



**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 1195/06

In the matter between

PATRICK MARKOM

Applicant

and

DESMOND MENQA

1st Respondent

O P ROUX

2nd Respondent

HEYNS AND PARTNERS INCORPORATED

3rd Respondent

REGISTRAR OF DEEDS

4th Respondent

NEDCOR BANK LIMITED

5th Respondent

MR J TROMP

6th Respondent

SHERIFF OF MAITLAND

7th Respondent

CITY OF CAPE TOWN

8th Respondent

SOUTH AFRICAN REVENUE SERVICES

9th Respondent

JUDGMENT

ZONDI, AJ

Introduction:

[1] This matter came before me on the return day of a *rule nisi* granted by Van Reenen J, on 10 February 2006. The relevant terms of the order are to the following effect:

"1. A *rule nisi* is hereby issued calling upon all interested parties to show cause on 23 March 2006 why a final order should not be granted in the following terms:

1.1 Declaring as null and void a sale in execution of a property known as erf 23584 Maitland, Cape Town, situated at 17 Camden Street, Maitland, Cape Town, allegedly held on 17 November 2003, together with all subsequent sales of such property thereafter;

1.2 Interdicting and prohibiting the registration by the Fourth Respondent of the pending transfer from the First to the Second Respondent of the property known as erf 23584

Maitland, Cape Town, situated at 17 Camden Street,
Miatland, Cape Town;

- 1.3 Suspending execution on a judgment obtained against the applicant in the Magistrates' Court for the District of Cape Town under case number 26081/1996 in terms of section 78 of Act 32 of 1944, pending finalisation of an appeal against the judgment of the learned Magistrate Jaxa in the Magistrates' Court for the District of Cape Town of 18 August 2005 under case number A536/2004 in this Honourable Court, or finalisation of other proceedings to set aside such judgment instituted within one month of the final order;
- 1.4 Directing the Fourth Respondent to register the Applicant as owner of a property known as erf 23584 Maitland, Cape Town, situated at 17 Camden Street, Maitland, Cape Town; *alternatively* granting the Applicant leave to proceed to recover ownership of the said property by way of a *restitutio in integrum* or otherwise and thereafter to register such ownership with the Fourth Respondent; and
- 1.5 Ordering the First to Fourth Respondent's, jointly and severally as the case may be, to pay the Applicant's costs on

the scale as between party and party to the extent that this application is or was opposed by one or any of them.

2. Sub-paragraphs 1.1, 1.2 and 1.3 above shall together operate as an interim interdict pending the return day of the *rule nisi*."

[2] On the return day of the *rule nisi*, the respondent opposed its confirmation and sought its discharge.

Factual background:

[3] In early 1995 the applicant purchased the property from the deceased estate of one Kock ("the deceased") for the sum of R120 000-00. He is currently residing at the property with his common law wife. He has been resident at the property since about April 1997. When he purchased the property it was occupied by one Jules Tromp, the sixth respondent, in terms of the lease he had with the deceased.

[4] On or about 4 June 1995 the applicant, together with two labourers, visited the property with a view to conducting certain repairs and performing general maintenance. The sixth respondent

was not pleased to see the applicant. A scuffle broke out between the applicant and the sixth respondent as a result of which the latter sustained certain bodily injuries. On or about 11 September 1996 the sixth respondent instituted a claim against the applicant for damages he suffered as a result of an unlawful assault. The amount claimed from the applicant was R98 665-45. The applicant defended the action on receiving the summons. There is a dispute between the parties on how applicant's notice of intention to defend the action was communicated to the sixth respondent's attorneys of record and whether it constituted a proper notice of intention to defend.

[5] On 19 November 1999 the sixth respondent obtained a default judgment against the applicant. According to the applicant he only became aware of the default judgment some years later when a notice of sale was served at the property on 13 November 2003. In terms of that notice the sale was to take place on 17 November 2003. Prior to consulting with N Allen Attorneys, who launched an application for an order staying the sale of property in execution, the applicant had initially seen a certain Mrs Davidson of Davidson and Badrodien Attorneys.

[6] In the morning of 17 November 2003 the applicant obtained the interim order staying the sale in execution but by the time it was served on the sheriff, the sale in execution had taken place. On 18 November 2003 the attorneys for the sixth respondent wrote to the sheriff notifying him that the sale had to be proceeded with as it had taken place validly and prior "to any court order being made in this matter".

[7] The second respondent bid for the property on behalf of the first respondent at the auction and thereafter signed the conditions of sale on his behalf.

[8] The applicant thereafter applied for rescission of the default judgment. This application had been set down for hearing on 19 January 2004 but was dismissed because of non-appearance of his attorney. He then applied for a rescission of the judgment dismissing his first application for rescission. This application was dismissed on 23 November 2004. Before bringing this application the applicant had on 24 February 2004 lodged an appeal against the order dismissing his rescission application which he subsequently withdrew on 27 August 2004.

[9] On 9 September 2005 the applicant noted an appeal against the dismissal of the rescission application.

[10] The sheriff re-attached the property on 26 May 2005 on the instruction of the sixth respondent's attorneys. The second respondent attended the sale in execution and bid for the property on behalf of the first respondent. The first respondent paid R110 000-00 for the property. The property was transferred to the first respondent on 11 November 2005. On 6 December 2005 the first respondent sold the property to the second respondent for R490 000-00. The transfer of the property to the second respondent is still pending. It is this transfer which the applicant has sought to interdict.

[11] The appeal which the applicant had noted was set down for hearing on 25 November 2005. It was, however, postponed *sine die* in order for *pro bono* counsel to be appointed to represent the applicant.

Discussion:

[12] It is important to emphasise at this stage that in these proceedings the applicant is not seeking an order setting aside the default judgment entered against him in the Magistrates Court. This issue is subject of an appeal which is pending in this Court. In other words the question whether or not the magistrate was entitled to enter judgment by default against the applicant is not to be determined in this application. All that the applicant seeks is an order confirming the *rule nisi*. In the circumstances any argument with regard to the validity of the judgment is irrelevant to the nature of the dispute presently before me.

Validity of the Writ:

[13] *Mr Greig*, who appeared for the applicant, attacked the validity of the execution process on four grounds. Firstly, he argued that the sale in execution of the property was invalid in that the warrant of execution which authorised the sale had not been obtained in accordance with the requirements of section 66(1) of the Magistrates Court Act, 32 of 1944 ("the Act"). For this proposition he relied upon the Constitutional Court judgment in the case of **Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others** 2005 (2) SA

140 (CC) and an unreported judgment of this division dated 10 October 2005 and handed down by Davis J in **Reshat Schloss v Gordon Taramathi & Others** Case Number 2657/2005. He argued that in terms of these two judgments the magistrate should have considered the applicant's personal circumstances before issuing the warrant and his failure to do so rendered the warrant invalid.

[14] Before **Jaftha** judgment section 66(1)(a) of the Act provided:

"Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made."

[15] In terms of the section, as it then stood before **Jaftha** judgment, the judgment creditor was entitled as of right to a writ of execution against immovable once the debtor had insufficient movables to

satisfy the debt and the clerk of the court had to issue it. The provision of section 66(1)(a) was held unconstitutional in *Jaftha* judgment as it allowed for sales in execution in unjustifiable circumstances and without judicial intervention.

[16] The Constitutional Court in *Jaftha* ordered that section 66(1)(a) of the Act has to be read as though the phrase "a court, after consideration of all relevant circumstances, may order execution" appear before the phrase "against the immovable property of the party...". At 164F-G the Court explained the effect of this reading in as follows:

"However, once the Sheriff has issued a *nulla bona* return indicating that insufficient movables exist to discharge the debt, the creditor will need to approach a court to seek an order permitting execution against the immovable property of the judgment debtor. The court will decide whether or not to order such execution having considered all relevant circumstances."

[17] In *Reshat Schloss* judgment; *supra*, it was held that the declaration of invalidity in *Jaftha* case applied retrospectively and accordingly a sale in execution which had taken place pursuant to a

writ which was not obtained in accordance with the requirements of section 66(1)(a) was invalid.

[18] In response to the applicant's argument in respect of section 66(1)(a), *Mr Sievers*, who appeared for the first and second respondents, argued that it was not correct that section 66(1)(a) provides only one procedure through which the warrant of execution can be issued. He submitted that it also provides a second procedure, namely that the court may, on good cause shown, order an execution against the immovable property of the judgment debtor.

[19] I am in agreement with Mr Sievers's submission. But it is clear from the provision of section 66(1)(a) as interpreted in **Jaftha** case that that alternative method of authorising execution will have to be preceded by an enquiry into all relevant circumstances of the case.

[20] It is clear that a warrant of execution was issued against the applicant's movables before the warrant of execution against the immovable property was authorised. In a return of non-service dated 23 March 2000 the sheriff reported "despite numerous attempts, the debtor could not be found... The premises were searched in the

presence of Gail, where no attachable assets could be found". In my view the present case falls within the four corners of the mischief which the Constitutional Court in **Jaftha** was seeking to address, namely the procedure whereby a clerk of the court, without any judicial oversight, rubber stamped the granting of a writ of execution against immovable once the debtor had insufficient movables to satisfy the debt. It is clear in this matter that the writ of execution was issued by the Clerk of the Court and without judicial supervision and was therefore in violation of the law as laid down in **Jaftha**. The writ was in the circumstances invalid.

[21] The next question to determine is the effect of this finding on the first respondent who bought the property at a sale in execution. Section 70 of the Magistrates Court Act provides:

"A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against purchaser in good faith and without notice of any defect."

This section provides protection to the purchaser who acquired property at a sale in execution tainted by some defect or irregularity (**Gibson NO v Iscor Housing Utility Co Limited** 1963 (3) SA 783 (T) 786B-D and **Standard Bank of South Africa Limited v Prinsloo** 2000 (3) SA 576 (C) at 586H-587C). To enjoy protection the purchaser must have bought property in good faith and without knowledge of defect. What is relevant for the purpose of impeaching the sale is the knowledge of the purchaser and not of the judgment creditor or sheriff.

[22] *Mr Sievers*, relying on the authority of **Gibson NO** *supra*, submitted that the fact that delivery had taken place and that the first respondent had acted in good faith did not entitle the court to impeach the sale in execution. He accordingly submitted that in the absence of proof of bad faith or knowledge of any defect on the part of the first respondent, the sale in execution should not be impeached. In my view, **Gibson** case does not apply in a situation where an alleged sale in execution takes place pursuant to an invalid warrant of execution. In the present case the sale in execution took place in terms of and on the basis of an invalid writ which, in my view,

is the heart of the sale. Therefore the fact that the first respondent acted in good faith when he purchased the property is irrelevant. In my view the provision of section 70 of the Act does not apply in the circumstances where a sale in execution took place pursuant to an invalid warrant of execution. To apply the provisions of section 70 in these circumstances would defeat the whole purpose of the Constitutional Court ruling in **Jaftha** case.

[23] I accordingly hold that the sale in execution was invalid as it took place on the basis of an invalid writ of execution and it could not have served to pass any title to the first respondent when the property was subsequently transferred to him. The applicant, as the owner of the property, would be entitled to recover it by way of *rei vindicatio* (**Joosub v J I Case SA (Pty) Ltd** 1992 (2) SA 665 (N) at 676G (now known as Construction & Special Equipment Co (Pty) Ltd and Others).

Suspension of the writ:

[24] Secondly, it was submitted by *Mr Greig* that the sale in execution was invalid in that the applicant had successfully obtained

an order staying the sale. I do not agree with this submission because there is no allegation in the applicant's papers that when the sheriff sold the property in execution he was aware of the order staying the sale. According to the first respondent the sale took place on 17 November 2003 shortly after 10h00 and the order staying the sale was communicated to the sheriff by the applicant after the sale. This averment has not been disputed by the applicant.

[25] It is also submitted by the applicant that the application for rescission and a subsequent appeal suspended the execution process and that if sixth respondent intended to proceed with the execution process he should have sought from court an order in terms of section 78 of the Magistrates Court Act.

[26] It is trite law that the execution of a judgment is automatically suspended upon the noting of an appeal with the result that pending the appeal the judgment cannot be carried out and no effect can be given to it (**South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977 (3) 534 (A). A judgment creditor who wishes to proceed with execution pending an appeal

must make an application in terms of section 78 of the Magistrates Court Act. This section provides:

"Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application."

[27] In his papers the applicant avers that he only became aware of the judgment on 13 November 2003 when he received a notice of sale on advising him that the sale in execution was to take place on 17 November 2003. In the morning of 17 November 2003 he successfully applied for and obtained from Magistrates Court an order staying the sale in execution, pending "an application for rescission of judgment to be brought... within 10 days" of the granting of the order. It is not disputed by the applicant, however, that the order reached the sheriff's attention after conclusion of a sale in execution.

[28] On 1 December 2003 the applicant applied for rescission. His application was dismissed on 19 January 2004 because of non-appearance of his attorney. On 11 March 2004 he noted an appeal against the Magistrates' decision dismissing his application for rescission. The applicant withdrew this appeal on 27 August 2004. On 10 September 2004 he launched an application to rescind the Magistrates' decision dismissing his first application. This application was dismissed on 23 November 2004. On 9 September 2005 he noted an appeal against the Magistrates' decision of 23 November 2004. The appeal is still pending before this Court.

[29] On 7 November 2005 the property was transferred to the first respondent.

[30] It is argued by the applicant that the application for rescission and a subsequent appeal suspended the execution process. It is accordingly submitted on applicant's behalf that the registration of transfer of the property in the name of the first respondent was unlawful as the first respondent was aware that the lawfulness and validity of the sale in execution were

being challenged. The answer to the applicant is to be found in the matter of **Modelay v Zeeman and Others** 1968 (2) SA 639 (A). In this case it was held that in terms of section 70 of the Magistrates' Courts Act, a sale in execution of immovable property is not liable to be attacked after transfer on the ground that the purchaser had notice of a defect only after the sale in execution but before registration of transfer. The first respondent is protected by section 70 of the Act. If the applicant wishes to impeach a sale in execution he must allege and prove bad faith or knowledge of any defect on the part of the first respondent when he purchased the property at such sale (**Sookdeyi and Others v Sahadeo and Others** 1952 (4) SA 568 (A) at 572E-F). It is not the applicant's case that the first respondent was aware that he was challenging lawfulness of the sale in execution when the first respondent bought the property. It is true, that the first respondent might have become aware of this fact subsequent to the sale and at the time when he took transfer of the property. But this is not what is required in order to impeach the sale in terms of section 70 of the Act.

The purchaser must be shown to have had knowledge of defect before the sale. I accordingly reject the applicant's contention.

[31] Thirdly, it was submitted by *Mr Greig* that the sale in execution was invalid in that the property was sold on less than one month's notice to the applicant. It is unnecessary for me to deal with this contention as I have already stated that section 70 of the Magistrates' Courts Act protects the purchaser where the sale in execution has been tainted by some defect or irregularity.

[32] In terms of Rule 43(6)(a) of the Magistrates' Court Rules the sheriff must appoint a day and place for the sale of attached property which day shall be not less than one month after service of the notice of attachment. The applicant contends that the sale in execution was invalid in that the sheriff served a notice of attachment at his house some three days before the sale. He accordingly submitted that the attachment and sale did not properly constitute a valid sale in execution and that it had to be set aside. *Mr Sievers* submitted that section 70 protected the first respondent in a situation where there has

been a defect in the execution process. I am in agreement with Mr Sievers's submission. The sheriff's failure to comply with the Rules regarding time and manner of service of attachment notice will constitute irregularity in the execution process, but that irregularity will not affect the sale in execution as long as the purchaser was not aware of it and had acted in good faith at the time of sale. Section 70 will protect him in that situation.

[33] Finally, it was submitted by *Mr Greig* that the warrant of execution was invalid in that it was issued on the basis of the judgment which was *void ab initio*. He argued that the Magistrates' Court should never have granted judgment in this matter. The applicant had defended the matter. His notice of intention to defend was, however, defective and in the circumstances the attorneys for the sixth respondent should have complied with the provision of Rule 12(2) of the Magistrates' Court Rules and they had not done so. *Mr Greig* accordingly submitted that in the circumstances the magistrate should not have granted judgment against the applicant. It is not necessary for me to deal with this contention as the point

raised by *Mr Greig* is subject of an appeal which is pending before this court. What is being challenged in the present proceedings is the validity of the execution process and not the validity of the judgment.

The Order:

[34] In the circumstances the *rule nisi* is confirmed in its entirety with costs.

A handwritten signature in dark ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

ZONDI, AJ