


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: A1/2020

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE 2/6/2022 SIGNATURE 

FIRSTRAND BANK LIMITED

Appellant

and

MICHAEL HERBERT WRIGHT

First Respondent

CLAIRE COLLEN WRIGHT

Second Respondent

JUDGMENT

PHOOKO AJ

INTRODUCTION

- [1] This matter came before us sitting as the full bench appeal together with my brothers, Makhoba J and Nyathi J on 2 March 2022. We reserved the judgment. This decision sets out our ruling against the Respondents and the reasons

thereof.

- [2] The case concerns an appeal brought by the Appellant against the judgment and order of the court of first instance delivered by, Mothle J, on 09 September 2019 in this Division. There, Mothle J struck from the roll the Appellant's foreclosure application and ordered that the Appellant forfeits all interest earned on the judgment debt from 13 February 2019 after the granting of summary judgment up to and including a period of one month after the delivery of that judgment among others.
- [3] The Appellant was represented by counsel. Both the First and Second Respondent appeared in person.

THE PARTIES

- [4] The Appellant is FirstRand Bank Limited a public company duly registered and incorporated in terms of the company laws of the Republic of South Africa with registration number 1929/001225/06 whose main address of the business is at FNB Campus, Ground Floor FNB Building, 1 Enterprise Road, Fairlands, Johannesburg.
- [5] The First Respondent is Michael Herbert Wright, a major male businessman, married in community of property to the Second Respondent. Further particulars are unknown to the Appellant.
- [6] The Second Respondent is Claire Colleen Wright, a major female businesswoman, married in community of property to the First Respondent

whose full and further particulars are unknown to the Appellant.

THE ISSUES

[7] The issue before us is whether the court *a quo* erred in its judgment and order?

THE FACTS

[8] This matter originates from a home loan agreement in respect of two loans that were advanced by the Appellant to the Respondents in the amounts of R940 000.00 and R460 000.00 respectively.

[9] The loans were secured by two mortgage bonds on a property belonging to the Respondents. The said property is not the Respondents' primary residence.

[10] As a result of the Respondent's failure to repay their loans, the Appellant obtained summary judgment against the Respondents in the amount of R1 436 196.00, together with interest calculated at a variable rate of 11.65% per annum from 1 January 2018.

[11] However, the orders declaring the property to be as especially executable and the authorisation of a writ were postponed *sine die* to enable the Appellant to comply with the provisions of Rule 46(1) read with Rule 46(A) of the Uniform Rules of the Court. This was subsequently heard on 13 August 2019.

[12] In the court *a quo*, the Respondents *inter alia* argued that the Appellant was unwilling to cooperate in the sale of the property through a private sale. In addition, the Respondent contended that had the Appellant cooperated, the total debt due would have been settled by 13 February 2019 when the summary

judgment was granted.

- [13] Based on the above, the court *a quo* concluded that the Appellant did not make full disclosure to the effect that the Respondents had already concluded a private sale of the property and that they were in the process of seeking transfer of the property to prospective owners among others. According to the court *a quo*, the Appellant made an “oblique”¹ reference to the private sale and thus sought to bypass the private sale and obtain authority to sell the property through auction.²
- [14] Consequently, the court *a quo* struck from the roll the Appellant’s foreclosure application and ordered that the Appellant forfeits all interest earned on the judgment debt from 13 February 2019 after the granting of summary judgment up to and including a period of one month after the delivery of that judgment among others.
- [15] Not satisfied with the decision of the court *a quo*, the Appellant lodged this application appealing the judgment of the court *a quo*.
- [16] The Appellants grounds of appeal are fully set out in the Application for Leave to Appeal³ and need not be reproduced here save to say that the Appellant is of the view that the court *a quo* erred in finding that there was no full disclosure of the fact that the Respondents had already concluded a private sale of the property and that they were in the process of seeking transfer to the new owners.
- [17] The First Respondent, although present in court, did not make any significant

¹ Judgment para 9.

² Judgment para 10.

³ Appeal Record Vol. 4 page 287-298.

submissions opposing the appeal.

APPLICABLE LAW

[18] The law regarding appeals dictates that a court of appeal should be slow to interfere with the judgment of the court below.⁴ However, this is not a rigid rule.⁵ The appeal court may reverse the judgment of the court *a quo* if the circumstances of the case justify an intervention. In *Makate v Vodacom (Pty)*,⁶ Jafta J, as he was then, accurately stated that:

“... If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case” (emphasis added).

[19] Similarly, in *S v Naidoo & others*,⁷ it was stated that:

“a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong” (emphasis added).

[20] Considering the above precedent, absent any misdirection by the court *a quo*, there will be no reasons whatsoever for interference by this Court.⁸ However, if somehow the court *a quo* misdirect itself on the facts and as a result came into the wrong conclusion, this Court will be justified to reverse such decision.

[21] I now consider the submissions of the parties to ascertain whether this court can interfere with the judgment of my brother, Mothle J.

⁴ *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA); *S v Naidoo and Others* 2003 (1) SACR 347.

⁵ *Mkhize v S* (16/2013) [2014] ZASCA.

⁶ 2016 (6) BCLR 709 (CC) para 40.

⁷ 2003 (1) SACR 347 (SCA) para 20.

⁸ *R v Dhlumayo and Another* 1948 (2) SA (A); *S v Monyane & Others* 2008(1) SACR 543 SCA at para 15.

APPELLANT'S SUBMISSIONS

[22] The submissions made by both parties during the hearing of the case were brief and precise.

[23] Counsel for the Appellant *inter alia* argued that the court a *quo* erred in finding that the Plaintiff had not made a full disclosure regarding the sale of the property. To this end, he directly pointed this Court to various portions of the record where the disclosure about the private sale of the property was fully made.⁹

[24] When counsel was asked by this Court regarding partial disclosure, counsel vigorously stood his position that there was full disclosure. In addition, he submitted that the issue of disclosure and/or non-disclosure had no relevance whatsoever to the application before the court a *quo*.

[25] Regarding the forfeiture of the interest, the Appellant contended that there is no basis in law to deprive a lender of its interest. According to counsel, he tried without success to locate an authority where a lender forfeits his/her interest because of non-disclosure of certain facts.

RESPONDENT'S SUBMISSIONS

[26] The First Respondent did not attempt to challenge the Appellant's submissions in any way. Instead, the Respondent explained about his attempts to sell the property via a private sale.

⁹ See for example, Appeal Record Vol. 2 page 111 and pages 136-149 - correspondence MM5.

[27] To this end, the First Respondent indicated that he had already secured prospective buyers, but the delays related to the sale jeopardized the success of the private sale. The First Respondent further indicated that at some stage, he was given a new acknowledgment of debt but hesitated to sign it because it contained a new amount compared to the initial one that he had received.

[28] When the First Respondent was asked by this Court whether he has made any contribution towards the payment of the debt, the First Respondent's response was a no. The basis for this answer was that due to financial challenges brought about by COVID-19, he was no longer able to honour the agreement and effect the required monthly payments.

EVALUATION OF SUBMISSIONS

[29] My reading of the judgment and order of the court *a quo* including the submissions of the parties reveals a misdirection that would justify interference by this Court.

[30] Further, the First Respondent did not attempt to challenge the foreclosure application in any manner and/or raise issues related to non-disclosure of information by the Appellant.

[31] It was out of the court's *a quo* volition to raise and focus on the alleged Appellant's partial disclosure about the private sale. It cannot be said that the Appellant had not made a full disclosure about the then failed private sale when the record of appeal before this Court in all respects indicates otherwise.

[32] I also agree with the Appellant's submissions that the issue of disclosure and/or non-disclosure about the private sale had no relevance whatsoever in the determination of the foreclosure application.

[33] With regards to the forfeiture of interest by the Appellant, I further agree with the Appellant's submission that there is no authority in law that suggests that a lender should be deprived of his/her interest based on non-disclosure of facts.

[34] Having carefully considered the appeal record, the First Respondent's submissions, Appellant's written and oral submissions. I am of the view that the court *a quo*, misdirected itself on the facts before it and this resulted in it applying the wrong principles of law, and reaching a wrong conclusion. The court *a quo* erred in finding that there was no full disclosure about the private sale of the property.

[35] I make the following order:

(a) The appeal is upheld;

(b) The order of the court *a quo* is varied as follows:

(c) The Respondents' following immovable properties are declared specially executable:

- (i) *Section No. 1 as shown and more fully described on the Sectional Plan No. SS536/2000, in the scheme known as Erf 1220, Rooihuiskraal in respect of the land and building or buildings situate at Rooihuiskraal Noord, Extension 16 Township, Local Authority; City of Tshwane*

Metropolitan Municipality of which section the floor area, according to the said Sectional Plan, is 142 (ONE HUNDRED AND FORTY-TWO) square meters in extent;

and

- (ii) *An individual 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 THE DEED OF TRANSFER NO. STO25127/11.

and

An exclusive use area described as Garden Number G1 measuring 232 square meters being as such part of the common property, comprising the land and the scheme known as Erf 1220, Rooihuiskraal in respect of the land and building or buildings situate at Rooihuiskraal Noord, Extension 16 Township, Local Authority; City of Tshwane Metropolitan Municipality as shown and more fully described on Sectional Plan Number SS536/2000.

HELD BY NOTARIAL DEED OF CESSION OF EXCLUSIVE USE AREA SK001669/11.

- (d) The Registrar is authorised and ordered to issue a Writ of Execution against the Respondents' immovable property, described in (c) above.

(e) The Respondents' immovable property, described in (c) above may be sold in execution by the Sheriff without a reserve prize, in terms of the provisions of Rule 46A(8) of the Uniform Rules of Court.

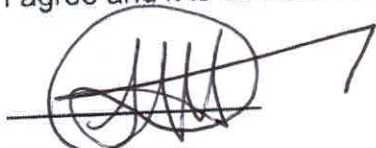
(f) The Respondents are ordered to pay the costs of the application on the scale as between attorney and client.



M R PHOOKO AJ

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

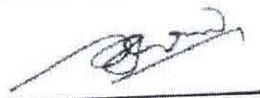
I agree and it is so ordered.



D MAKHOB

**JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

I also agree and it is so ordered.



J NYATHI

**JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment 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

APPEARANCES:

Counsel for the Appellant:	Adv PG Cilliers SC
Instructed by :	PDR Attorneys INC.
Counsel for the Respondent:	In person
Date of Hearing:	14 March 2022
Date of Judgment:	25 June 2022