IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 8287/2012

DATE: 20 JULY 2012

In the matter between:

M E VENTER Applicant

and

F VENTER Respondent

J U D G M E N T

DAVIS, J:

This is an application for a *rule nisi* to be issued in terms of which the respondents are to show cause why an order should not be granted, interdicting the sheriff of the Magistrate's Court of Kuilsrivier, from executing an order of eviction, which was obtained under case number 13/286 Kuilsrivier Magistrate's Court, pending an application to set aside the order as obtained within 30 days of this application in finding it adjudicated upon, as well as an application to set aside the registration of transfer of the immovable property of the

respondent.

Briefly, the facts are that the applicants are the registered owners of the immovable property, erf 19, by Hegley, Stellenbosch, Western Cape, situate at 53 Falcon Street, Hegley, Western Cape. It is common cause that the immovable property was sold in terms of a sale in execution on 13 October 2011 by Standard Bank of South Africa Limited. The property was purchased by the respondent. On 12 March 2012, an application for sequestration of the applicant's estate was launched by one Aiden Baren in this court, in terms of case 25469/10.

It appears also to be common cause that both estates were placed under a provisional order of sequestration by the Master of the High Court on 19 March 2012. On 10 April 2012, the Master of the High Court appointed Messrs Daniel Terblanche and André October as provisional liquidators of the insolvent estates.

The question upon which I have been asked to adjudicate turns on the issue as to whether the sale of execution has the legal consequences which would permit an application for eviction to be brought by the respondent, as the purchaser of the property in terms of the sale of execution and as against

the applicant. The suggestion from the applicants, based on Simpson v Kleyn N.O. & Others 1987 (1) 405 (WLD), is that ownership of immovable property attached pursuant to a writ of execution, does not pass upon a sale in execution, but upon formal transfer by the deputy sheriff or messenger to the purchaser in execution. Until that point, ownership of the immovable property remains vested in the judgment debtor.

Where the immovable property has been sold in execution, but the estate of the judgment debtor is sequestrated before the property has been transferred to the purchaser in question in terms of the sale in execution, the property must then be dealt with in terms of section 20(1)(a) of the. Insolvency Act 24 of 1936. As that did not occur in this case, given the fact that the Master nor the trustees' consent was procured insofar as the transfer was concerned, there has not been a valid transfer. Accordingly, the respondent had no legal basis by which to obtain the order of eviction.

This case is made more complex by virtue of further facts which were fed to me by way of an intravenous drip from the Bar; that is facts which were not necessarily on the papers, but which seemed to emerge as they were provided to me by counsel. For example, I was informed that an application for leave to appeal against the order of the magistrate was

lodged. I was further informed that this application for leave to appeal had lapsed, or had not been properly prosecuted timeously nor was there any indication that any move for condonation and the prosecution of the appeal had taken place.

A further question arises as to the standing of the applicant. It appears from the applicant's papers that on 4 July 2012, the *rule nisi*, as obtained on 19 March 2012, had been discharged. The argument, therefore, is that the applicant is no longer under an order of provisional sequestration and accordingly he has the standing to bring an application as prefigured in the notice of motion for a setting aside of the registration of the transfer of immovable property to the respondent, which, in turn, would on his argument, justify the setting aside of any order to evict the applicant. If the registration of transfer was set aside, the respondent would not be the owner and accordingly there would be no basis by which the respondent could bring such eviction proceedings.

If, by contrast, the applicant was still under an order of provisional sequestration, manifestly this particular set of proceedings could not be justified. Why? Because an application to set aside the registration of the property would then have to be brought by the trustee or perhaps the Master.

Indeed the only basis by which this particular prayer makes any sense, is if the court operates on the assumption:

1. That Simpson's case applies (and I leave aside the contradictory authorities to which I shall make further reference in any supplementary reasons so requested).

2. That the applicant has the *locus standi* to bring the necessary application.

If the applicant does not have the necessary *locus standi* to bring the application, what is then being asked of this court, is for an open ended invitation to ensure that an execution of an order of eviction never takes place. It would not be an interim order, but it would effectively be a final order in terms of which no further relief could be obtained by the respondent. I was then informed, again from the Bar, that an application was already before this court, which will be heard on 26 July (next week) that is an application to resuscitate the provisional order of sequestration. It is being brought by a creditor. If this is the case and that is successful, all my apprehensions, articulated in relation to the open ended nature of this relief, would be correct. There is simply no basis by which to grant an order, in these terms, in circumstances where, within the

next week, the applicant could well find that the provisional has been extended.

I should add that for the sake of caution, a court should examine the prospects of such an application. Respondent has cogently pointed to the fact that the initial application for a provisional order of sequestration, was a friendly sequestration brought by the applicant's attorney in circumstances where there can be no doubt that it was a friendly sequestration. In these circumstances, it does appear to me, on these papers, that there is considerable weight to the argument that such an order will be granted. I do not entertain the merits of this case, because that is not before me. I simply raise this issue to test the proposition as to whether a refusal of this application would be speculative viewed in this particular context.

In my view, if I granted an order as sought and the sequestration application is granted, the entire basis of this order would have been improperly sought, improperly granted. For these reasons **THE APPLICATION IS DISMISSED WITH COSTS**.

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DAVIS, J

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