

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: Friday 30 November 2007

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

Desmond Menqa & Owen Peter Roux v Patrick Markom & 7 Others

The Supreme Court of Appeal today dismissed in part and upheld in part an appeal against an order made by the Cape High Court in terms of which the sale in execution of a residential property in Maitland to Mr Desmond Menqa, as well as a subsequent sale of the property to Mr Owen Peter Roux, were declared to be null and void. The Cape High Court also directed the Registrar of Deeds, Cape Town, to register Mr Patrick Markom as the owner of the property. Menqa and Roux appealed to the SCA with the leave of the court below.

Markom bought the property in 1995 for R120 000. It was occupied at that time by a lessee, Mr Jules Tromp. The lease was terminated, but Tromp refused to leave the property. On 4 June 1995, during a visit to the property by Markom, a fight broke out between him and Mr Tromp and the latter then claimed damages for personal injury against the former during September 1996. On 19 November 1999, the magistrate's court granted default judgment against Markom in favour of Tromp for nearly R100 000. Markom subsequently moved into the property and it was registered in his name. He lives there with his family.

According to Markom, he only became aware of the default judgment against him four years later, when a notice arrived at the property on 13 November 2003, notifying him that it would be sold in execution on 17 November. On that day, Markom obtained an urgent interim court order staying the sale in execution, but this order was received by the Sheriff of Maitland after the sale had already taken place. Roux bought the property for R110 000 at the sale on behalf of Menqa.

Markom tried twice to have the default judgment against him set aside, but his applications were dismissed by the magistrate's court. Eventually he noted an appeal to the Cape High Court against the dismissal of his second application for rescission. On 25 November 2005, this appeal was postponed indefinitely so that a lawyer could be appointed to represent Markom *pro bono*.

In the meantime, the property was transferred to Menqa on 7 September 2005 and the Nedbank bond over the property was cancelled. Menqa paid a total amount of approximately R140 000, about R103 000 of which went to Nedbank and R26 500 to Tromp. On 6 December 2005, Menqa sold the property to Roux for R490 000. Markom then launched proceedings in the Cape High Court to prevent the transfer of the property to Roux.

The Cape High Court held that the warrant of execution obtained by Tromp against the property was invalid because it was issued by the clerk of the magistrate's court without the oversight of a court, as required by the Constitutional Court in its 2005 judgment in the case of *Jaftha v Schoeman; Van Rooyen v Stoltz*. The absence of this procedural safeguard imperilled Markom's fundamental right of access to adequate housing contained in s 26(1) of the Constitution. The sale in execution to Menqa was invalid for the same reason. As this sale was a nullity in that it had taken place in breach of Markom's constitutional rights, s 70 of the Magistrates' Courts Act 32 of 1994, which protects sales in execution where the purchaser is in good faith and does not have knowledge of any defect in the sale, does not apply.

The SCA agreed with the reasoning of the court below and confirmed the orders of that court declaring the sale in execution of the property, as well as the subsequent sale to Roux, to be null and void, and prohibiting the Registrar of Deeds from registering transfer of the property to Roux.

The SCA did not, however, agree with the order of the Cape High Court directing the Registrar of Deeds to register Markom as the owner of the property. It pointed out that the Sheriff derives his or her authority to transfer ownership pursuant to a sale in execution from the Magistrates' Courts Rules and that, if the sale is null and void because it violates the principle of legality (as in this case), then the Sheriff has no authority to transfer ownership of the property to the purchaser. The purchaser thus does not become the owner despite registration of transfer of the property in his or her name.

It followed that, in this case, Menqa did not become the owner of the property when it was transferred to him and that, in theory, Markom is entitled to claim the property back from Menqa. However, simply to direct the Registrar of Deeds to re-register the property in Markom's name would not properly take into account the fact that Menqa has paid more than R140 000 in respect of the property and that, amongst other things, by virtue of the cancellation of Markom's bond debt to Nedbank Markom seems to have been unjustifiably enriched at Menqa's expense. The SCA thus concluded that it would be much fairer to both parties if these claims are dealt with, preferably simultaneously, in future court proceedings which would no doubt be instituted in due course. For these reasons, the SCA set aside the relevant order made by the Cape High Court.

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