IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2020/15557

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

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O. MOOKI **27 SEPTEMBER 2021**

In the matter between:

KGOADI, BOITUMELO	Applicant
and	
FIRST RAND BANK LIMITED	First Respondent
BEZUIDENHOUT VAN ZYL & ASSOCIATES INC.	Second Respondent
THE SHERIFF OF COURT (SANDTON)	Third Respondent
THE REGISTRAR OF DEEDS	Fourth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties or their legal representatives via email and by uploading same onto CaseLines. The handing down of this judgment is deemed to be 27 September 2021.

MOOKI AJ:

[1] The applicant brought an urgent application that came before the Court on 8 July 2020. She sought relief in two parts. Part A sought to interdict the respondents from effecting transfer of title of the subject immovable property. The applicant seeks declaratory relief in Part B, namely that the sale in execution of property be declared null and void; alternatively, set-aside.

[2] The applicant defaulted on a mortgage bond held by First Rand Bank Limited ("the Bank"). The bond pertained to property that the applicant purchased in 2014. The Bank issued summons and took default judgement. The Bank obtained an order on 13 July 2016, authorising the issuing of a writ of execution. This was followed by a writ of attachment on 21 July 2016. The applicant was notified of the attachment on 2 August 2016.

[3] The Bank notified the applicant that the property was to be sold in execution. The sale was scheduled for 1 November 2016. The applicant liquidated the arrears before the scheduled date. The Bank then cancelled the sale.

[4] The applicant did not pay legal costs. She later fell into arrears. The Bank scheduled a sale in execution for 7 May 2019. The applicant made payment arrangements and the Bank cancelled the sale. The applicant did not comply with the payment arrangement and the Bank scheduled a sale in execution for 27 August 2019.

[5] The applicant launched a rescission application on 15 August 2019. She then launched an urgent application on 21 August 2019, which was enrolled for 26 August 2019. Her urgent application sought to stay the sale in execution scheduled for 27 August 2019.

[6] The parties settled the urgent application. The applicant made a part payment of the outstanding arrears. She also tendered costs incurred by the Bank. The Bank cancelled the sale scheduled for 27 August 2019.

[7] The Bank notified the applicant in January 2020 that the Bank had scheduled a sale in execution in relation to the property. That followed the applicant again having failed to make payments. The sale was scheduled for 24 March 2020.

[8] The High Court in Pretoria heard the applicant's rescission application on 3 February 2020. The applicant sought to have the judgement rescinded based on what she says is a misdescription of the property and because there was no reserve price. The applicant did not attend in court when the court entertained her application. The Court dismissed the application and ordered the applicant to pay costs on an attorney and own client scale.

[9] The sale in execution took place on 24 March 2020. The property was sold on auction for R820 000.00.

[10] The applicant launched an urgent application on 8 July 2020, seeking relief as described in paragraph 1. Yacoob J granted relief sought in Part A. Her order included the applicant having to join the purchaser as a fifth respondent.

[11] The applicant did nothing after the order by Yacoob J. It appears that the Bank then took steps for the Court to consider Part B of the relief sought by the Applicant.

[12] This Court is to determine the relief sought in Part B. The applicant raises three grounds for the relief that she seeks; namely: that the Bank misdescribed the property during in the notice for the sale in execution; that the Bank did not comply with the rules on sales in execution, and that the sale took place without judicial supervision.

[13] The applicant says that the Bank did not comply with Rule 46(7)(b) in describing the property. The notification of the sale described the property as having two bedrooms, when the property had three bedrooms. The applicant submits that the description materially affected the price obtained by the sheriff at the auction. She also says that the description impacted her right in property.

[14] The applicant also contends that the property was not inspected before the auction, the effect being that bidders bid for a two-bedroom property, which had a material impact on the sale, including fetching a lower price than a three-bedroom property.

[15] The applicant submits that there should have been judicial oversight for the following considerations. The applicant paid and the agreement continued, which must mean that the Bank reinstated the agreement. The judgement and execution was therefore of no legal force and the Bank could not sell the property on auction.

[16] The applicant admits that her payment history has been disgraceful. She proffered an explanation, including that she lost her job. The Bank, on the other hand, maintains that the applicant repeatedly broke her various promises to pay.

[17] The applicant says that the Bank was no longer entitled to rely on the original writ of execution after the applicant settled the arrear payments and when the Bank cancelled the sale scheduled for 1 November 2016. She contends that the Bank is obliged to obtain a new writ of execution whenever the applicant paid off arrears and re-defaulted, as that constituted a new cause of action. The applicant contends that the Bank was no longer competent to seek to execute because the cause of action fell away when the Bank put the property for sale by execution in 2016; that the court order was carried out and the property rendered executable.

[18] The applicant continues that the applicant and the Bank entered a settlement agreement for the applicant to settle arrears and that the applicant complied. The effect of the above, according to the applicant, is that the cause of action for the execution fell away.

[19] The applicant says that the Bank had to follow a particular approach once the bank cancelled the initial sale in execution. The Bank, according to the applicant, had to place new circumstances before a court; including inviting the applicant, as debtor, to place new facts before the court.

[20] The applicant contends that "this ought to be the proper approach" because banks, otherwise, "obtain a writ, have their arrears satisfied and use the same judgement and writ for all future occasions to harass the debtor, without a court having oversight of any change in circumstances."

[21] The applicant further avers that the law changed in 2017 as reflected in Rule 46A(8), which was not the case in 2016 when the Bank obtained the court order. The change, according to the applicant, created a further right and protection for the applicant, which obliged the Bank, after 2017, to approach a court for a reserve price. The Bank did not approach the court for a reserve price.

[22] The applicant contends that it would be unfair for the Bank to execute and give transfer of the property and that the Bank should be stopped "on the basis of good faith and fairness to the applicant," as found by the Constitutional Court in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*.[1]

[23] The Bank disputes the contentions by the applicant. It maintains that the original writ remained in force until such time as the applicant had satisfied the judgement in full. The applicant had not done so, including not having paid legal costs. The applicant was also in arrears as set out in the certificate of indebtedness.

[24] The Bank disputed the other contentions as follows: it denied that Rule 46A applied, as that rule had no retrospective application; the applicant did not settle arrears and the reasonable legal costs in full; the Bank does set a reserve price, which is unknown to the public. The applicant was aware of this in her previous applications.

[25] The Bank denies that the decision in Beadica applies in the current matter, and points out that the applicant abused the court process because there is no finality to judgements more than four years since the handing down of the judgements.

[1] 2020 (5) SA 247 (CC)

[26] The submission that the judgement should not have been granted in favour of the Bank because the applicant had made payments is unsound. The applicant did not make payments and the judgement was in consequence of the applicant not meeting her obligations. It bears pointing out that the applicant did not defend the summons and the Bank took default judgement. She was in arrears in the amount of R81, 931.21 on 28 January 2020, when the Bank reminded her of the sale in execution scheduled for 24 March 2020.She was in arrears in the amount of R103, 903.89 on 12 March 2020, leading to the sale on 24 March 2020.

[27] The submission regarding the judgement being of no legal force is a disguised means to revisit the rescission application. That is not permissible. There is no warrant to disturb the judgement in favour of the Bank. That judgement specified the applicant's indebtedness. The applicant has not satisfied the indebtedness. The Bank remains entitled to have the judgement satisfied.

[28] The various authorities referred to by the applicant are not applicable. There is no authority that a writ of execution is extinguished where a bank cancels a sale in execution because a judgement debtor settled the arrears leading to the scheduled sale in execution. A cancelled sale in execution does not extinguish the indebtedness as reflected in the court order underlying the sale in execution.

[29] There is equally no support for the applicant's contention that the Bank had to submit to judicial oversight every time a bank seeks to effect a sale in execution. It would be intolerable, both on the judgement creditor and on the courts, for a judgement creditor to obtain a court order every time a new sale in execution is scheduled because the previous sale was postponed or cancelled. The cancellation or postponement of a sale in execution does not extinguish the writ of execution that underpins the entitlement to constitute a sale in execution. There could be any number of reasons for a scheduled sale in execution being cancelled or being postponed. That does not warrant intervention by a court whenever a new sale is scheduled.

[30] The issue of "arrear" payments, properly considered, does not arise in relation to a judgement creditor. That is because the whole indebtedness is encompassed in the judgement amount. In this instance, the Bank obtained judgement in the amount of R1 041 544.85. This is the applicant's total indebtedness to the Bank. The Bank is entitled to execute against that amount.

[31] Rule 66 (2) fortifies my view. I do not accept that the rule operates on a "once-off" basis, as submitted by the applicant – namely that the rules contemplate execution of a judgement in the singular meaning, according to the applicant, that a judgement creditor cannot schedule multiple sales in execution but must return to court should the first sale in execution not proceed for whatever reason. Rule 66(2) is clear that a writ of execution remains in force until a judgement has been satisfied. The applicant has not satisfied the judgement in favour of the Bank.

[32] I accept the contentions by the Bank that Rule 46A does not apply to the Bank. This Court has determined that Rule 46A does not apply to execution proceedings that commenced and were pending in terms of prior execution orders before Rule 46A came into operation on 22 December 2017.[2]

[33] This court has held that:

> Execution is the process for enforcing judgments. It commences with the issue of a writ of execution in the form prescribed by the Rules. […].[3]

[34] The Bank did not forfeit its right to execute when it cancelled the scheduled sales. The applicant had not satisfied the judgement upon which the writ of execution was issued. There was no new cause of action when the Bank cancelled the scheduled sales in execution. The Bank also did not abandon the judgement given in its favour. The applicant, as indicated, did not satisfy the judgement.

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[2] Williams and Another v Standard Bank of South Africa Ltd and Another [2019] ZAGPPHC 364 (3 May 2019), Para 38
[3] Williams, Para 34

[35] I disagree that the description of the property in the notice of the sale in execution as a 2-bedroom instead of a 3-bedroom property is a ground to declare the sale void or to have the sale set-aside. There is no requirement in law that the notice indicate the number of bedrooms. The notice gave a correct description of the property as recorded in the sectional titles scheme. Reference to “2 bedrooms” was in relation to “improvements.” The notice was explicit that the indication of the “improvements” was not stated as a fact. Members of the public had the opportunity to inspect the property if they so chose.

[36] There was no evidence to support the contention that the auction would have fetched a higher price but for the property being described as a two-bedder.

[37] I should point out that it is strictly not necessary for this court to have had to address the complaint on the reserve price and the description of the property. That is because the applicant raised the same complaints in her rescission application, which the High Court in Pretoria dismissed. The applicant is not allowed to relitigate the issues in another court.

[38] The applicant is a serial defaulter. The facts of this case illustrate why the case advanced on her behalf, that the court should intervene whenever a sale in execution is cancelled, cannot be sound law. The facts show that the Bank, if the law was as contended by the applicant, would have had to obtain at least four court orders in relation to the applicant not meeting her obligations arising from the same cause of action, namely her failure to meet her obligations under the mortgage bond.

[39] The applicant invokes the Constitution as regards “good faith and fairness” in dealings between the applicant and the Bank. The Constitution is ill-served and is debased where it is called in aid by a party to a contract freely-entered into and where that party does not meet his obligations. It is inherent in the Constitution that parties be held to their undertakings, within the bounds of the law. The applicant

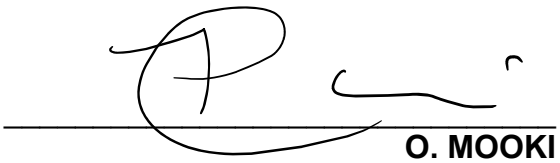
has not shown that the Bank acted contrary to the law in holding the applicant to her undertakings.

[40] The costs of the proceedings on 8 July 2020 were held over for consideration in relation to part B of the application. The applicant should be liable for those costs. The application, seen in its totality, is an abuse of the court process. The applicant did not defend summons by the Bank. She broke her undertakings to the Bank on multiple occasions, leading to the Bank cancelling scheduled sales-in-execution. She launched a rescission application that she did not prosecute. She raises essentially the same complaints in this application as she did in the rescission application. She did not comply with the court order of 8 July 2020. She did not prosecute Part B of the relief that she sought in her urgent application. It fell to the Bank, on the papers, for Part B to come before Court. The applicant would use the Court process to frustrate the Bank from effecting a lawfully sanctioned order, namely that the applicant is indebted to the Bank in the amount of R1 041 544.84.

[41] I make the following order:

1. The application is dismissed;

2. The applicant is ordered to pay costs, including the costs of the application heard on 8 July 2020.



O. MOOKI
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard:	21 July 2021
Judgment:	27 September 2021
Applicant's Counsel:	Z Khan
Instructed by:	Roy Suttner Attorneys
First Respondent's Counsel:	D Strydom
Instructed by:	Bezuidenhout van Zyl Attorneys