

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 67730/2009

Date: 17 April 2014

Not reportable

Not of interest to other judges

In the matter between:

T[...] R[...] T[...]

APPLICANT

(Executor of the Deceased Estate of J[...] S[...] T[...])

and

TRANSNET LIMITED

RESPONDENT

JUDGMENT

HUGHES J

1. In this application the applicant seeks the following order:

1.1 Rescinding the default judgment granted against the applicant under case number 2009/67730 which, declared the immovable property below executable:

ERF [...] E[...] TOWNSHIP REGISTRATION DIVISION I.R PROVINCE OF GAUTENG IN

EXTENT OF 500 SQUARE METRES HELD BY DEED OF TRANSFER T[...]

1.2 That the applicant be granted leave to defend the matter;

1.3 Costs of this application be costs in the cause except in the event that this application be opposed, in which event the applicant request costs of the application,

2. Briefly, this matter commences from the premise that the applicant is the executrix of the deceased estate of J[...] S[...] T[...] (“J[...]”). J[...] was employed by the respondent before his death. During his employment with the respondent on 3 February 2000 he entered into a loan agreement with the respondent. This loan was secured by a mortgage bond over ERF [...] E[...] TOWNSHIP (“the property”).

3. J[...] died on 18 November 2002 with the applicant being appointed as executor on 14 February 2003. On 25 January 2010 the respondent served a summons dated 30 October 2009 on the deceased’s *domicilium citandi et excutandi*. It was recorded on the return that the address that service was effected upon was [...] H[...] Street, E[...]. In addition the return also indicated that it was served on the owner Ms Flora Msasa. It is noted that the property ERF [...] E[...] TOWNSHIP, physical address, is recorded as [...] H[...] Street E[...]. It is also interesting to note that when the summons was drawn up and served the deceased had been dead for seven years.

4. On 15 July 2010 the respondent obtained default judgment for the amount of R34 462.42 and on 8 June 2011 the property was sold by auction. Though the property was sold in execution on 8 June 2011, it was only transferred to the current owners on 12 December 2011. Sometime in September the current owner approached those that were resident on the property to vacate the property. This is the first time that the applicant became aware that the property had been attached and sold. The current owners then launched eviction proceedings as the occupiers did not vacate the property as requested. Thus by September the current owners were aware that there was an issue with regards to the ownership of the property and knowingly they proceeded with the eviction proceedings.

5. During September 2011 the applicant conducted investigations and the necessary enquiries. This is how the applicant became aware of the default judgment taken and the sale in execution of the property.

6. Even though the applicant launched a counter application on 2 April 2012 seeking the stay of the eviction, the current owners obtained an eviction order on an unopposed basis on 2 August 2012. This order was duly rescinded by consent on 10 October 2012. With the stay of eviction in place, on 7 February 2013 the applicant was granted leave to institute this current application.

7. According to the applicant, about early 2003, pursuant to the deceased death she personally attended on

the respondent and was informed by the respondent that no amounts were payable in terms of the bond as the life policy that the deceased had covering the bond would settle all outstanding amounts owing on the bond.

8. The applicant's main contention amongst others was that the court which granted the default judgment would have never done so if it had been appraised of all the relevant facts. I was referred to the headnote, which I think is apt to quote at this stage, of **Gundwana v Steko Development and Others 2011 (3) SA 608 (CC) at 608C-E:**

"Sale of homes in execution after judgment on money debt: constitutionality of current practice

Since it is established that execution may only follow upon a judgment in a court of law, and that judicial oversight is required where execution is sought against the homes of indigent debtors after the judgment on a money debt, the High Court rules and practice that allow registrars to grant orders declaring such property specially executable are, bearing in mind the constitutionally entrenched right to housing, unconstitutional. *Bond holders who wish to execute on a mortgage bond must first approach a court of law for it to make a proper determination as to whether the sale in execution of a person's home is justifiable in the circumstances of the case.*"(Paragraphs [41], [49]-[50], [53] at 623E-F, 625D-G and 626C-E.) [My emphasis]

9. Further pertinent submissions made by the applicant was the non-service of the summons as well as the section 129 letter or notification in terms of the National Credit Act 34 of 2005 on the correct address of the applicant. In addition and to me most importantly the respondent had failed to comply with section 30 of the Administration of Estates Act 66 of 1965. There were a host of other submissions which I do not propose to go into.

10. The respondent raised *a point in limine* that this application for rescission was out of time by eighteen months; taking into account that September 2011 was the period when the applicant became aware of the default judgment. The respondent further submitted that the applicants delay in acting upon the knowledge that the property was to be sold and allowing the transfer of the property to go through, created a situation where the applicant had now lost her right to have the sale in execution set aside.

11. In dealing with the aspect of the delay of eighteen months, the applicant has provided an explanation, that as soon as she became aware of the property having been sold by the eviction request, the emphasis was to avoid being evicted from the property at all costs. After this was averted, the stay of the eviction, she then proceeded to obtain leave to institute this rescission application.

12. The explanation provided is a reasonable explanation and in the circumstances permits me to grant the applicants condonation when weighing up the delay as against the merits and prospects of success of the

rescission application. Condonation is duly granted.

13. In examining the second aspect raised as a *point in limine*, I take into consideration that the applicant became aware that the property was sold, on its own version on or about September 2011. The transfer of the property only took place on 12 December 2011. I am of the view that when the transfer took place the current owners were well aware that there was a real risk to their rights as purchasers. Even so they still went ahead with the transfer of the property in December 2011, having become aware in September 2011, that their rights may be affected by the existing occupiers and applicant.

14. In my opinion the merits of the current rescission application and the second *point in limine* raised are interwoven, thus I propose to deal with both simultaneously.

15. The present case deals with a situation where the current bona fide owner purchased the property on auction. The said auction arose from a default judgment obtained by the respondent seven years after the deceased's death. The summons was served on the wrong *domiliuim* address, as is evident from paragraph (3) above. On an inspection of the summons, the document cites the deceased as the respondent, when in fact the respondent cited was already deceased. Default judgment was granted on 15 July 2010 against the deceased who had died on 18 November 2002. When default judgment was granted the executor had already been appointed as far back as on 13 February 2003 to the deceased's estate.

16. The applicant had submitted that the judgment was granted in contravention of section 30 of the Administration of Estates Act as the executor of estate had not been cited but rather the deceased. Further, the summons was not even served on the correct *domililium* address. The applicant submits that the respondent cannot contend that it was not aware that the deceased was no longer alive as the insurance on the life of the deceased paid out on the debt due on the bond and in doing so paid off the balance of what was due. This balance is what the respondent alleges its claim as against the deceased is based on.

17. Section 30 of the Administration of the Estates Act was dealt with in **Knox NO v Mofokeng and others 2013 (4) SA 46 (GSJ) at page 59:**

In De Faria v Sheriff High Court, Witbank 2005 (3) SA 372 (T) it was held that non-compliance with the provisions of s30 resulted in a nullity, as the wording contained in s30 was clearly couched in peremptory and negative language. The court took into account that a criminal sanction was imposed in s102 (1) (h) in the event of the provisions of s30 not being adhered to, and that recognition of a sale in contravention of the section would give legal sanction to the very situation which the legislature sought to prevent. The court found that the purpose of the provision was to ensure that every creditor and heir received what they were entitled to, without preference, if sales in

contravention of s30 were not visited with nullity, those intentions would be frustrated, the Master would have no control over the liquidation and distribution process, and statutory procedures would be circumvented. Accordingly, the court held that the sale in execution in contravention of s30 of the Act was invalid. In Wright v Westelike Provinsie Kelders Bpk 2001 (4) SA 1165 (C) it was held that the provisions of the Administration of Estate Act displaced the common-law right to proceed against a debtor. The provision of s30 gave expression to public policy, in that execution of a judgment against a deceased was required to be completed by means of a claim against the executor appointed under the Act. Accordingly, the judgment obtained against the deceased was not executable against any property which formed part of the estate, unless the Master or the court otherwise directed. ”

18. The scenario set out above is the exact position that the applicant finds itself in in this instance. As such I am of the opinion that, that which is set out above is duly applicable in this matter before me. The default judgment could have never taken place, further it is clear that there could not have been a sale in execution without an order by either the Master or the court. The sale in execution of property in this matter which was under the control of the applicant, who was not cited as a party, is thus a nullity and not valid.

19. If the sale of the property was a nullity and not in accordance with the applicable procedure, then it stands to reason that the sheriff had no right to sell the said property to the current bona fide owner. In terms of the "golden rule" of the law of property, the sheriff did not have the right to sell the property because 'one cannot transfer more rights to another than what one has'. See **Knox NO v Mofokeng and others (supra) at page 56.**

20. In conclusion as the sale was a nullity and the transfer could never have taken place, the applicant has demonstrated that she has valid grounds for the default judgment to be rescinded and the applicant is therefore entitled to the order sought.

21. Accordingly I make the following order;

21.1 The default judgment granted against the applicant under case number 2009/67730 which, declared the immovable property below executable: ERF [...] E[...] TOWNSHIP REGISTRATION DIVISION I.R PROVINCE OF GAUTENG IN EXTENT OF 500 SQUARE METRES HELD BY DEED OF TRANSFER T[...] is duly rescinded

21.2 The applicant is granted leave to defend the matter;

21.3 Costs of this application follow the result and are awarded to the applicant.

W. Hughes Judge of the High Court

Delivered on: 17 April 2014

Heard on: 17 March 2014

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