

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 9815/2011

In the matter between:

THE SHERIFF FOR THE

MAGISTRATE'S COURT KUILS RIVER

First Applicant

ABSA BANK LIMITED

Second Applicant

and

THE REGISTRAR OF DEEDS, CAPE TOWN

First Respondent

PAULINE DAVIDS

Second Respondent

Court: BOZALEK J

Heard: 31 May 2011

Delivered: 24 June 2011

INSTRUCTED BY: Fourie Basson & Veldtman

ADV. FOR DEFENDANT:

INSTRUCTED BY:

ADV. FOR AMICUS CURIAE:

INSTRUCTED BY:

Reportable

THE REPUBLIC OF SOUTH AFRICA

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First Applicant

ABSA BANK LIMITED

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versus

THE REGISTRAR OF DEEDS, CAPE TOWN

First Respondent

PAULINE DAVIDS

Second Respondent

JUDGEMENT : 23 JUNE 2011

BOZALEK J:

[1] In this unopposed application heard in the motion court, the Sheriff of the Magistrates' Court, Kuils River (the first applicant) and ABSA Bank Limited (the second applicant), sought an order against the Registrar of Deeds, as first respondent, and the second respondent, as the owner of certain immovable property situated at Brackenfell, directing the former to pass transfer of such property from the first applicant to the second applicant.

BACKGROUND

[2] The background to the application is as follows. Second applicant loaned certain monies to the second respondent under the security of two mortgage bonds registered over the immovable property. When the second respondent defaulted in the payment of monthly instalments on the underlying loans, the second applicant foreclosed on the mortgage bonds and obtained default judgment against the second respondent for the outstanding balance and an order, made on 6 November 2009, by the magistrate of Kuils River declaring the immovable property executable.

[3] A writ of execution was issued and an attachment of the property was effected on 22 December 2009. It was, however, only sold in execution by the first applicant to the second applicant on 10 January 2011 i.e. more than a year later and without any extension of the validity of the warrant. The deed for the passing of transfer was lodged in the Deeds Office, Cape Town on 14 March 2011.

[4] The first respondent rejected the deed giving as a reason that an attachment issued by the magistrates' court was valid for only one year. The second applicant wrote to the first respondent contending that in terms of s 66 of the Magistrate's Courts Act, 32 of 1994 ("the Act") an attachment only lapses in such circumstances where the immovable property is subject to a claim preferent to that of the execution creditor. It pointed out, furthermore, that the mortgage bonds upon which it had foreclosed were the only preferent claims in respect of the property. The first respondent did not accept these contentions and cited, as further reasons why it would not pass transfer, non-compliance by the applicants with the requirement set out by Constitutional Court in the cases of *Gundwana v Steko Development CC and 2 others* CCT 44/10 [2011] SA CC 14 and *Japhta v Schoeman and others*; *Van Rooyen v Stoltz and others* SA 140 CC. Further correspondence passed between the second applicant's attorneys and the first respondent regarding the applicability of those judgments to the proposed transfer but to no avail.

[5] In these proceedings the second respondent filed a report stating that it abided the decision of the Court but submitting that the Minister of Justice and Constitutional Development should be cited as a respondent since the order sought affected the current practice of the magistrates court and because the interpretation of s 66 (2) - (5) was 'being challenged'. It was submitted that there was uncertainty as to the correct interpretation of s 66 (2) - (5) of the Act inter alia because the magistrates courts allegedly do not differentiate between preferent and non-preferent creditors in granting writs of attachment in terms of Rule 43 and, further, that there was uncertainty as to who determines whether a "claim" is preferent or not. In this regard the first respondent pointed out that the Receiver of Revenue may have a preferent claim unbeknownst to the court, the sheriff or other creditors. The first respondent raised various other related queries and commented on current practices by the sheriff and magistrates courts relating to the extension and upliftment of attachments over immovable property pursuant to warrants of execution.

[6] The following comments emanating from the office of the Chief Registrar of Deeds were also cited:

'The practice in the deeds registries has always been to interpret s 66 (4) of the Magistrates' Court Act to all attachments in cases where the property at issue was not sold within a 12 month period from the date on which the attachment was noted in a deeds registry. The basis of this practice has been the institutional inability of the deeds registry to determine the absence of a creditor whose claim is preferent to the judgement creditor's claim.'

It referred to a resolution taken by the registrars of deeds at a conference held in 2009 which considered inter alia whether s 66 (4) of the Act referred only to preferent claims in sales in execution attachments issued by the magistrate's courts or all sales in execution attachments issued by the magistrate's courts against immovable property. The resolution eventually adopted was that:

The existing practice must prevail in that either the attachment must be withdrawn or proof must be submitted that it has not lapsed or has been extended.'

The first respondent also states in his report:

'in view of the deeds registries' predicament mentioned above, should the Court find fault with the deeds registries application of s 66 (4), the Court is respectfully requested to provide guidance on how to distinguish between those attachments that lapsed in cases where property has not been sold within the 12 month periods and those that do not.'

THE ISSUES

[7] The principal issues in this matter are whether, regard been had to the provisions of s 66 of the Act, and rule 43, the applicants are entitled to an order directing the first respondent to pass transfer to the immovable property in question. Also at issue are whether the responsible Minister should be cited as a respondent and what guidance, if any, this Court should furnish to the first respondent in its interpretation and application of s 66 (4) of the Act.

THE LAW

[8] Section 66(2) - (5) of the Act reads as follows:

'(2) No immovable property which is subject to any claim preferent to that of the judgment creditor shall be sold in execution unless -

- (a) the judgment creditor has caused such notice in writing of the intended sale in execution to be served personally upon the preferent creditor as may be prescribed by the rules; or
- (b) the magistrate or an additional magistrate of the district in which the property is situate has upon the application of the judgment creditor and after enquiry into the circumstances of the case, directed what steps shall be taken to bring the intended sale to the notice of the preferent creditor, and those steps have been carried out, and unless
- (c) the proceeds of the sale are sufficient to satisfy the claim of such preferent creditor, in full; or
- (d) the preferent creditor confirms the sale in writing, in which event he shall be deemed to have agreed to accept such proceeds in full settlement of his claim.

(3) A sale in execution of such immovable property as is referred in ss (2) shall take place within such period of the date of attachment and in such manner as may be provided by the rules.

(4) If a sale referred to in ss (3) does not take place or the immovable property concerned is not released from attachment within a period of one year from the date of attachment, such attachment shall lapse.

(5) The court may, upon the application and at the expense of the judgment creditor, extend the period of one year referred to in (4) by further periods of one year each.'

[9] Magistrates Court rule 43 deals with execution against immovable property and also makes extensive provision to protect the interests of preferent creditors upon the sale in execution of such property. The rule requires a warrant of execution against immovable property to contain a full and complete description of the nature and the situation thereof to enable it to be traced and identified by the sheriff, accompanied by sufficient information to enable the sheriff to give effect to the provisions of sub-rule (2).

[10] Sub-rule (2) provides as follows:

'(2) (a) The mode of attachment of immovable property shall be by notice by the sheriff served in like manner as a summons together with a copy of the warrant of execution upon the execution debtor as owner thereof, upon the registrar of deeds or other officer charged with the registration of such immovable property, upon all registered holders of bonds (other than the execution creditor) registered against the property attached and, if the property is in the occupation of some person other than the execution debtor, also upon such occupier, and upon the local authority in whose property is situated.

(b) if the period of attachment is extended as referred to in s 66(5) of the Act, notice of such extension shall be given to the persons referred to in paragraph (a) in the manner as referred to in that paragraph.'

[11] The importance which the legislature attaches to the interests of a preferent creditor where a debtor's immovable property is sold in execution, is illustrated by the provisions of the following sub-rules i.e. -

[11.1] '(3) After attachment the sheriff shall ascertain and record whether the said property is subject to any claim preferent to that of the execution creditor and, if that be the case, he shall thereupon notify the execution creditor of the existence of any such claims to enable the latter to give notice in terms of s 66(2) of the Act;'

[11.2] sub-rule 6 (b) - (d) which provide for the execution creditor, after consultation with the sheriff, to prepare a notice of sale containing particulars thereof to be published in a newspaper and in the Government Gazette prior to the sale and requiring the sheriff to forward a copy of such notice to every execution creditor who has lodged a warrant of execution and to every mortgagee in respect of the immovable property whose address is reasonably ascertainable;

[11.3] sub-rule 7(a) and (b) which require the conditions of sale to be provided to the sheriff

and to every person entitled to notice of the sale prior thereto and further that any interested parties may apply to a judicial officer for a modification of such conditions of sale;

[11.4] sub-rule 14 (b)-(f) which make detailed provision for the sheriff to distribute the price received upon the sale in execution of the property in accordance with a plan of distribution which he must prepare and which must ordinarily lie for inspection and objection in the sheriff's office for a stipulated period after the date of sale;

[11.5] sub-rule 14 (c) which provides the order of preference for the payment of the claims of creditors in their legal order of preference;

[11.6] sub-rule 14 (d) provides for objections by interested parties to the plan of distribution which objection can ultimately be determined by the court.

[12] Clearly, rule 43 goes to great lengths to ensure that the interests of preferent creditors are protected pursuant to the sale in execution of immovable property.

[13] The wording of s 66 (4) - (5) of the Act was considered in *September and Another v Nedcor Bank Limited and Another* 2005(1) SA 500 (C) where the court comprehensively set out the historical background of our law and practice relating to the execution of judgements. The genesis of s 66 (4) and (5), which were added by Act 63 of 1976, appear to derive from the report of a Committee of Inquiry into the Collection of Debts in Magistrates' Courts in 1970. The court found that the provisions made in ss 4 and 5 for the lapse and possible extension of warrants of execution clearly only applied to sales in execution of immovable property subject to any claim preferent to that of the judgment creditor. In this regard it found, albeit obiter, that 'immovable property which is attached but not subject to some other preferent claim is thus excluded and still subject to indefinite attachments.' I am in respectful agreement with that interpretation.

[14] The court expressed the view, however, that the effect of the new subsections was illogical in relation to the recommendation of the Committee of Inquiry that all judicially attached immovable property should be released from such attachments after the lapse after one year. It expressed the further view that the amendments, notwithstanding the explanation of the Minister to Parliament when the amending legislation was considered, were not in accordance with the recommendations of the Committee of Inquiry.

[15] In the circumstances the court held that 'in the view of the obvious mistakes by the draftsmen' the amendment should be restrictedly interpreted so as to change the existing law as little as possible and should not be interpreted in a manner which would preclude a creditor to re-attach property which is the subject of some other preferent claim.

[16] In the present case the provisions of ss (4) - (6) do not apply and the warrant of execution obtained by the second applicant did not lapse after a year because there was no claim preferent to the second applicant's claim. In fact it was the only holder of a preferent claim over the immovable property. The remaining provisions of s 66 provide no bar to the relief sought by the applicants, namely, that the first respondent be directed to pass transfer of the property to the second applicant.

[17] Regarding the first respondent's comments and submissions, I can in the first place see no basis for joining the Minister as a party to these proceedings. The first respondent abides the decision of the court and a reading

of its report indicates no quarrel with any interpretation of ss (4) -(5), merely the noting of what he regards as practical difficulties in the implementation of its provisions.

[18] It is, furthermore, beyond the scope of this court's duties to offer advice or 'guidance' to that office in the performance of its functions in relation to warrants of execution over immovable property. Clearly the Registrar of Deeds must permit effect to be given to the provisions of ss 66 (2) - (5) which, although they may be at odds with the recommendations of the Commission of Inquiry, are nonetheless clear.

[19] To the extent that his office may be uncertain in specific instances as to whether or not it may lawfully pass transfer of immovable property pursuant to a sale in execution, there is no doubt good sense in its seeking clarification from the judgment creditor, the sheriff or the transferee as to the possible existence of a creditor with a claim preferent to that of the execution creditor and/or the validity of the warrant of execution. The only observation I would make in this regard is that nowhere in the rule 43 or s 66 do 1 detect a duty resting upon the Registrar of Deeds, (obviously, apart from considering its own records) to pro-actively ascertain or determine the existence or ranking of preferent claims over immovable property.

[20] There remains the question of whether the first respondent can refuse to pass transfer of the property on the basis that there has been a failure to comply with the requirements of the Constitutional Court in the Japhta and Gundwana cases.

[21] In Japhta, s 66(1)(a) of the Magistrate's Court Act was found to violate s 26 (1) of the Constitution to the extent that it allowed execution against the homes of indigent debtors where they lose their security of tenure. It was held further that the failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in s 66(1)(a) of the Act was unconstitutional and invalid. To remedy that defect the section was to be read as though the words 'A court, after consideration of all relevant circumstances may order execution' appear before the words 'against the immovable property of the party'. In the present case the warrant of execution was issued by the magistrate and there is therefore no question of there being a lack of judicial oversight.

[22] In Gundwana it was held that the Registrar of the High Court was not constitutionally competent to make execution orders when granting default judgment in terms of Rule 31(5)(3) of the Rules of the High Court. The court noted that the effect of this order had been overtaken by the amendment to Rule 46(1) of the High Court Rules with effect from 24 December 2010. That rule now provides that no writ of execution against the immovable property of any judgment debtor shall issue until, inter alia, such property shall have been declared to be specially executable by the court or, where the judgment is taken by default and the property is the primary residence of the judgement debtor, the court has considered all the relevant circumstances and orders execution against such property.

[23] Clearly the Gundwana decision does not bear upon the facts of the present matter since the proceedings emanated from the Magistrate's Court where there was judicial oversight prior to the granting of the warrant of execution.

[24] In the circumstances there is no reason why the applicants should not be afforded the relief which they seek and the following order is made:

- 1) First respondent is ordered to pass transfer by the first applicant to the second applicant of certain immovable property known as:
 - 1.1 Section No. 4 as shown and more fully described on the Sectional Plan no

SS177/1981 in the scheme known as BRACKVIEW in respect of the land and buildings, situate at BRACKENFELL, in the City of Cape Town, Cape Division, Western Cape Province, of which section the floor area according to the sectional plan is 30 square metres in extent; and

1.2 an undivided share in the common property in the scheme appointed to the said section in accordance with the participation quota as endorsed in the said sectional plan;

held by the second respondent, identity number by Deed of Transfer no ST28039/2005.

L. J. BOZALEK, J

JUDGE OF THE HIGH COURT