IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 11/12/2014 SIGNATURE

CASE NO: 20740/2013
7580/2007
1730/2013

DATE: 12/12/2014

IN THE MATTER BETWEEN:

SHEPARD TENDAYI CHIURA	**FIRST APPLICANT**
ESTER CHIURA	**SECOND APPLICANT**
AND	
ABSA BANK LIMITED	**FIRST RESPONDENT**
NEDBANK LIMITED	**SECOND RESPONDENT**
MISHAN, SHLOMO	**THIRD RESPONDENT**
MISHAN, MIRIAM	**FOURTH RESPONDENT**
SHERIFF HALFWAY HOUSE	**FIFTH RESPONDENT**
REGISTRAR OF DEEDS, PRETORIA	**SIXTH RESPONDENT**
JOYSPRING TRADE & INVESTMENTS 11 (PTY) LTD	**SEVENTH RESPONDENT**
RICHARD NGWENYA & PARTNERS	**EIGHTH RESPONDENT**
WEBBER WENTZEL ATTORNEYS	**NINTH RESPONDENT**
DAINFERN VALLEY HOMEOWNERS ASSOCIATION	**TENTH RESPONDENT**
THE JOHANNESBURG CITY COUNCIL	**ELEVENTH RESPONDENT**

ESKOM **TWELFTH RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. The litigation between the parties in this matter has a long and somewhat eventful history and it is necessary to record it in order to provide the context of the relief which is currently being sought in two applications before this Court.

2. The first is an application by the second respondent in terms of Rule 47(3) of the Uniform Rules of Court seeking an order which would direct the applicants to furnish security for costs in respect of three applications for leave to appeal launched by them on the 5th of May 2014, the 6th of June 2014 and the 7th of July 2014.

3. The second application brought separately by the first, seventh, eighth and ninth respondents, seeks the setting aside as irregular in terms of Rule 30(1) and 30A the various applications for leave to appeal. In the alternative these respondents also seek an order that the applicants file security for costs in terms of Rule 47(3) pending the various applications for leave to appeal.

4. **THE HISTORY OF THE MATTER AND THE LITIGATION BETWEEN THE PARTIES:**

   a. The applicants purchased the property known as Erf 2106 Dainfern, Extension 19 Township, Gauteng ('the property') on the 17th of October 2005 and financed the purchase price of the property by way of a loan from Nedbank who caused a mortgage bond to be registered over the property by way of securing its loan in the sum of R2 350 000-00.

b. The applicants fell into arrears with their mortgage payments resulting in Nedbank taking legal action and on the 29th of March 2007, Nedbank obtained default judgment in the sum of R2 401 460-05 while the property was also declared executable.

c. The property was sold in execution during or about July 2009 to the third and fourth respondents for the sum of R1 400 000-00 and it was transferred to them in September 2009. The applicants vacated the property in November 2009.

d. The third and fourth respondents thereafter sold the property to the seventh respondent in May 2010 for an amount of R3 325 000-00. The first respondent financed the purchase of the property and a mortgage bond was registered over the property in favour of the first respondent to secure the indebtedness of the seventh respondent.

e. In July 2011, the applicants launched proceedings out of this Court in which they sought an order rescinding the judgment obtained by Nedbank, an order setting aside the order declaring the property specially executable, and an order setting aside the sale in execution, as well as an order for the re-transfer of the property into their names.

f. The matter came before TUCHTEN J who on the 24th of January 2013 made the following order:

1. *The claims for the rescission of the default judgment granted on 29 March 2007 and to set aside the order made declaring the property at 2106 Benedict Drive Dainfern Valley ('the property') specially executable are dismissed.*
2. *The sale in execution of the propery held on 28 July 2009 is set aside.*

3. *It is declared that the purported transfers of the property out of the names of the applicants and further are invalid.*
4. *The fifth respondent, the Registrar of Deeds, is hereby directed forthwith to cancel, as invalid:*
   4.1 *all deeds of transfer in relation to the property executed after 28 July 2009, including deeds of transfer of the property to or from the second and third respondents (Shlomo and Miriam Misham) and the sixth respondent (Joyspring Trade and Investment 11 (Pty) Limited);*
   4.2 *all mortgage bonds registered over the property after 28 July 2009.*
5. *The Registrar of Deeds is hereby directed forthwith to reinstate, as if never cancelled, mortgage bond no. B191008705 registered over the property in favour of the first respondent (Nedbank Limited).*
6. *All fees of office, if any, due to the Registrar of Deeds for acting in accordance with this order must be paid, on demand, by Nedbank Limited.*
7. *Nedbank Limited may not take further steps to execute against the property unless and until it has been authorised to do so in accordance with the provisions of the proviso to rule 46(1)(a)(ii).*
8. *Any party to this application may approach Tuchten J or, failing him, any other judge of this Division, in chambers, for directions or a ruling on any matter arising from this order.*
9. *The order of costs made against the applicants on 1 October 2012 is set aside. All other costs order made in this application will stand. Save as provided in this paragraph, each party will bear his, her or its own costs in relation to the application.*

g. In setting aside the sale in execution TUCHTEN J took the stance that the notice of sale was invalid in that the description of the property in the notice of sale differed materially from the actual description of the property and

that this was misleading. He expressed the view in his judgment that the purpose of the description was not merely to identify the property but also to inform the public what was being sold in order to attract bidders and thus obtain the highest possible price on auction.

h. The first respondent who financed the purchase of the property by the seventh respondent was not cited as a party in the proceedings before TUCHTEN J and in April 2013 it brought an application to set aside the order of TUCHTEN J.

i. The matter came before VAN DER BYL AJ who granted an order rescinding the judgment and order of TUCHTEN J.

j. Thereafter the applicants brought various applications which served before TLHAPI J, MPHALELE J and VORSTER AJ all in the period July to October 2013 in which they sought in broad terms relief that would have had the effect of setting aside the order of VAN DER BYL AJ and enforcing the order of TUCHTEN J. All three applications were unsuccessful and in all three instances adverse punitive cost orders were made against the applicants. The applicants represented themselves in all of these proceedings and it must be apparent that they misconceived the relief that the various Courts they approached were competent to make.

k. What they in essence sought was for the order of TUCHTEN J to be revived. It is clear from their stance that they believed that this would be possible if a Court simply set aside the order of VAN DER BYL AJ and replaced it with that of TUCHTEN J. It is therefore perfectly understandable that none of the applications they launched in the period July to October 2013 would have enjoyed success, leaving aside other reasons such as the lack of urgency which may have been an additional factor that would determine the destiny of the various applications.

l. Having come to realise that the course of action they embarked upon was not going to deliver the relief they sought, the applicants proceeded to file various applications for leave to appeal against the orders of VAN DER BYL AJ, TLHAPI J, MPHALELE AJ and VORSTER AJ.

m. There are a number of serious difficulties with the various applications. Firstly they constitute separate applications in respect of the various orders they seek to appeal against yet they are all consolidated in a single application. Secondly some of them relate to the same orders – the first and the third relate to all four orders to which reference has been made while the second relates only to the order of VORSTER AJ.

n. Whatever overlap, duplication and unwarranted consolidation there may well be, when one considers the content of the applications against the requirements of the Rules, there can hardly be any doubt that the various applications viewed substantially constitute an intention to seek leave against the various orders made.

THE APPLICATION IN TERMS OF RULE 30 TO SET ASIDE THE VARIOUS APPLICATIONS FOR LEAVE TO APPEAL

5. In advancing the argument that the leave applications all fall to be set aside in terms of Rule 30, the first, seventh, eighth and ninth respondents take the following stance:

   i. The leave applications contain matter such as the 'notice of appeal' which is premature;

   ii. The applications contain matter which is extraneous to the consideration of the leave sought;

   iii. The application represents a consolidated application in respect of four different orders whereas it should have

consisted of four different and separate applications for leave;

iv. There has been a duplication of applications without a withdrawal of the earlier application;

v. To the extent that condonation is sought, the applications do not set out a basis for such condonation.

vi. Parties are cited who were not parties before the Court when the judgment and costs order appealed against were granted.

6. When I have regard to the various deficiencies in the leave applications then the argument of the respondents does appear attractive. The Rules are there to assist the Court and litigants in ensuring that litigation occurs in an orderly and predictable fashion. On the other hand a Court must not be insensitive to the position of a litigant who acts in person. Ours is a sophisticated legal system that is difficult to navigate for laypersons such as the applicants and a Court should be careful in not taking an approach that may in fidelity to the Rules, shut the doors of the Court to a party, which should otherwise remain open.

7. In this regard it is also trite that even where an irregularity has been established, the Court is entitled to overlook it if it does not result in any substantial prejudice to the other side:

> *'It is clear that the court has a discretion whether or not to grant the application even if the irregularity is established. The attitude generally adopted by the court is that it is entitled to overlook, in proper cases, any irregularity and procedure which does not work any prejudice to the other side. In fact, it has been held that prejudice is a prerequisite to success in an application in terms of Rule 30.'*

(See *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th edition at page 741)

8. It is clear that the applicants intended to bring leave to appeal applications in respect of all of the four orders to which reference has been made. That the applicants did so inelegantly and in a manner not contemplated by the Rules is hardly in doubt. On the other hand what is also not in doubt is the applicants' desire that those applications for leave would ultimately result in an appeal that would reverse the order of VAN DER BYL AJ and by implication all the other orders that followed.

9. Whether ultimately that will be possible or feasible remains to be seen in the fullness of time but for now, my view is that despite the deficiencies in the various applications, there is enough before me to justify exercising my discretion against setting aside the various applications. On the contrary Rule 30(3) empowers a Court to grant leave to amend and this may well be one way of at least, in form, ensuring that the applications comply with the Rules. I intend to make such an order.

THE APPLICATION IN TERMS OF RULE 47(3)

10. In terms of the common law, a Court has the discretion to order an *incola* applicant to furnish security for the costs that a respondent may incur in opposing the *incola's* application (or action as the case may be).

11. In considering the principles relating to an application for security for costs under the common law, the Appellate Division in ***ECKER v DEAN* 1938 AD 102** held as follows per DE WET J.A.:

'In my opinion a proper consideration of these cases does not justify the conclusion that the fact of the plaintiff being an insolvent per se *entitles the defendant to demand security for costs nor that there is a presumption that the action is vexatious. Notwithstanding* dicta *to the contrary, it seems to me that the correct principle underlying these decisions is that every application for security must be decided on the merits of the particular case before the Court, bearing in mind the basis of granting an order for security is that the action is reckless and vexatious...The Court has inherent jurisdiction to prevent abuse of its process by staying proceedings or ordering security in certain circumstances, but as pointed out by Solomon J.A. in* Western Assurance Co. v Caldwell's Trustee *(1918, A.D. at p. 274) this power ought to be sparingly exercised and only in very exceptional cases.'* (at pages 110 and 111)

12. In ***RAMSAMY NO AND OTHERS v MAARMAN NO AND ANOTHER*** **2002 (6) SA 159 (C)**, the Court held as follows per THRING J:

'As a general rule then, mere inability of a plaintiff or applicant as the case may be, who is an incola, *to satisfy a potential costs order against him is insufficient in itself in a case of this kind to justify an order that he furnish security for his opponent's costs. Something more than this is required before that can be done. What this 'something' is has been variously described in a number of decisions. Thus in Ecker v Dean...it was said that the basis of granting an order for security was that the action was 'reckless and vexatious'.* (at 172I to 173A)

13. It follows that where a Court is satisfied that litigation is vexatious, reckless or constitutes an abuse of the process of a Court, a Court may in the exercise of its discretion order the furnishing of security for costs.

14. In ***PHILLIPS v BOTHA*** **1999 (2) SA 555 (SCA)** the Supreme Court of Appeal defined abuse of process as follows:

> *'The term abuse of process connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate, they are regarded as an abuse for this purpose'.*

15. With regard to the concept of what is vexatious the Cape Provincial Division as it was then called in **IN RE: *ALLUVIAL CREEK*** **1929 CPD 532** said the following:

> *'But I think the order (to pay costs on a punitive scale) may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright of purpose and a most firm belief in the justice of their cause and yet those proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.'*

16. When I accordingly have regard to the factors to be considered in the exercise of the discretion vested in me in terms of Rule 47(3), I have to carefully consider and balance the interests of the applicants in seeking to ensure that their day in Court, which is constitutionally guaranteed, is not unjustifiably impaired by a requirement that they provide security for costs while on the other hand also ensuring that the respondents are not exposed to litigation that is vexatious or an abuse of the process of this Court.

17. In this regard sight should not be lost of the thrust of the applicants' complaint and the relief they were able to secure before TUCHTEN J. While the learned Judge confirmed the correctness of the judgment against them as well as the order of executability, he set aside the sale on the basis that the advertisement relating to the sale in execution was inaccurate and misleading.

18. When the sale to the third and fourth respondents took place, the applicants were still the registered owners of the property and continued to have an interest in the sale including the amount of the sale. After all, their indebdteness to the second respondent arising out of the judgment debt would be materially affected by the sale. The judgment was for an amount of R2 401 460-05. If the property were to be sold for that amount or a higher amount it would have largely settled their indebtedness. On the other hand if the property was sold for considerably less than the judgment debt, their liability to the second respondent for the difference would be ongoing.

18. In this regard the property was sold for R1 400 000-00 to the third and fourth respondents who in turn sold it a few months later for R3 325 000-00. The consequence of this is that on the one hand the third and fourth respondents were able to make a profit in the region of close

to two million Rand from the purchase and sale of the property in a relatively short space of time, while the effect for the applicnats was that they sustained a loss in the same amount. Such a conclusion is warranted in my view on account of the observation I make that the property must have been in value close to R 3 325 000-00 when it was sold to the third and fourth respondents, allowing them to be able to re-sell it shortly thereafter for that price. Even if one takes into account property price fluctuations, it could hardly be said that the sale for R1,4 million represented the market value of the property.

18. If one has regard to the right to property which is enshrined in Section 25 of the Constitution, then the applicants would have lost close to 2 million Rand out of the sale that had been found to be invalid by TUCHTEN J. It is that sense of injustice that continues to characterise their ongoing litigation and which must be considered in the context of whether the litigation they have embarked upon is vexatious, reckless or an abuse of the process.

19. It cannot, with respect, simply be said that the principles of purchase and sale operate at times with unfair results and that the free market system is the one that govern the economy and that parties must be bound by the outcomes of such a system.

20. This case is different in the sense that the sale was one that occurred in accordance with the Rules of Court and one that was activated by the second respondent as execution creditor. Rule 46(5) of the Uniform Rules of Court provides that the execution creditor has the right to stipulate a reasonable reserve price or to agree in writing to a sale without reserve. I must assume that the sale was without reserve. This raises the question of whether a sale under such circusmtances and

where the property description was clearly found to be materially deficient which would in all likelihood have affected the interest in the property and the amount that was finally paid resulted in fairness and justice to the applicants? That question does not fall to be determined in these proceedings but I raise it in the course of placing in context the actions of the applicants and their stance, even if it was misconceived in law, in seeking to redress what they perceived to be a wrong inflicted upon them.

21. Reverting to the application for securitry for costs, I am not satisfied that I should grant the order that is being sought. For the reasons already given I do not agree that the conduct of the applicants could be said to be vexatious, reckless or an abuse of the process of this Court.

22. It may well be that the relief the applicants seek by way of leave is unlikely to bring them the relief they desire. In my view and for what it is worth, their remedy may lie elsewhere and they would be well-advised to reconsider the trajectory of their current litigation stance and to obtain legal advice in that regard.

COSTS

23. With regard to costs, both the applicants and respondents achieved some measure of success in the proceedings. However it could not be said that either the applicants or the respondents were substantially successful. It is trite that with regard to costs, a Court has a discretion which must be judicially exercised.

My view is that it would be just and equitable that no order as to costs be made.

ORDER

23. In the circumstances, I make the following orders:

a. An order is made allowing the applicants to amend their application for leave to appeal so that it accords with the provisions of the Rules of this Court. Such amendment, if it is to be effected, shall be made within ten days from date hereof;

b. The application for security for costs in terms of Rule 47(3) is dismissed;

c. No order is made as to costs.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

HEARD ON: 11 NOVEMBER 2014
FOR THE APPLICANTS: (APPEARANCE IN PERSON)
FOR THE FIRST, SEVENTH, EIGHT & NINTH RESPONDENTS: ADV G F PORTEOUS
INSTRUCTED BY: NORTON ROSE FULBRIGHT SOUTH AFRICA (ref: C Erasmus/sd/B62/2013) (correspondents: Macintosh Cross & Farquharson)
FOR THE SECOND RESPONDENT: ADV J DANIES (assisted by ADV C VETTER)
INSTRUCTED BY: LOWNDES DLAMINI (ref: A Lowndes/mm/111697)