



IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

CASE NO: 2009/5700

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED ✓
8.10.2014	
DATE	SIGNATURE

In the matter between:

KEITUMETSE PATRICIA MAHLANGU

AND

PAFORMA PROPERTY FINANCE (PTY) LTD

(CURRENTLY T/A BETTER LIFE GROUP)

REGISTRAR OF DEEDS, JOHANNESBURG

SHERIFF OF THE HIGH COURT, BOKSBURG

NEA INCORPORATED

PETER ALBERTYN

MARIA ALBERTYN

ARLINGTON JOSEPH MAHLANGU

JOPA PROPERTIES REAL ESTATE CC

APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

SIXTH RESPONDENT

SEVENTH RESPONDENT

EIGHT RESPONDENT

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] On urgent basis, the applicant brought this application, seeking an order in the following terms:

1. “Hearing this application as one of urgency in accordance with the provisions of Rule 6(12) and dispensing with the usual forms, time limits and procedures as laid down in Rule 6(5) and condoning the Applicants’ (sic) failure to comply with the provisions of Rule 6(5) strictly;
2. pending the outcome of an Application for Rescission of Judgment taken by the First Respondent against the first Applicant, seventh and the Eighth Respondent under case number 3227/2008 in the Boksburg Magistrates Court by default on the 17th of June 2008, the Applicants (sic) seek the following interim relief:

2.1 The Respondents are hereby interdicted and restrained from transferring the immovable property described as Portion 46 of ERF 192, Klippoortjie, Registration division A.L. measuring approximately _____ square metres in extent to the Fifth and Sixth Respondent or any other party whatsoever and under any circumstances;

2.2 Interdicting and restraining the Respondents from submitting any documents to the second Respondent for the purposes of effecting transfer of the property into the name (sic) of the Fifth and Sixth Respondent.(sic)

3. Directing the Respondents to pay the costs of this Application in the event of any Respondents opposing the relief sought herein;

4. Further and/or alternative relief.”

BACKGROUND

[2] The applicant was married to the seventh respondent in community of property on 25 May 1985. On 09 June 1993, and at the Central Divorce Court, the parties were divorced from each other. Their decree of divorce is annexure “A” to the founding affidavit. The applicant after their divorce purchased Portion 46 of Erf 192 of Klippoorjie AL (the “immovable property”). A nurse by profession, she decided to go and work for more money in Muscat, Orman. She left behind her three children who were later joined by the seventh respondent, notwithstanding their Divorce. The applicant contended that the seventh respondent established the eighth respondent. Evidence shows that she and the seventh respondent, in equal shares, are the only members of the eighth respondent. It is her further contention that, that notwithstanding, she had nothing to do with the running of the eighth respondent. She further contended that the seventh respondent interacted with attorneys and did not need her as she had nothing to do with the running of the eighth respondent. ABSA bank registered a bond over the immovable property as it helped her procure the property. The first respondent and the eighth respondent concluded a Master Commission sale agreement in terms of which the first respondent, financially, assisted the eighth respondent. The eighth respondent ended up owing the first respondent. The seventh respondent participated in the deal. The first respondent contends that the applicant bound herself to the first respondent as surety and co-principal debtor, jointly and severally with the eighth respondent (the principal debtor)” for the proper and timeous payments by the principal debtor of any amounts whatever owing (including damages of whatever nature) and all legal costs as on the scale as between attorney and own client, which the principal debtor may now or in the future owe to the company (the first respondent) arising out of any agreement concluded between the company and the principal debtor including all claims, or compensation or damage which the company at any time may have

suffered as a result of breach, cancellation or termination of any agreement. This included punctual performance by the principal debtor of the principal debtor's obligations under or arising or flowing from or incidental or relating to any agreement which also included obligations for any damages (whether actual, contingent, or potential), costs and expenses for which the principal debtor may now or in the future owe to the company. The applicant denied that she concluded or signed a deed of suretyship as alleged. She demanded a copy of the suretyship she was alleged to have signed. She was furnished with a copy of the alleged deed of suretyship without the last page thereof.

- [3] The First respondent contends that the principal debtor defaulted and that then resulted in the action which it brought against the applicant, the seventh and the eighth respondents.
- [4] The first respondent obtained default judgment against all three of them. The judgment, according to the first respondent, was followed by a warrant of execution in respect of the movable property. The first respondent then sought and obtained an order declaring the immovable property executable. This was done by this court. The order was granted by Du Plessis J on 27 March 2009.
- [5] The first respondent contends that the warrant of execution against the immovable property was followed by the attachment of the property. The sale of the property, it is contended, was arranged but cancelled or stayed a number of times either at the instance of the seventh respondent or the applicant. The applicant denies any involvement in any cancellation. The sale, according to the first respondent, was stayed a few times when the property would be bought either by the seventh respondent or the applicant. The cheques that were given as payment for the property were never honoured. The first respondent contends that on 11 June

2014 the immovable property was finally purchased by the fifth and sixth respondents who are referred to as the “*bona fide* third party”.

- [6] The first respondent’s case is that “the summons was served on the applicant personally on 16 May 2008. It is alleged that the warrant of execution against the movables was served on the applicant personally on 19 August 2008, the notice of motion to declare the immovable property executable was served on the applicant personally on 12 February 2009; the applicant and the seventh respondent attempted to purchase the immovable property but that the cheques used for the purpose were dishonoured. The *bona fide* third party purchased the property; the applicant co-signed the master commission sale agreement. The applicant has been represented by at least five sets of attorneys within a period of 6 years. It is further contended that the applicant is now creating the defence of the missing last page. Du Plessis J declared the immovable property executable in an open court and not the registrar. The applicant is now said to be owing R199 347.87. Mr Hamman, for the first respondent, submitted that the applicant has not proved the necessary requirements for the interdict that she seeks and that the application should be dismissed with punitive costs.
- [7] The applicant contends that: She never received the summons; she first discovered that the immovable property was to be auctioned when she was alerted thereto on 12 August 2013; she could have taken the necessary steps had she been aware that the property was sold in execution on 18 May 2014; she did not sign the deed of suretyship and was never involved in the running of the eighth respondent; that the judgment declaring the property executable was granted by the registrar without any judicial oversight, she has various movable items which the sheriff could have seen if he cared to; the first respondent overall claim is R41 222.80; that she did everything possible to protect her property as soon as she discovered that judgment

had been taken and upon knowing that the immovable property was to be sold in execution. It is her case that she has made out a case for the relief that she seeks.

[8] ISSUES

The issue is whether the applicant made out a case for the relief that she seeks

[9] It is common cause:

9.1 that the immovable property was purchased by the applicant alone and that same was registered in her name;

9.2 that the applicant was married to the seventh respondent and that they are now divorced;

9.3 that the eighth respondent has, as its members, the applicant and the seventh respondent;

9.4 that the first respondent and the eighth respondent concluded a master commission sale agreement.

9.5 that the last page of the deed of suretyship which the applicant is alleged to have signed is missing.

9.6 that the immovable property that has been declared executable is portion 46 of Erf 192, Vosloorus extension 3 held under Title deed T8084/2002.

9.7 that the immovable property that was sold in execution is: portion 46 of Erf 192, Klippoortjie AL, the immovable property that the applicant purchased and got registered in her name.

9.8 that the second, third, fourth, fifth and the seventh respondents do not oppose the application.

[10] The applicant, as already alluded to above, on urgent basis, brought the application to interdict and restrain the respondents from;

10.1 transferring the immovable property to the fifth and the sixth respondents or any other party whatsoever and under any circumstances; and

10.2 submitting any documents to the second respondent for the purposes of effecting transfer of the property into the name of the fifth and sixth respondents pending the outcome of an application for rescission of judgment taken against the applicant, seventh and the eighth respondents.

[11] The applicant, in her founding affidavit, explains what happened after she and the seventh respondent were divorced. Her explanation is that the eighth respondent, used by the seventh respondent, got indebted to the first respondent. Creditors kept on knocking on her door looking for the seventh respondent, who, according to her, owed them money. The contention is that even the sheriff brought some documents destined for the seventh respondent as she was specifically requested to give the documents to the seventh respondent. She, as a result, had to ask the seventh respondent to leave her house and he did.

[12] She denies that she signed the deed of suretyship; that she found herself as surety and as co-principal debtor for the due payment of the money that the seventh respondent owed the first respondent. It is noteworthy that no one, at this stage, has the last page of the deed of suretyship. Advocate J G C Hamann (Mr Hamann), for the first respondent, also so conceded.

[13] The property that has been declared executable is not the applicant's property. The two immovable properties are different as the one is in Vosloorus while the other is in Klippoortjie.

[14] The applicant's property is referred to in Tlhapi J's order cancelling the sale of property and authorising the resale thereof. The court's order is dated 25 July 2012. What is not clear, however, is as to where and how the amendment was effected substituting the immovable property that was declared executable with that of the applicant. The first respondent is silent on this.

- [15] Mr Hamman, for the first respondent, submitted that there was no prospect of success in the application for the rescission of the default judgment that was granted by the Boksburg Magistrate's Court. His further submission was that the applicant, in this application, had not been candid with the court. He further submitted that the fact that the property declared was wrong was only raised in the replying affidavit. The problem with this submission is that the property that has been declared executable is in Vosloorus and not Klippoortjie. One cannot substitute properties in court documents without following the necessary procedures. This has been brought to the notice of the court which, because of its significance, cannot ignore.
- [16] The applicant highlighted the difficulties in this matter. She explained what happened. One of the difficulties that were pointed out by the applicant is that the last page of the deed of suretyship is missing. One would have expected the first respondent to have kept a copy thereof. The copy is not there either. This complicates the matter. The court dealing with the rescission of the default judgment will, obviously, be called upon to deal with the issues raised that faced the parties. This is the view of Advocate R F De Villiers (Mr De Villiers), for the applicant.
- [17] The applicant, in her founding affidavit, contends that she had nothing to do with the eighth respondent and that the seventh respondent alone ran the eighth respondent. She further contends that she never signed the deed of suretyship and never bound herself to any obligations whatsoever. There is a confirmatory affidavit by the seventh respondent. The applicant approached the police and laid a charge against the seventh respondent relating to the problem. From her affidavit, one gleans that she does not trust the seventh respondent.

[18] Justice, having regard to the facts of this case, demands that everything relevant to this matter be properly ventilated.

[19] It cannot be gainsaid that the applicant has a right which, in my view is not open to doubt. The applicant seeks an interlocutory relief. Because of the right that she has being the registered owner of the immovable property, she has a well-grounded apprehension of irreparable harm if the relief she seeks is not granted. The immovable property is at stake. The balance of convenience surely favours the granting of the interim interdict. There is, in my view, no other remedy that can stop the transfer of the immovable property into the names of the fifth and sixth respondents.

[20] It must be borne in mind that section 26 of the Constitution of the Republic of South Africa Act, 108 of 1996 (the Constitution) guarantees the right which everyone has to acquire housing. No one, in terms of section 25 of the Constitution, may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The interim interdict, in my view, should be granted. The applicant has made out a case for such relief.

[21] I make the following order:

1. The application is urgent. The applicant's failure to comply with the provisions of Rule 6(5) strictly is hereby condoned
2. Pending the outcome of an application for rescission of judgment taken by the first respondent against the applicant, the seventh and eighth respondents under case number 3227/2008 in the Boksburg Magistrate Court by default on 17 June 2008, the following interim relief is granted:

- 2.1 The respondents are hereby interdicted and restrained from transferring the immovable property described as portion 46 of Erf 192, Klippoortjie, registration division AL to the fifth and sixth respondents or any other party whatsoever and under any circumstances;
- 2.2 The respondents are interdicted and restrained from submitting any documents to the second respondent for the purposes of effecting transfer of the property into the names of the fifth and sixth respondents.
3. The costs of this application will be costs in the rescission application; and
4. The applicant is to bring the application of rescission of the judgment under case number 3227/2008, Boksburg, referred to in 2 above, within 30 days of the granting of this order.



M.W MSIMEKI
JUDGE OF THE NORTH AND
GAUTENG HIGH COURT

COUNSEL FOR THE APPLICANT:

Adv. R F DE VILLIERS

INSTRUCTED BY:

SULEMAN INCORPORATED

C/O S S OMAR ATTORNEYS

COUNSEL FOR THE RESPONDENT:

Adv. J G C HAMMAN

INSTRUCTED BY:

NEIL ESTERHUYSEN ATTORNEYS

DATE OF HEARING:

03 July 2014

DATE OF JUDGMENT:

09/10/14