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

CASE NO: 2012/28961

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

09/11/2021 .....
DATE SIGNATURE

In the matter between:

	First applicant
KGOLE, MATLOU GEORGE	
KGOLE, MAPASEKA LUCY	Second applicant

and

FIRSTRAND BANK LIMITED	First respondent
U 4 ME ESTATES	Second respondent
SHAW KEVIN THULANI	Third respondent
THE SHERIFF OF THE HIGH COURT, BOKSBURG	Fourth respondent
THE REGISTRAR OF DEEDS, JOHANNESBURG	Fifth respondent

JUDGMENT

ENGELBRECHT, AJ:

Introduction

1. This case concerns the efforts of a couple whose property was sold in execution some seven years ago to undo the sale and the subsequent registration of the title to that property to a third party. This, in circumstances where the purchaser of the property at the sale in execution was dilatory in complying with an obligation to provide a guarantee, which led to the fourth respondent seeking and obtaining an order to set aside the sale in execution. That order was granted by default at a time when the guarantee had already been provided (albeit belatedly), and after the purchaser had already sold the property to a third party. In essence, the applicants (the Kgoles) contend that the registration of the property in the name of the third respondent (Mr Thulani) was unlawful. The first and second respondents, respectively being the judgment creditor that obtained authorisation for the sale in execution and the original purchaser have responded with a counter-application to rescind the order setting aside the sale in execution.

Relevant facts

2. In about July 2008, the Kgoles entered into a loan agreement with FirstRand Finance Company Limited (FirstRand Finance), and monies were lent and advanced to the applicants thereunder, to enable the applicants to acquire [….] (the Property). As security for the repayment of the monies lent and advanced, a mortgage bond was registered over the Property.

3. Then, in 2012, the Kgoles fell into arrears. FirstRand Finance ceded its rights under the loan agreement to the first respondent (FirstRand) and FirstRand proceeded with foreclosure proceedings. The foreclosure proceedings were opposed, but on 10 February 2014, by brother Wepener J granted judgment in favour of FirstRand. Pursuant to the Property being declared specially executable, and a writ of execution having been issued, the Property was sold to the second respondent (U 4 Me) at a sale in execution held on 11 July 2014.

4. Clause 2.4 of the conditions of sale in execution of the Property (the Conditions) provided that:

"*This sale shall only come into effect upon the purchaser and the Sheriff signing these Conditions and the Purchaser making payment of the deposit and Sheriff's commission, failing which this agreement shall be of no force and effect"*.

5. Clause 3.1 of the Conditions provided that "*If the Sheriff makes any mistakes in selling, such mistake shall not be binding on any of the parties, but may be rectified"*.

6. In terms of clause 5.1(a) of the Conditions, the U 4 Me was to pay a deposit of 10% of the purchase price in cash immediately upon signature of the Conditions by the fourth respondent (the Sheriff), and

"*the balance against transfer to be secured by a bank or building society guarantee, to be approved by the Execution Creditor's Attorneys, to be furnished to the Sheriff within 21 (twenty one) days after the date of sale."*

7. Notably, clause 6 of the Conditions provided that the purchaser would be entitled to possession of the Property "*immediately after the fall of the*

hammer and signing of the sales conditions, payment of the initial deposit and the auctioneer's commission".

8. Clause 11.1 provided that:

"*if the Purchaser fail [sic] to comply with any of the conditions of this agreement, the sale may be cancelled by a judge summarily on application by the Sheriff after due notice having been given to the Purchaser by way of serving the application on the Purchaser at the address chosen by the Purchaser as his domicilium citandi et executandi. In the event of the sale being cancelled as a result of the Purchaser's default, the property may again be put up for auction and the Purchaser will be liable for any loss or damage suffered by the Judgment Creditor or the Sheriff as may be determined by a judge after due notice being given to the Purchaser."*

9. U 4 Me complied with the conditions of sale by paying the required deposit. However, it failed to secure payment of the balance of the purchase price by furnishing the Sheriff with a bank or building society guarantee within 21 days of the sale in execution.

10. In the result, on about 25 August 2014, the Sheriff issued an application for an order cancelling the sale in execution and authorising the Sheriff to sell the Property in execution once more. On 3 September 2014, the notice of motion and annexures were served on U 4 Me Estates.

11. On 19 September 2014, U 4 Me provided the guarantee required of it by the Conditions.

12. On 3 October 2014, the Sheriff granted a power of attorney to a conveyancer at Hammond Pole Attorneys to effect registration of transfer.

13. On 5 October 2014, U 4 Me then sold the Property to the third respondent (Mr Thulani).

14. Despite these developments, the Sheriff on 7 October 2014 proceeded to lodge the application to cancel the sale in execution in terms of rule 46(11). The order cancelling the sale in execution was granted by my brother Coppin J on 27 October 2014 (the Order). However, the Sheriff did not act upon the Order, presumably in circumstances where the Sheriff accepted the provision of the guarantee. Notably, in the answering affidavit filed on behalf of FirstRand, the deponent asserts that:

    14.1. "*During the period after the Rule 46(11) application was lodged and the 26th November 2014, the First Respondent's attorneys regularly followed up with the offices of the Registrar of the above honourable court to determine if the Rule 46(11) order had been granted but during this entire period they were never provided with a copy. The attorneys therefore proceeded to lodge transfer papers on the assumption that no Rule 46(11) order had been granted*"; and

    14.2. "*It was at all relevant times, subsequent to the provision of the guarantees by [U 4 Me], the intention of [FirstRand], [U 4 Me] and [the Sheriff] that the Property be sold to [U 4 Me]*".

15. On 26 November 2014, the Property was registered in the name of Mr Thulani.

16. The Kgoles launched the present application (the main application) in July 2019. That is when FirstRand and U 4 Me became aware of the existence of the Order cancelling the sale in execution. In answer to the main application, FirstRand and U 4 Me raised counter-applications. They seek an order rescinding and setting aside the Order, on the basis that it was erroneously sought and granted (the rescission applications).

Issues for decision

17. The main application is premised on the Order. If the Order was erroneously sought and granted, as FirstRand and U 4 Me contend, it must be rescinded and the main application must fail. The rescission applications must accordingly be considered first. If, in the view of this court, the rescission applications must fail, then the merits of the main application must be adjudicated upon.

The rescission applications

18. The rescission applications are based on rule 42. Rule 42(1)(a) provides that the court may *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or granted in the absence of a party affected thereby. Rule 42 constitutes an exception to the general rule that, once a court has duly pronounced a final judgment or order, it has itself not authority to set it aside or to correct, alter or supplement it. The purpose of rule 42 is "*to correct expeditiously an obviously wrong judgment or order"*.[1]

19. In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.[2]

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[1] *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E–F; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417B–I; *Kili v Msindwana in Re: Msindwana v Kili* [2001] 1 All SA 339 (Tk) at 345.

[2] *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D–G; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153C; *Rossitter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) at para 16; *Thomani v Seboka NO* 2017 (1) SA 51 (GP) at 58C–E; *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 366E–367A.

20. When an affected party invokes rule 42(1)*(a)*, the question is whether the party that obtained the order was procedurally entitled to it.[3] If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence.

21. In the present case, it is common cause that the Order was granted in the absence of FirstRand and U 4 Me, and also in the absence Mr Thulani, who had by then acquired the Property and who patently had an interest in the relief that was being sought. FirstRand and U 4 Me were aware of the launch of the application, but in circumstances where the guarantee had been rendered, they assumed that the application would not be proceeded with. At worst for them, they were negligent in not taking steps to ensure that the Sheriff would not proceed with moving the application, but that does not amount to wilful default that would preclude the grant of the relief sought.

22. The only true question is whether it can be said that my brother Coppin J would have granted the Order had he been made aware of the facts and circumstances that included provision of the guarantee by U 4 Me (albeit belatedly), the grant of the Power of Attorney to the conveyancer by the Sheriff and the on-sale of the Property to Mr Thulani, all of which had occurred prior to 7 October 2014. It is my considered view that the Order would not have been granted had these facts been brought to the attention of the Court at the time that the application was moved. By that stage, all requirements for the sale had been complied with. U 4 Me was *bona fide* in

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[3] *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465H and 467G–H.

on-selling the Property, as was Mr Thulani in purchasing it. A proper legal and factual basis for rescinding the Order exists.

23. However, the Kgoles contend that the rescission applications are defective, in circumstances where FirstRand and U 4 Me did not file notices of motion when they raised the rescission applications in their answering affidavits. They also complain of the lateness of the filing of the answering affidavits.

24. Insofar as the lateness is concerned, the answering affidavit contains an explanation for the delay, which includes the need to retrieve files dating back to 2012. This is an appropriate case for condonation to be granted for the late filing of the answering affidavit. It is in the interests of justice, and aligned with the duty of this Court to grant just and equitable relief, that the version of the respondents to the main application not be disregarded.

25. The complaint that no notice of motion was filed together with the counter-application does not stand in the way of granting relief: Erasmus *Superior Court Practice*[4] makes the point that "*a notice of motion would seem to be unnecessary*" where a counter-application is brought. In *Commissioner, South African Revenue Service v Public Protector*,[5] reversed on appeal only in respect of the personal costs order against the Public Protector in *Public Protector v Commissioner for the South African Revenue Service*,[6] it was held[7] that if there are more parties than one to the main application, a counter-application should be brought on notice of motion and served on all the other parties. In the present case, the counter-application is as against the Kgoles, who act as one in the main application. The consideration that

[4] RS 16, 2021, D1 – 82.

[5] 2020 (4) SA 133 (GP).

[6] 2021 (5) BCLR 522 (CC).

[7] At paras 42 – 43.

no notice of motion was necessary in the circumstances does not apply in the present case. The Kgoles were advised precisely what the nature of the relief sought in the counter-application was. They cannot avoid adjudication on the basis of the technical objection.

The main application

26. In circumstances where this Court considers that that the rescission applications appropriately fall to be granted, the main application must be dismissed. Nothing more need be said about that application.

27. For the sake of completeness, this Court records that it would in any event not be in the interests of justice to grant the relief sought in the main application.

27.1. The sale in execution took place on 11 July 2014, U 4 Me met the requirement of providing the guarantee in early September 2014, and the Property was sold to Mr Thulani and registered in his name in November 2014.

27.2. The main application was issued on 8 July 2019, and served on 9 and 10 July 2019. This, despite the fact that Mr Thulani had brought eviction proceedings against the Kgoles by as early as September 2015 (which were successful). Essentially, they say that they only became aware of the "*unlawfulness"* of the sale of the Property in early 2019, when a newly appointed attorney discovered the Order.

27.3. Even if the Kgoles were successful in their application, the Kgoles would be no better off. Importantly, as the deponent for FirstRand points out in the answering affidavit, the Kgoles "*have not sought*

any order rescinding or setting aside the honourable court's execution order and the writ of execution authorizing [the Sheriff] to sell the Property on auction. … In light of the above, the order/s sought by [the Kgoles] in this application will have no practical effect as [the Kgoles] would still not be entitled to the Property. The [Sheriff] would still be obliged to sell the Property on auction". The simple point is that the Kgoles, upon the grant of the order declaring the Property specifically executable lost their right to claim any entitlement to the Property.

28. The Kgoles would ask this Court to "*unscramble the egg"* some seven years later, essentially on the basis that U 4 Me paid the guarantee out of time, to the detriment of FirstRand for whose benefit the Sheriff sold the Property in execution and to the obvious detriment of Mr Thulani, who has been the registered owner of the Property for all this time. The basis for such invasive relief simply does not exist.

29. It is true that the sale in execution had been cancelled by the Order, but that position has now been rectified.

30. It is also useful to have regard to the treatment in law of the consequences of a sale in execution where a rescission application has been brought in respect of the order declaring a property specifically executable and authorising a sale in execution.

30.1. It has been accepted in the case law that where a judgment is rescinded after a sale in execution had taken place <u>*but before transfer of the property to the purchaser had taken place*</u>, the owner of the property is entitled to seek an order setting the sale in execution aside and interdicting the transfer of the property to the

purchaser at the sale in execution. See, for example, *Vosal Investments (Pty) Ltd V City of Johannesburg;*[8] *Jubb v Sheriff, Magistrate's Court, Inanda District; Gottschalk v Sheriff, Magistrate's Court, Inanda District.*[9]

30.2. However, where the sale in execution has been perfected by registration of transfer in the case of immovables to a *bona fide* purchaser who had no knowledge of the judgement debtor's proceedings for the rescission of the judgement or where transfer of ownership has been effected prior to the institution of the rescission proceedings, the judgement debtor is *not entitled to recover possession of the property* in question, unless it can be established that the judgment and/or the sale in execution constituted a nullity.

31. Notably, in *Legator McKenna Inc. and Another v Shea and Others*[10] the Supreme Court of Appeal held that a property had been validly transferred, notwithstanding the fact that the transfer was effected by virtue of an invalid agreement of sale (*inter alia* for non-compliance with the requirements of section 2(1) of the Alienation of Land Act No 68 of 1981). The Court held that the abstract theory of transfer applies to the transfer of both immovable and movable property. Since there was no defect in the real agreement, the property was validly transferred to the second respondent in that instance.[11] The abstract theory for the passing of ownership was also accepted by the Supreme Court of Appeal in *Du Plessis v Prophitus and Another*[12] and

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[8] 2010 (1) SA 595 (GSJ)

[9] 1999 (4) SA 596 (D) at 605F-G.

[10] 2010 (1) SA 35 (SCA)

[11] See paras 21 – 24.

[12] 2010 (1) SA 49 (SCA).

Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others.[13] IN paragraph 12 of the latter judgment, Shongwe JA held as follows:

"It is trite that our law has adopted the abstract system of transfer as opposed to the causal system of transfer. Under the causal system of transfer, a valid cause (iusta causa) giving rise to the transfer is a sine qua non for the transfer of ownership. In other words, if the cause is invalid, e.g. non-compliance with formal requirements, the transfer of ownership will also be void - See Carey Miller 'Transfer of Ownership' in Feenstra & Zimmerman Das Römisch-Holländische Recht 537; 'Transfer of Ownership' in Zimmerman & Visser Southern Cross: Civil Law and Common Law in South Africa 727 at 735-9. Under the abstract system the most important point is that there is no need for a formally valid underlying transaction, provided that the parties are ad idem regarding the passing of ownership: Meintjes NO v Coetzer 2010 (5) SA 186 (SCA)."[14]

32. It is on this basis that immovable property validly sold in execution at judicial sales cannot, as a general rule, after registration of transfer be vindicated from a *bona fide* purchaser. Indeed, it was held by Van den Heever JA in *Sookdeyi v Sahadeo*[15] that it was a principle of the common law that a perfected sale in execution should after transfer or delivery of the subject matter not be lightly impugned and that the reluctance to rescind perfected sales in execution has been received in our case law.

[13] 2011 (2) SA 508 (SCA).

[14] Emphasis supplied.

[15] 1952 (4) SA (A) at 571G-572B

33. Given these considerations, the main application would have been met with significant challenges even in the absence of the rescission applications.

34. Finally, this Court wishes to express its displeasure at the conduct of the legal representatives of the Kgoles, who in submissions to this Court made allegations of fraud that were entirely unsubstantiated. U 4 Me and its representatives entertained the *bona fide* belief that the sale in execution could be given lawful effect once they had responded with payment of the guarantee. This belief was supported when the Sheriff granted a Power of Attorney to the conveyancing attorneys. There was no reason for U 4 Me to believe that there was anything unlawful about the on-sale to Mr Thulani, or for Mr Thulani to believe that there was anything untoward about his purchase of the Property and the registration of title that followed it. Submissions that another party acted fraudulently should not be made lightly, and they were made entirely inappropriately in the present case.

Costs

35. In the ordinary course, costs follow the result.

36. In the present case, the Kgoles launched the main application on the advice of their attorney, Mr Hadebe, who advised that the transfer of the Property had been unlawful, in circumstances where the sale in execution had been set aside on 27 October 2014. This was not an unreasonable position to adopt in the circumstances. The application was then met with the counter-application for the rescission of the Order. The Kgoles might have been better advised not to have pursued the main application in the circumstances of the case, but their decision to proceed with the main application was not

so unreasonable in the circumstances of the case that they ought to be mulcted in an adverse costs order. The consequence of the application initiated by the Kgoles is that the Court has ultimately been placed in a position to set aside the Order of Coppin J and to regularise the position for the benefit of all parties to this litigation. The discretion of this Court in respect of costs is exercised against the grant of an adverse costs order against the Kgoles, particularly in circumstances where there appears to be little practical benefit to grant a costs order against them given the financial predicament in which they find themselves.

Conclusion

37. In the circumstances, I make the following order:

37.1. The order of Coppin J of 27 October 2014 under case number 2012/28961 is rescinded;

37.2. the application to set aside the registration of the transfer of [….] (the Property), under case number 28961/2012, is dismissed.

37.3. Each party shall bear its own costs in the application and the counter-application.

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MJ ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 NOVEMBER 2021.

Date of hearing: 13 August 2021

Date of judgment: 9 November 2021

Appearances

For the applicant: ZD Kela

Instructed by: T Hadebe Attorneys

For the respondent: D Van Niekerk