IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 2018/19617

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
23/05/2022

In the matter between:

MMATHOTO LEAH LEPADI N.O. (In her capacity as the Sheriff of the High Court Randburg South West)	Applicant
and	
STEINMULLER; ANNO	Respondent
In re:	
FIRSTRAND BANK LIMITED	Plaintiff
and	
KRIEL, MORNE	Defendant

Summary: cancellation of sale agreement – retainment of deposit by Sheriff – costs of application in favour of Applicant – no report justifying the Applicant to retain deposit

JUDGMENT

PHOOKO AJ:

INTRODUCTION

[1] This is an application brought by the Applicant in terms of Uniform Rule 46(11) for the cancellation of a sale in execution of immovable property described as Section No. 36 as shown and more fully described on the Sectional Plan No. SS43/2005 in the scheme known as Libanon, in respect of the land and building or buildings situate at Sonneglans Extension 23 Township, in the area of the Johannesburg Metropolitian Municipality, of which Section the Floor Area, according to the said Sectional Plan, is 71 Square Metres, and an undivided share in the common property in the scheme apportioned to the said Section in accordance with the participation quota as endorsed on the said Sectional Plan, held by Deed of Transfer no. ST[....] ("the Property"). The sale in execution was held on 25 July 2019 (the Sale in Execution). The Applicant seeks the cancellation of the Sale in Execution and an order authorising a new sale in execution.

[2] The Applicant further seeks an order for the deposit paid by the Respondent towards the purchase price of the Property in the Sale in Execution be retained by the Applicant in trust until damages have been quantified after the completion of any subsequent sale envisaged in Uniform Rule 46(11). In addition, the Applicant seeks that the Respondent be ordered to pay the costs of the present application.

THE PARTIES

[3] The Applicant is the Sheriff of the High Court, for the District of Randburg, South West.

[4] The Respondent is Arno Steinmuller, an adult businessman who had sought to purchase the Property in the Sale in Execution.

JURISDICTION

[5] The property in question is situated within the jurisdiction of this Court. Therefore, this Court has the power to adjudicate this case.

THE ISSUES

[6] At the beginning of proceedings before the Court, the issues to be decided were:

(a) Whether the Respondent's application for the postponement of this Rule 46(11) application brought by the Applicant should be granted?

(b) Whether the Respondent's Application to supplement his pleadings should be granted?

(c) Whether the Applicant is entitled to retain the deposit paid by the Respondent, and to recover the costs of this application?

[7] Following concessions made by the Respondent during the hearing of this matter, the issues to be decided by this Court remained points (b) and (c) above.

THE FACTS

[8] On 25 July 2019 the Sale in Execution of the Property took place for the amount of R450 000.00. The property was purchased by the Respondent in accordance with the terms of the sale agreement.[1]

[9] The Respondent paid a deposit towards the purchase price in the amount of R45 000.00 including an amount of R17 250.00 in respect of the auctioneer's commission.

[1] Sale agreement available on CaseLines.

[10] According to Clause 4.3 of the sale agreement, the Respondent was required to furnish a guarantee within 21 days of the Sale in Execution. However, the Respondent failed to comply with the aforesaid condition within this timeframe, and within an additional 5 days extension period.

[11] Aggrieved by the Respondent's default in furnishing the guarantee timeously, the Applicant instituted the present Application for the cancellation of the sale agreement and for an order to resell the property.

APPLICABLE LAW

[12] The overall guidance to this Court in determining applications brought under Rule 46(11) is the need to expedite proceedings in the interests of the judgment creditor and other interested parties. In the matter between the *Sheriff of the High Court, Johannesburg East v Chetty and Others; InRe: Firstrand Bank Limited T/A FNB Home Loans* (Formerly First National Bank of Southern Africa Limited*) v Chetty and Another*,[2] Mbongwe AJ explicitly stated that:

> "the purpose and intention of the provisions of Rule 46(11) … are to expedite the sale of attached immovable property primarily for the benefit of the judgment creditor and other interested parties."

[13] Considering the above, it is evident that all the information relevant to the cancellation of the sale agreement should be placed before the Court so as not to cause prejudice to the judgment creditor and/or any other interested party.

[14] Taking this into account, I now deal with the submissions of the parties in relation to the application to supplement pleadings, retainment of the deposit by the Applicant and costs of this application.

RESPONDENT'S APPLICATION TO SUPPLEMENT PLEADINGS

[15] The Applicant contended that the Respondent agreed to the terms of the sale

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[2] (2009/3673) [2014] ZAGPJHC 352 (27 March 2014) para 3.

agreement. However, the Respondent is resorting to delaying tactics through the late filing of his answering affidavit, and later an application to supplement his pleadings.

[16] The Applicant contended that the Respondent's application to supplement his pleadings was not properly before the Court. Consequently, the Applicant argued that this application should not be heard by the Court.

[17] All in all, the Applicant argued that the Respondent's supplementary affidavit completely creates a new case to the extent that it does not even refer to the answering affidavit. Consequently, the Applicant objected to the introduction of the supplementary affidavit.

[18] In his supplementary answering affidavit, the Respondent to a large extent explained that the delays that were associated with the furnishing of bank guarantees were not his fault.

[19] The Respondent further argued that he did not introduce new facts in the supplementary affidavit but rather sought to address the new amounts that made it difficult to comply with the conditions of the sale agreement.

[20] In my view, it is in the interest of justice for this Court to accept the Respondent's supplementary affidavit to furnish this Court with a complete picture regarding the delays that eventually resulted in the application to cancel the sale agreement of the property. I, therefore, grant the Respondent leave to supplement his pleadings.

[21] I now address whether the Applicant is entitled to retain the deposit paid by the Respondent and whether the Applicant is entitled to recover the costs of this application.

RETENTION OF DEPOSIT AND ENTITLEMENT BY THE APPLICANT TO COSTS

APPLICANT'S SUBMISSIONS

[22] The Applicant argued that this matter has been going on for almost two years

since the Sale in Execution took place on 15 July 2019. However, by 15 August 2019 and 20 August 2019 respectively, the Respondent had not furnished any guarantees.

[23] The Applicant's main contention is that the Respondent has failed to furnish the guarantees as per their undertaking in terms of the sale agreement.

[24] Despite the demand for guarantees, the Applicant further argued that the Respondent failed to furnish the guarantees within the permissible time as per the conditions of the sale agreement including the grace period that was afforded to him. Instead, the Respondent only filed the bank guarantee on 13 October 2020.

[25] The Applicant further contended that the Respondent initially opposed the present application but only agreed to the cancellation of the sale agreement in their heads of argument.

[26] According to the Applicant, when the Respondent finally filed his answering affidavit on 13 October 2020, he mainly opposed the requirement to furnish the agreed bank guarantee with interest that had since accrued.

[27] The Applicant further argued that on 7 April 2021, the Respondent filed the supplementary affidavit that was the subject of the application to supplement his pleadings. To this end, the Applicant argued that the Respondent's heads of argument are based on the supplementary affidavit, something that was not properly before the court.

[28] The Applicant further argued that she was entitled to retain the Respondent's deposit until the property has been sold to a third party and damages have been quantified.

[29] Based on the aforesaid submissions, the Applicant argued that the costs of this application should be awarded because although the Respondent has eventually consented to the cancellation of the sale agreement, he opposed the matter from the beginning and, in various ways listed above, contributed to the undue delay in the

progression of and finalisation of the matter.

RESPONDENT'S SUBMISSIONS

[30] The Respondent consented to cancellation of the sale agreement in his heads of argument. Consequently, the Respondent mainly opposed the relief sought by the Applicant in so far as it relates to retaining the deposit and the costs of this application.

[31] The Respondent argued that there should be no cost order against him. He argued that he acted *bona fide* in these proceedings. According to the Respondent, it was the Applicant who, *inter alia*, failed to execute her "duties correctly or in totality" including failure to provide the necessary information such as the Sheriff's report before this Court.

[32] According to the Respondent, there was no basis in law for the Applicant to retain the deposit because no information was placed before the Court to show the loss suffered by the Applicant.

[33] In addition, the Respondent argued that the Applicant was seeking prospective damages but failed to make a case for such damages. To this end, the Respondent argued that "the purchaser must be given a notice of the Sheriff's submission of the report"[3] but none was done in this case.

[34] Ultimately, the Respondent argued that in the absence of a written report by Sheriff before this court as per the requirements of Rule 46(11)(b), the Applicant is not entitled to retain the deposit including the costs of this application.

EVALUATION OF SUBMISSIONS ON RETENTION OF DEPOSIT

[35] About the retainment of the deposit by the Applicant, I am not entirely convinced that the Applicant is entitled to retain the deposit pending the until such time that damages have been quantified. I agree with the Respondent's

[3] Respondent's heads of argument para 49.5.

submissions that the Applicant failed to place information before this Court indicating the justification to withhold the Respondent's deposit. In addition, there was no report presented before this Court showing the loss (if any) sustained by the Applicant.[4]

[36] Accordingly, there is no basis in law to justify the retainment of the Respondent's deposit.

[37] I deal with the issue of costs below.

EVALUATION OF SUBMISSIONS ON COSTS

[38] Even though the Respondent had agreed to the cancellation of the sale agreement, I deemed it necessary to include the submissions related to the lapse of the agreement.

[39] A simple reading of the pleadings, in particular the conditions of the sale agreement, reveals that the bank guarantees were due latest on 20 August 2019. This is a factor that was not disputed by the Respondent. To the contrary, the Respondent consented to the cancellation of the sale agreement.

[40] The breach arose solely as a result of the Respondent's failure to secure the guarantees within the stipulated time frames. Had the Respondent timeously provided the bank guarantees, the sale agreement would have been finalised. Instead, the Respondent advances several reasons, ranging from becoming aware of the Applicant's application to this Court late, the COVID-19 pandemic, as also having contributed to the delay in obtaining the guarantees.

[41] I need to emphasise that the Respondent vigorously opposed this application for the cancellation of the sale agreement from its inception and only consented to the cancellation of it in the heads of arguments. This is long after the drafting and exchange of several sets of pleadings had taken place. At some stage, the Applicant also had to prepare an application to compel the Respondent to file his heads of arguments. I view the circumstances as different from the matter between the *Sheriff*

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[4] *Sheriff of the High Court Benoni v Lombard obo Yellow Dot Property and Another* (15685/09) [2015] ZAGPPHC 722 (15 October 2015) para 18.

of the High Court, Roodepoort v Magwaza; In re: Standard Bank of South Africa v Sebola and Another[5] where it was said that "in the absence of an opposition to report for cancellation and resale, there will be no need to make an order for costs".

[42] In the matter between the *Sheriff of the High Court, Witbank v Wessels; In re: First National Bank, a Division of Firstrand Bank Ltd v Smal and Another*[6] said by Teffo J said:

> "The respondent breached the conditions of sale by failure to provide the guarantees as required of her in terms of clause 4.4. She had taken the risk of the property after the fall of the hammer, the signing of the conditions of sale and payment of the initial deposit…."

[43] The terms of the contract were clear and not contested. The breach, in this case, was committed by the Respondent through his failure to timeously provide bank guarantees as per the sale agreement. In light of the above, I do not see any justification as to why the Applicant should be out of pocket for the costs of this application when it was the Respondent who failed to honour the terms of the sale agreement.

[44] Save for my determination on the entitlement to retain the deposit, I am of the view that the Applicant has been a successful party in these proceedings. Accordingly, the Applicant is entitled to the costs of this application.[7]

CONCLUSION

[45] After reading through the papers, hearing counsel for the Applicant, and counsel on behalf of the Respondent, I grant judgment in favour of the Applicant as follows:

(1) That the sale in execution held on 25 July 2019 in respect of the

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[5] (13644/13) [2015] ZAGPPHC 721 (15 October 2015) para 9.

[6] (49144/2010) [2016] ZAGPPHC 189 (5 April 2016).

[7] *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* [2022] ZACC 1 para 112.

immovable property referred to in paragraph 2 below is set aside;

(2) Subject to prayers 3 and 4 below, the applicant is authorised to again sell in execution the immovable property, known as:

SECTION NO. 36 AS SHOWN AND MORE FULLY DESCRIBED ON THE SECTIONAL PLAN NO. SS43/2005 IN THE SCHEME KNOWN AS LIBANON, IN RESPECT OF THE LAND AND BUILDING OR BUILDINGS SITUATE AT SONNEGLANS EXTENSION 23 TOWNSHIP, IN THE ARE OF THE JOHANNESBURG METROPOLITIAN MUNICIPALITY, OF WHICH SECTION THE FLOOR AREA, ACCORDING TO THE SAID SECTIONAL PLAN, IS 71 SQUARE METRES, AND AN UNDIVIDED SHARE IN THE COMMON PROPERTY IN THE SCHEME APPORTIONED TO THE SAID SECTION IN ACCORDANCE WITH THE PARTICIPATION QUOTA AS ENDROSED ON THE SAID SECTIONAL PLAN, HELD BY DEED OF TRANSFER NO. ST[....] ("the property") for the reserve price of R376 000.00.

(3) A copy of this order is to be served personally on the Judgment Debtor, as soon as is practicable after the order is granted, but prior to any future sale in execution.

(4) The Judgment Debtor is advised that, as a result of the order referred to in paragraph 1, the provisions of section 129(3) and (4) of the National Credit Act 34 of 2005 (the "NCA") APPLY TO THE JUDGMENT GRANTED IN FAVOUR OF THE Judgment Creditor. The Judgment Debtor may prevent the sale of the property referred to in paragraph 2 above if he pays to the Judgment Creditor together with all enforcement costs and default charges, prior to the property being sold in execution.

(5) That the Respondent pays the costs of this application, to be taxed.

M R PHOOKO AJ
ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

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 23 May 2022.

APPEARANCES:

Counsel for the Excipient:	Adv. D. Strydom
Instructed by:	Bezuidenhout V and Zyl Attorneys
Counsel for the Respondent:	Adv. B Bhabha
Instructed by :	Vermaak, Marshall, MB Wellbeloved Attorneys
Date of Hearing:	14 March 2022
Date of Judgment:	23 May 2022