IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32331/05

1. Reportable: No
2. Of interest to other Judges: No
Date delivered: 05 September 2019
4. Signature

EMMANUEL PINTO DOS SANTOS SILVA	Applicant
and	
FIRSTRAND BANK LIMITED	First Respondent
REGISTRAR OF DEEDS	Second Respondent
SHERIFF OF THE COURT-JOHANNESBURG SOUTH	Third Respondent
RUI MIGUEL MARTINS MIRANDA	Fourth Respondent

JUDGMENT

MAKHUBELE J

Introduction

[1] The relief sought in the initial Notice of Motion dated 16 November 2016 reads as follows:

1. Declaring that the credit agreement entered into between the Applicant and 1st Respondent pertaining to a mortgage bond registered over holding 9 Kliprivierberg Estate, Holdings, Johannesburg was reinstated I terms of Section 129(3) of National Credit Act.

2. Declaring that the Applicant is the lawful owner of Holding 9 Kliprivierberg Estate Holdings also known as the 36 – 48 Mathers Road, Kliprivierberg Estate, Holdings, Johannesburg.

3. Ordering the respondents to take all necessary steps to ensure that the aforementioned property is transferred back into the name of the applicant.

4. Ordering that the cost of transfer mentioned above shall be borne by 1st Respondent.

5. Ordering that in the event of any of the parties herein not signing the documents necessary for the transfer of the aforementioned property, that the 3rd Respondent is ordered to sign such documents to ensure transfer of the property is effected to the Applicant.

6. Cost of suit against the 1st Respondent and against such other Respondents that opposes this application.

7. Further and/or alternative relief.

[2] The founding affidavit had very scanty information. The circumstances under which the immovable property was attached and sold in execution and the basis for the contention that the credit agreement had been reinstated were not explained. No documents were attached to support the allegations of payments of arrear amounts and reinstatement of the credit agreement. In fact, there was no disclosure of material and relevant facts, save for bald allegations that may be summarised as follows:

[2.1] During 2005, the court, per Acting[1] Justice Jooste granted summary judgment in favour of the first respondent, who I shall henceforth refer to as 'the bank ' in terms of which his immovable property described in the Notice of Motion , which I will henceforth refer to as 'the property' was declared executable. Subsequent to the summary judgment being granted, he received telephone calls from officials of the bank advising him to pay the arrear amounts on the credit agreement, failing which the bank would give effect to the judgment and sell his property in execution.

[2.2] He paid the arrears, administrative and legal costs associated to the bank's litigation against him. Thereafter the credit agreement between him and the bank was reinstated. He continued to make payments to the bank in in terms of the credit agreement.

[2.3] He fell into arrears again in 2013 because he relied on the rental income he was deriving from letting out the property to pay bond installment and he was unable to meet his commitments when the tenants defaulted. As a result, the bank put up the property again for sale in execution during 2013. He was again told to pay the arrears and bring his account up to date to stop the sale, which he did because he did not want to lose his property.

[1] It is actually Jooste J.

[2.4] The bank subsequently sold the immovable property but the sale was cancelled during November 2013.

[2.5] In February 2014, the bank again threatened to sell his property and it was indeed sold but again, the sale was cancelled.

[2.6] The bank has over the years threatened to sell his immovable property to extract payments from him of large sums of money and then simply cancelled the sale after receiving payments. It was eventually sold in execution during 2015.

[2.7] His credit agreement with the bank had become reinstated in 2005, however, despite this, the bank continued to use the judgment secured in 2005 to repeatedly attempt to sell his property and eventually sold it unlawfully in 2015.

[2.8] He is entitled to have the credit agreement reinstated In terms of section 129(3) of the National Credit Act, and in this regard he tenders to pay to the bank all arrear amounts including the reasonable costs to have the credit agreement reinstated.

[2.9] The sale to the fourth respondent is unlawful because his credit agreement with the bank was reinstated before the sale in execution and good cause exists for an order that the property be transferred back into his name.

[3] The bank filed its opposing affidavit during July 2017 and outlined the circumstances under which the immovable property was attached as well as the ensuing litigation since 2005 to date. The bank attached the following:

[3.1] Documents filed in the application for summary judgment, which include the applicant's 'reply', 'plea 'and 'counter-claim'. The latter document contained allegations of corruption, defeating the ends of justice, oppression and all sorts of grievances against state entities, politicians both local and international, officers of court in relation to the debt. He also sought an order against the U.S Justice Department for payment of some millions of dollars for what he called blood money due to death of 12 million people from 1940 – 1944. His unhappiness appears to be based on soured business relations between him and the bank. All this is really not relevant.

[3.2] The written judgment for Summary judgment dated 16 November 2005.

[3.3] The Supreme Court of Appeal order dismissing the applicant's application for leave to appeal dated 14 June 2006.

[3.4] The Constitutional Court order refusing leave to appeal dated 23 August 2006.

[3.5] The conditions of sale in execution signed by the fourth respondent on 28 July 2015.

[3.6] The applicant's Notice of Motion issued at the Johannesburg Local Division on 28 October 2018 in terms of which he sought an order to interdict the Registrar of Deeds from transferring the immovable property.

[4] The contentions in the bank's answering papers may be summarised as follows:

[4.1] The bank issued summons against the applicant to recover monies lent and advanced which a mortgage bond secured over the property in question. He defended the action, whereafter an application for summary judgment was filed. He opposed the summary judgment and filed an affidavit which Jooste J found that it dit not constitute a valid defence against the first respondent's claim.

The application for Summary Judgment was granted on 16 November 2005. His application for leave to appeal was refused and his petitions to the Supreme Court of Appeal and the Constitutional Court were refused on 14 June 2006 and 26 August 2006 respectively.

[4.2] The property was attached during September 2006. Over the years, eleven (11) sales in executions were scheduled.

[4.3] Six (6) scheduled sales in execution were cancelled due to the arrangements with the applicant to pay the arrear amount, which he did not honour.

[4.4] The immovable property was sold twice to the same purchasers in 2013 and 2014 and each time it was cancelled because they did not comply with the conditions of sale.

[4.5] On two occasions (2011 and 2014), the scheduled sales were cancelled to investigate the escalated rates and taxes and a discrepancy in the balances of the municipal account. Another sale scheduled for in November 2014 was cancelled to investigate a complaint lodged by the applicant with the National Credit Regulator. The complaint was dismissed.

[4.6] The property was subsequently sold to the fourth respondent on 28 July 2015. This was the twelfth (12th) sale in execution.

[4.7] The applicant instituted application proceedings at Johannesburg High Court during October 2015 to interdict transfer of the property, pending adjudication of the complaint that he had lodged with the National Credit Regulator (NCR) with regard to the legality of this auction and the previous cancelled ones. The applicant's contention was that the bank stole his property and auctioned it

illegally. It appears from the record that this complaint had already been finalized on 23 June 2015 in favour of the bank.

[4.8] The fourth respondent also failed to comply with the conditions of sale. The Sheriff issued a Rule 46(11) application to cancel the sale. The parties settled the dispute and their agreement was made an order of court on 01 August 2016. The order issued by Tlhapi J makes provision for amongst others, payment of arrear rates and taxes by the fourth respondent for purposes of obtaining a clearance certificate from the relevant municipality and payment of transfer duty.

[4.9] The Sheriff's distribution account indicates that an amount of R174 746.57 was paid to the bank. This was the outstanding amount in the applicant's loan account. The payment extinguished his indebtedness to the bank. The surplus after payment of other charges was an amount of R794 645.55. This was paid into the personal bank account of the applicant. The supporting vouchers were attached to the answering papers.

[4.10] The application to interdict transfer of the property that applicant had launched at Johannesburg High Court was removed from the roll by order of Moshidi J dated on 09 November 2016. The costs were reserved, pending launching of these proceedings.

[5] The applicant filed a replying affidavit during July 2017 and denied that the sales in execution were scheduled and cancelled as alleged by the bank. He reiterated his contention that he paid all arrear amounts whenever he was called to do so, and furthermore, the bank could not still rely on the judgment to sell the property because there had been negotiations to reinstate the agreement.

[6] He contends that when the sale between the bank and the fourth respondent is unlawful because their 'purported agreement' was entered into after he had already accepted his payments arrears, administration and legal costs and that his credit agreement had been reinstated.

[7] He attached proof of payment of an amount of R11 150.00 that he paid at 12:16 on the date of the auction. He did not attach any other proof of payment.

[8] The bank filed what it referred to as *'Supplementary affidavit'* and addressed the applicant's denial in his replying affidavit that he received an amount of R794 645.55 from the proceeds of sale of the property to the fourth respondent. Proof of receipt of this amount was attached to the bank's answering affidavit. In this further affidavit the bank attached the Sheriff's *'Distribution account'* that reflects that an amount of R794 645.55 was paid to the applicant as 'surplus due' to him.

[9] It appears from a filing sheet that the applicant replied to the fourth respondent's answering affidavit, however, both documents were not included in the record before me.

The amended notice of motion

[10] The applicant obtained leave to amend his notice of motion. The court order granted by Meyer J on 22 October 2018 in this regard reads as follows:

> *"1. The application is postponed sine die.*
>
> *2. The applicant is given leave to amend his notice of motion within 15 (fifteen) days of the date of this order and to file a supplementary affidavit whereafter the respondents may, if advised file supplementary affidavit within 15 (fifteen) days after the supplementary founding affidavit had been filed.*
>
> *3. The applicant is to pay the wasted costs occasioned by this postponement."*

[11] The only difference between the initial and amended notice of motion is the date of the alleged reinstatement of the credit agreement. In the latter the relevant portion reads as follows:

> *"... was reinstated pror to the sale in execution of the afore-said immovable property on 28 July 2015".*

[12] It appears from a reading of the supplementary founding affidavit that the purpose of amending the relief sought and founding affidavit was to

address the issues raised in the bank's answering papers with regard to the sales in execution that were scheduled and cancelled as indicated above. The main issues raised in the supplementary founding papers are as follows:

[12.1] He did not receive formal notification of the scheduled sales in execution despite the fact that the bank knew his chosen domicilum citandi et executandi. He also updated his personal details to ensure that he receive writtten communication from the bank.

[12.2] He never received copies of statement of his bond account for the period 2013,2014 and 2015.

[12.3] He heard about the sale in execution that was scheduled for 02 July 2013 during an unspecified date in June from an employee of the bank who telephoned him and told him to pay the arrears, failing which the property would be sold. He went to the Diagonal Street branch of the bank where he was shown a computer screen indicating the arrears to be R11 149.85.

He made an arrangement to pay the arrears but this was written down in a paper not in the bank's letterhead. He was to make three payments and the last one was in August a date falling after the scheduled sale in execution, thus making him to be still in arerars and with no proof of the arrangement.

[12.4] On 02 July 2013, he went to the same branch again at about 07:45 and asked to speak to the officials that he spoke to during his visit on 19 June. Both of them were not available. He spoke to one Mr Moosa who told him that the sale would proceed unless he paid the full amount of the arrears before 10:00. The amount indicated was R11 150.00. He paid this by making an electronic transfer at Balfour Park branch at 12:09. The payment was delayed because the systems were offline.

[12.5] He notified the sheriff about the payment before 10:00. The sale was held back until the last auction of the day but it proceeded on instructions of the bank's attorneys.

[12.6] He went to the Diagnonal street branch of the bank again at around 14:00 and showed Mr Moosa proof of payment. He told him that the property had been sold already.

[12.7] He did not service his bond account since that date because he believed that the property had been sold and was never informed that the sale was subsequently cancelled.

[12.8] He heard about the scheduled sale of 04 February 2014 from a Cape Town based financila institution on 27 January 2014 after he received their SMS about financing the property. He paid R2 000.00 and R8 677.00 into his bond account on 04 and 17 February 2014

respectively. He later learnt that the sale in execution went ahead. He did not make further payments in his bond account. His account was debited with certain amounts that he refers to as 'fictitious arrears', resulting in his account being in arrears in the amount of R14 232.74 during February 2014. He subsequently wrote to the National Credit Regulator on 09 November 2014 and laid a complaint in this regard. He later learnt that the sale in excution was cancelled.

[12.9] On 17 June 2015 he received an sms from the attorneys of the bank informing him about the sale in execution that was scheduled to take place on 28 July 2015.

[12.10] He received another sms on 05 September 2015 advising him that the property was sold and had been registered in the name of the fourth respondent.

[13] He contends that the sale of 28 July 2015 was unlawful because he did not receive a notice. He is tendering to pay all arrear amounts including the reasonable costs to have the credit agreement reinstated.

[14] He did not make further payments into his bond account after learning that the sale in excution of 04 February 2014 went ahead because the amount obtained from that sale exceeded his debt with the bank. This extinguished his liability.

The bank's supplementary answering affidavit

[15] The bank denies that the applicant did not receive notices of the various scheduled sales in execution and bank statements as alleged by him. Several documents were attached to counter this allegation.

[15.1] The sherriff's return of service with regard to notice of sale scheduled for 28 July 2015. The notice was served on 'the occupier Mr Ken Naidoo' on 14 July 2015. A copy of the return of service was attached.

[15.2] Bank statements were sent to the applicant's postal address, being P.O Box 761, Highlands North. On his own version he visited the bank's branches at various times when he got information about imminent sales in execution to obtain information on his arrears.

[15.3] It was admitted that his arrears as on 13 June 2013 amounted to R11 149.85. However, it was denied that this would have still been the arear amount on 02 July 2013 and that he was advised to pay this amount for the auction to be suspended on this date. The arrears on this date amounted to R11 884.07. A bank reconcilliation statement to this effect was attached.

[15.4] Applicant's allegations that the payment he made on 02 July 2013 was delayed due to the bank's systems being offline were denied. It was also denied that he paid the overdue amounts, permitted default

charges and reasonable costs of enforcing the agreement that would have entitled him to reinstatement of the credit agreement in terms of section 129(3) and (4) of the National Credit Act.

[15.5] The applicant only made two payments of R11 150.00 and R2 000.00 on 02 July 2013 and 04 February 2014. The arrear amount on the latter date was R15 078.82. After payment of R2 000.00 the outstanding amount was R13 078.82.

[15.6] The National Credit Regulator ruled in favour of the bank on 23 June 2013.

[15.7] The property has already been sold to a bona fide purchaser and as such the applicant's tender to pay the outanding arrears and costs of reinstatement will not have any efefct. Furthermore, he has failed to tender repayment of the amount of R794 654.55 that he received from the proceeds of the sale to the fourth respondent as well as a refund of the amounts that the latter has paid to the municipality in respect of arrear rates and taxes.

[16] The replying affidavit does not take the disputes raised any further. He denies service of the notices by the sheriff. He admits his postal address, but deny receiving bank statements. He denies the authenticity of the bank's reconcilliation statement because it is not printed in the official letterhead.

[17] The bank's answering affidavit was filed late, and so were other subsequent affidavit that were filed by the applicants. The bank also filed a fourth set of affidavits without leave of the court. The both counsel requested condonation for the various omissions, which I duly granted.

The fourth respondent's position

[18] The fourth respondent's answering affidavit dated 02 August 2017 (before the amended notice of motion) was referred to during the hearing of the matter, however, it was not included in the paginated and indexed record before me. There was a filing sheet only. I received a copy with the bank's supplementary heads of argument. I will not address the issues raised therein because there was no appearance on behalf of the fourth respondent. Another answering affidavit filed subsequent to the filing of the amended notice of motion forms part of the record. It only addresses the issue of costs, that the fourth respondent should not be ordered to pay the costs. The applicant filed a reply to the first answering affidavit. He denied that payment was made to him after the sale of the property. He however confirmed that the sheriff did pay an amount of money into his account which was a suplus from the sale *'which money, I received without prejudice'*.

[19] The issues pertaining to the fourth respondent were addressed in the bank's answering affidavits and are common cause. The sale was declared valid as indicated above and transfer has already been effected. It is common cause, as it appears in the court order of Tlhapi J that in addition to the purchase price of the property, the fourth respondent had to pay certain

amounts to the municipality in order to obtain a clearance certificate and also became liable for rates and taxes on the assessed amount.

The legal framework

[20] The National Credit Act, No.34 of 2005 (NCA) came into effect on 01 June 2007. Chapter 6 that is relevant for present purposes is titled *'collection, repayment, surrender and debt enforcement'* and is divided into three parts. Part A (sections 124, 125 and 126) deal with collection and repayment practices, Part B (sections 127 and 128) deal with surrender of goods and Part C (sections 129, 130 and 131) which deal with debt enforcement by repossession or judgment. Section 129, particularly subsections (3) and (4) are relevant for present purposes. The original text read as follows:

> *(3) Subject to subsection (4), a consumer may –*
>
> *(a) at any time before the credit provider has cancelled the agreement re- instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and*
>
> *(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.*
>
> *(4) A consumer may not re-instate a credit agreement after-*

(a) the sale of any property pursuant to-

(i) an attachment order, or

(ii) surrender of property in terms of section 127,

(b) the execution of any other court order enforcing that agreement; or (c) the termination thereof in accordance with section 123.

[21] These provisions were amended by the National Credit Amendment Act, No.19 of 2014 that came into operation on 13 March 2015. They now read as follows:

(3) *Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement,* ***remedy a default*** *in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the* ***time the default was remedied****.* (own emphasis)

(4) *A credit provider may not re-instate or revive a credit agreement after-*

(a) the sale of any property pursuant to-

(i) an attachment order, or

(ii) surrender of property in terms of section 127,

(b) the execution of any other court order enforcing that agreement ; or

(c) the termination thereof in accordance with section 123"

[22] The following questions or issues were settled in the interpretative Constitutional Court judgment of Nkata v Firstrand Bank Ltd and Others[2]

[22.1] To successfully re-instate the credit agreement, the consumer must pay all arrear instalments and the creditor's permitted default charges and reasonable enforcement costs. In that matter, the arrears were settled before First Rand Bank obtained the default judgment against her and before the subsequent sale of the property. First Rand Bank could not rely on the Section 129(4) exceptions to challenge the reinstatement.[3] The issue of payment of costs of enforcement was decided on the facts because there was no evidence that she was called upon to pay any of those costs.

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[2] [2016] ZACC 12

[3] *paras 79 - 81*