the applicant's founding affidavit:
 - (i) A copy of the order against which he had appealed to a full bench of this Court, which appeal was struck from the roll;
 - (ii) A copy of the order of the full bench of this Court which struck the appeal from the roll, together with a copy of the judgment of the full bench of this Court striking it from the roll;
 - (iii) A copy of the application for leave to appeal to the Supreme Court of Appeal;
 - (iv) A copy of the judgment and order of the Supreme Court of Appeal dismissing the application for leave to appeal to it;
 - (iv) A copy of the application for leave to appeal to the Constitutional Court;

- (vi) An explanation as to the outcome of the application for leave to appeal to the Constitutional Court;
 - (vii) An explanation of any facts relevant, in the applicant's view, to the applicability of rule 70 of the Magistrates' Court Rules to this matter;
 - (viii) An explanation as to precisely when and how the applicant acquired notice of the sale in execution;
 - (ix) An explanation of the steps taken by the applicant to secure return of the vehicle from when it was first attached.
- (e) The supplementary affidavit described above, together with this judgment and court order, must both be served by the deputy-sheriff on the body corporate at its registered address, as well as personally on the purchaser of the motor vehicle.



WHG van der Linde

Judge, High Court

Johannesburg

Date heard: 7 August 2019

Date judgement: 8 August 2019