REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPEHIGH COURT, CAPE TOWN)

CASE NO: 9619/2012

In the matter between:

JOSEPH FREDERICK SNYMAN	Applicant
and	
THE HONOURABLE MAGISTRATE MR HANNES FOLSCHER	First Respondent
ABSA BANK LIMITED	Second Respondent
EBEN JOHANNES VAN TONDER	Third Respondent
MINISTER OF JUSTICE AND CONSITUTIONAL DEVELOPMENT	Fourth Respondent

Coram Blignault J and Davis AJ

Heard: 8 March 2013, 31 May 2013

JUDGMENT DELIVERED ON 6 SEPTEMBER 2013

DAVIS AJ

Introduction

[1] The applicant in this matter seeks to review and set aside one or more decisions of the first respondent, the Robertson magistrate ('the magistrate'). The papers do not pertinently identify the decisions sought to be set aside,or the grounds of review relied upon. One sees from the notice of motion that it is complained that:

1.1. the magistrate 'took some drastic irregular decisions resulting in the sale of the applicant's house in *(sic)* auction in settlement of a debt which did not exist';

1.2. in reaching the decision 'todeprive the applicant's fundamental right *(sic)* to own property' the magistrate acted unfairly and irregularly;

1.3. the magistrate deprived the applicant of his right to be heard and violated due process of law, as a result of which 'the applicant could not properly respond to the allegations against him';

1.4. there were serious irregularities involving procedures and rules to be complied with when property is sold on an auction;

1.5. the magistrate ignored the fact that the case against the applicant was based on a fraudulent bond and power of attorney.

[2] The application is opposed by second respondent ('Absa') and third respondent ('Van Tonder'), both of whom are represented by attorneys and counsel.

[3] The applicant was not represented by a qualified attorney or advocate. It appears from the affidavits that he was first assisted in bringing this case by the Robertson Community Workers Forum, a non-profit organization which serves the community in regard to 'human rights, justice, social grants, municipal problems and other social-legal problems' and which handles 'complaints related to illegal evictions, land claims, fundamental rights, labour law and consumer rights'. He was later assisted by Professor Jozana Ka Mahwanqa ('Ka Mahwanqa') of the Human Rights and Public Interest Law Forum.

[4] When the matter first came before us on 8 March 2013, the applicant did not appear. He sent Ka Mahwanqa as his representative, who explained that the applicant was ill and requested that the matter be postponed in order that the applicant could attend.Ka Mahwanqaalso mentioned that the applicant wished to obtain legal representation and required an opportunity to do so.

[5] The application for a postponement was initially opposed by Absa. We were of the view that the matter was in any event not ripe for hearing as the papers were not in order. No record of the relevant proceedings in the Robertson Magistrates' Court had been filed, as required in terms of rule 53, and the matter could not proceed in the

absence thereof as the record was clearly essential for the proper determination of the matter. Althoughresponsibility for preparation of the record lay, strictly speaking, with the applicant as *dominus litis*, we considered that a measure of responsibility in this regard rested on second and third respondents' legal representatives in circumstances where the applicant, to their knowledge, lacked the benefit of qualified legal assistance.

[6] In the event, Absa did not persist with its opposition to the application for a postponement, and we made an order in the following terms:

> *'1. The review application is postponed to 31 May 2013 for hearing;*
>
> *2. The applicant shall before that date take all steps necessary to obtain legal representation if he so chooses;*
>
> *3. The second respondent will prepare a bundle including the record of the proceedings in the Magistrates' Court of Robertson that gave rise to the default judgment and consequent sale of the property at execution by 12 April 2013;*
>
> *4. The third respondent will prepare a bundle including the record of the proceedings in the Magistrates' Court of Robertson that gave rise to the eviction order and consequent warrant of eviction by 12 April 2013;*
>
> *5. The third respondent will file a supplementary affidavit and an application for leave to file such an affidavit by 20 March 2013;*
>
> *6. This order, the record referred to in paragraphs 3 and 4, and the supplementary papers referred to in paragraph 5 shall be served on the applicant in terms of the rules of court;*

7. The parties will file heads of argument (or additional submissions) in terms of the rules of court;

8. The costs occasioned by the postponement will stand over for later determination.'

[7] During the course of the hearing on 8 March 2013 it was drawn to the attention of Ka Mahwanqa that the applicant had failed to attach to his founding affidavit the annexures referred to therein and that this was an aspect which the applicant needed to correct. No order was made in this regard, however.

[8] Absa and Van Tonder duly complied with the obligations imposed on them in terms of the order of 8 March 2013. Copies of all documents filed were properly served on the applicant.

[9] Three days before the hearing on 31 May 2013, applicant sought to file an additional bundle of documents pertaining to the matter ('the additional bundle').Copies of the additional bundle had not been served on the attorneys representing Absa and Van Tonder. We enquired of applicant as to the nature of the documents and why they were sought to be filed at the eleventh hour without service on the respondents. The applicant was simply unable to give a satisfactory answer in this regard, even with the assistance of Ka Mahwanqa (who sat next to him and guided him during the course of

the hearing).[1] In the event we declined to entertain the documents on account of their late submission, without explanation of their relevance or the delay in filing them.

Relevant background

[10] The following facts, which are common cause save where indicated, are gleaned from the records in this review application.

[11] The applicant and his wife, Mrs Rachael Charlotte Snyman, to whom he is married in community of property, has at all relevant times resided at the property being Erf 2866 Robertson, more usually described as 35 Watsonia Street, Panorama, Robertson ('the property'). Rachael Snyman is not cited as a co-applicant. She deposed to an affidavit, however, in which she clearly supports the application and associates herself with the relief sought.

[12] Applicant and his wife ('the Snymans') purchased the property for R 40 000.00 in 1997, with funding from a loan from Boland Bank Limited ('Boland') secured by a mortgage bond over the property ('the original bond'). At some stage Absa took over Boland, and acquired the rights under the original bond.

[1] Ka Mahwanqa did not address the Court initially as the respondents objected to his representing the applicant on account of the fact that he is not admitted as an attorney or advocate. Later during the course of the hearing, however, we afforded Ka Mahwanqa the opportunity to make submissions on behalf of the applicant.

[13] In 2005 the Snymans took out a loan from Absa (‘the loan’). Applicant alleges that the loan was for an amount of R 20 000.00 and that the loan was unsecured.The written loan agreement could not be produced as it was destroyed in a notorious fire in 2009, which burned down a document storage facility housing many of Absa’s documents.

[14] On or around 9 May 2007, Absa issued summons against applicant, as first defendant, and Rachael Snyman, as second defendant, under case number 362/2007 in the Robertson magistrates’ court (‘the action’). In the action Absaclaimed payment of the sum of R 89 690.46, plus interest, in respect of the amount due and owing by the defendants to plaintiff under Mortgage Bond Number B120534/2005 passed by the defendants in favour of plaintiff in 2005 (‘the bond’).In addition Absa soughtan order declaring the property, which had been hypothecated under the bond, executable for the amount claimed.

[15] The bond, a copy whereof was annexed to the summons in the action, records that the Snymans acknowledged their indebtedness to Absa in the capital sum of R 82 000.00 and that the bond constitutes a continuing covering security for the capital amount. It reflects that the Snymans executed a power of attorney at Robertson on 20 September 2005 in favour of one Anton Luther Posthumus (‘Posthumus’), in terms whereof they authorised him to appear before the Registrar of Deed and to register the bond on theirbehalf (‘the power of attorney’).

[16] The sheriff's returns of service appearing in the record of the default judgment proceedings indicate that summons in the action was served personally on the applicant (the first defendant in the action) and on Rachael Snyman (the second defendant in the action) on 24 May 2007.

[17] On 10 August 2007, Messrs Balsillies Strauss Daly ('Balsillies'), the attorneys acting on behalf of Absa at the time, applied for default judgment in respect of the action.On 23 August 2007 the Clerk of the Court raised certain queries regarding the National Credit Act 34 of 2005 ('the National Credit Act'). Balsillies responded and dealt with the queries in a letter dated 14 December 2007.

[18] On 18 December 2007 the magistrate granted default judgment in the action against applicant and Rachael Snyman, jointly and severally, for payment of the amount of R 89 690.46, together with interests and costs, and an order declaring the property executable('the default judgment'). A warrant of execution against the property was issued by the clerk of the court on the same day.

[19] The warrant of execution issued on 18 December 2007 was re-issued by the clerk of the court on 18 December 2010. It is not apparent from the papers what happened in the intervening three years, or why the writ had to be reissued.Returns of service contained in the record show that a warrant of execution and notice of attachment of the property were served on the applicant personally on 1 February 2011.

[20] A sale in execution of the property was held on 6 December 2011. The applicant was aware of the sale in execution and attended the auction sale. The property was purchased on auction by Van Tonder for R 95 000.00.

[21] On 15 December 2011 Van Tonder gave notice to the Snymans to vacate the property by 9 January 2012. When they failed to do so, Van Tonder brought an application in the Robertson Magistrates' Court in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ('PIE'), for the eviction of the applicant and his wife from the property. On 13 January 2012 the magistrate granted an order in terms of section 4(2) of the PIE authorising the institution of eviction proceedings against the Snymans, and calling upon them to appear on 9 February 2012 to oppose the application. This order was served personally on the applicant on 18 January 2012.

[22] On 9 February 2012 the Snymans attended at court to oppose the application, together with Ms Lakey ('Lakey'), an attorney from the Legal Aid Board. The matter was postponed by agreement until 16 February 2012 in order to attempt to reach a settlement.

[23] On 16 February 2012 Lakey withdrew as attorney of record for the Snymans. She informed the magistrate that they did not wish to settle the matter because they had a dispute with Absa.

[24] The magistrate took the view that the Snymans had no defence to the application and proceeded to grant an order on 16 February 2012 directing them to vacate the property by 11 May 2012, failing which the sheriff was authorised to evictthem from the property on 14 May 2012 (‘the eviction order’).

[25] On 27 February 2012 registration of transfer of the property into the name of Van Tonder took place.

[26] On 26 April 2012 Van Tonder entered into a deed of sale in terms whereof he sold the property to Alec and Wilma Wehr (‘the Wehrs’) for R 295 000.00. The deed of sale provides that the Wehrs willtake occupation of the property on transfer, but does not stipulate a date for the passing of transfer, which has not yet occurred. It is recorded in the deed of sale that the Wehrs are aware that the property is occupied by its former owners, i.e. the Snymans, and that Van Tonder undertakes to take all necessary steps in order to give vacant occupation to the Wehrs, including legal proceedings to have the Snymans ejected from the property, and indemnifies the Wehrs against any responsibility in this regard.

Grounds ofreview

[27] The grounds on which the proceedings of a Magistrates’ Court may be brought on review before a division of the High Court are set out in section 24(1) of the Supreme Court Act, Act 59 of 1959 (‘the Supreme Court Act’). They are:

27.1. absence of jurisdiction on the part of the court (s 24(1)(a));

27.2. interest in the cause, bias, malice or corruption on the part of the presiding judicial officer (s 24(1)(b));

27.3. gross irregularity in the proceedings (s 24(1)(c)); and

27.4. the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence (s 24(1)(d)).

[28] There is no clear delineation in the papers of what is impugned by the applicant and what grounds of review are relied upon. Upon a consideration of the affidavits it seems, however, that the applicant seeks to review and set aside three ordersor proceedings, namely:

28.1. the default judgment;

28.2. the sale in execution; and

28.3. the eviction order.

[29] I consider in turn whether the applicant has made out a proper case for the review and setting aside of any of these proceedings.

The default judgment

[30] The attack on the default judgment is based on the allegations that the summons was not served on the Snymans, and that the bond, on which the judgment was founded, was 'fraudulent'. Applicantcontends, further, that the default judgment should not have been granted as there had not been due compliance with the requirements of the National Credit Act or section 26(1) of the Constitution.

[31] The applicant complains that the default judgment was granted in his absence and without him being aware of the proceedings. The record of the default judgment proceedings, however, contains returns of service which show that the summons was served personally on the applicant and also on Rachael Snyman on 24 May 2007. During the hearing of the review applicant was questioned regarding these returns of service. He persisted with his denial that the summons had been served on him and his wife, and insisted that the sheriff had lied in the returns of service.

[32] This is a serious accusation which cannot be accepted merely at face value. The applicant has put up no evidence whatsoever to substantiate his claim that the contents of the sheriff's returns are false, and in the absence thereof I cannot accept the applicant's version that the summons was not served on him and his wife. More to the point, however, is the fact that the returns of service were proper and regular on the face of it and the magistrate was therefore entitled to accept the summons had been properly served.

[33] The applicant alleges that the bond and the power of attorney are both fraudulent. These allegations are made in the baldest terms in the founding affidavit, without any amplification or substantiation. During the course of the hearing the applicant was questioned in this regard, whereupon he stated that the signatures on the power of attorney, purporting to be his and his wife's, are forgeries. Again, these are serious allegations made without any attempt at corroboration.In my view they are not sufficient to make out a *prima facie* case of fraud.

[34] Applicant's argument based on non-compliance with the National Credit Act is misplaced given that the summons in the action was served on 24 May 2007, whereas the National Credit Act only came into operation on 1 June 2007 and therefore did not apply in this case.

[35] The applicant complains that the default judgment was granted without due compliance with section 26 of the Constitution. It is evident, however, that the summons contained the so-called 'Saunderson warning' in compliance with the practice direction issued by the Supreme Court of Appeal in *Standard Bank of South Africa v Saunderson and Others* 2006 (2) SA 264 (SCA). The relevant notice read as follows:

> *'The Defendants' attention is drawn to Section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the Defendants claim that the order for execution will infringe that right it is incumbent on the Defendants to place information supporting that claim before the court.'*

[36] Given that the summons containing the Saunderson warning was duly served on the Snymans, who failed to appear and place information before the court to show that the execution order would infringe their rights under section 26(1) of the Constitution, there is no basis, in my view, for the complaint that the default judgment violated their Constitutional rights under that section.

[37] In short, I consider that the default judgment record reveals that the papers before the magistrate were complete and regular on the face of it, and that no procedural irregularity was committed when the default judgment was granted. In the circumstances the applicant has not made out a case for the setting aside of the default judgment in terms of section 24 (1)(c) of the Supreme Court Act.

[38] As regards the remaining review grounds contained in section 24(1) of the Supreme Court Act, the only ground notionally relevant in this case is that of judicial misconduct of the nature contemplated in section 24(1)(b). No evidence has been put up to establish the requirements of this section.The serious but baseless allegations against the magistrate, which suggest that he is racist, corrupt and guilty of unlawful conduct, do not come close to discharging the onus of provingthat the magistrate was guilty of ‘interest in the cause, bias, malice or corruption on the part of the presiding judicial officer’ as contemplated in section 24(1)(b) of the Supreme Court Act. In short there is no evidence of wilful misconduct on the part of the magistrate, and the accusations against him were, in my view, recklessly made.

[39] It follows that, in my view, the applicant has not made out a case for the review of the default judgment.

The Sale in Execution

[40] The applicantalleges that there were irregularities in the procedure pertaining to the sale in execution of the property and asks that the sale in execution be set aside. He raises the following complaints in this regard:

40.1. The default judgment was not executed within three years of its pronouncement, and no order of court was obtained to reissue the warrant of execution judgment (‘the superannuation issue’).

40.2. The property was not attached.

40.3. The sale was not advertised.

[41] Applicant states as follows regarding the sale in execution:

> *‘The sale took place (on 6 December 2011) in the presence of the then Sheriff and the prospective buyer, Mr Van Tonder. The house was never attached, and the sale was not advertised. We were very shocked. All of this happened because of the presiding magistrate who granted the irregular default judgment and orders for the house to be sold in an auction. There were no other prospective buyers at the auction. In fact the auction was illegal.’* (Emphasis added.)

[42] The applicant's complaint that the property was 'never attached' is not borne out by the contents of the record of the default judgment proceedings. Returns of service compiled by the sheriff at that time, Mr E. P. Terblanche ('Terblanche'), indicate that a warrant of execution and a notice of attachment in respect of the property were served on the applicant personally on 1 February 2011.

[43] The allegation that the sale in execution was not advertised is unsubstantiated. No detail is given as to what searches, if any, the applicant (or those assisting him) undertook to ascertain whether the sale had been advertised. To my mind the applicant's bald allegations regarding the alleged failure to attach the property and to advertise the sale in execution are not sufficient to make out a *prima facie* case for the setting aside of the sale in execution.

[44] The superannuation issue, however, is another matter. The applicant states as follows in this regard:

> *'The other question to ask – is why it took ABSA Bank almost three years to enforce a default judgment issued in 2007. The order was not even re-issued as required by law.'*

[45] Although the relevant statutory provision is not identified in the founding affidavit, the applicant's complaint in this regard is clearly made with reference to the provisions of section 63 of the Magistrates' Court Act 32 of 1944, which lays down that:

> *'Execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except upon an order of the court in which judgment was pronounced …on the application and at the expenses of the judgment creditor, after due notice to the judgment debtor to show cause why execution should not be issued.'*(Emphasis added.)

[46] Section 63 of the Magistrates' Court Act must be read with rules 36 (1) and (5) of the Magistrates' Court Rules, which stipulate that:

> *'(1) The process for the execution of any judgment … shall be by warrant issued and signed by the registrar or clerk of the court and addressed to the sheriff.*
>
> *…*
>
> *(5) The registrar or clerk of the court shall at the request of a party entitled thereto reissue process issued under subrule (1) without the court having sanctioned the reissue.'*

[47] The record of the default judgment proceedings, read together with the magistrate's affidavit, reveals that the default judgment was granted on 18 December 2007 and a warrant of execution against immovable property was issued on the same day.On 18 December 2010, the clerk of the court reissued the warrant of execution against immovable property, and the property was attached and sold in execution on the strength of the reissued warrant.

[48] The crisp question, therefore, is whether or not it was competent for the clerk of the court to reissue the warrant of execution on 18 December 2010 without the sanction of the court.

[49] It is clear that section 63 of the Magistrates' Court Act operates to prohibit the issue of process in executionafter three years from the date of the judgment, unless authorised by an order of court sought by the judgment creditor on notice to the judgment debtor.The question,then, is how the relevant period of three years is to be calculated.

[50] The computation of calendar years is governed by the civil method of computation. (See *Fouche v Mutual Fire and General Insurance Co Ltd* 1969 (2) SA 519 (D) at 522 H – 523 B; *LAWSA* 2 ed.Vol 25 Part I para 352 (q)*; LAWSA* First Reissue Vol 27 para 428.)This method involves including the first day of the period and excluding the last.When the civil method of computation is applied to the facts at hand, the result is that the three year period referred to in section 63 of the Magistrates' Court Act commenced on 18 December 2007 and expired at midnight on 17 December 2010.

[51] That being the case, it follows that the default judgment became superannuated at midnight on 17 December 2010, and the prohibition in section 63 operated with effect from 18 December 2010 to preclude the issue of any process in execution thereof without an order of court. It was therefore not competent, in my view, for the clerk of the court to reissue the warrant of execution on 18 December 2010 in terms of rule 36 (5), and the reissued warrant was invalid for non-compliance with section 63 of the Magistrates' Court Act. The question which then arisesis the effect, if any, of the absence of a valid warrant of execution on the validity of the sale in execution - and subsequent sales.

[52] In *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA) (*'Menqa'*) Cloete JA drew a distinction between essential formalities and non-essential formalities pertaining to sales in execution and concluded, at para [46], that:

> *'(A)t common law a sale in execution was void for non-compliance with an essential formality, but that non-compliance with non-essential formalities did not have this result.'*

[53] A valid warrant of execution is clearly a pre-requisite for a valid attachment of immovable property in terms of rule 43 of the Magistrates' Court rules. As such, it is an essential formality for a valid sale in execution. The invalidity of thewarrant of execution carries the consequence that theproperty was not validly attached and the subsequent sale in execution was a therefore a nullity(see *Menqa (supra)* at para [45], p 141 C - D).

[54] It must be accepted that Van Tonder had no knowledge of these defects and that he purchased and took transfer of the property in good faith. The question, then, is whether Van Tonder's title is protected in terms of section 70 of the Magistrates' Court Act, which provides that:

> *'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 a purchaser in good faith and without notice of any defect.'*

[55] Cloete JA concluded in *Menqa* (*supra*) at para [46] that section 70 of the Magistrates' Court Act does not avail a purchaser in circumstances where the warrant of execution was invalid, and the sale in execution accordingly void.He reasoned as follows in this regard (at paragraphs [47] and [48]):

> *'… s70 should be interpreted as not protecting a 'sale' which is void for to do so would put it in conflict with the basic principle of legality (which requires public power to be properly exercised in terms of a valid law that authorises it) and s 25(1) of the Constitution which provides that 'no law may permit arbitrary deprivation of property'. Neither consequence could be justified in terms of s 36 of the Constitution – sales in execution were not sacrosanct at common law and there is no reason why they should be in the modern South Africa (save only in the two respects mentioned in s70).*
>
> *It is for these reasons that I support the conclusion of my colleague Van Heerden and the court a quo that s 70 cannot be interpreted as rendering a sale in execution unimpeachable because this would defeat the whole purpose of the Constitutional Court ruling in the Jaftha case. In my judgment this is achieved by not interpreting s70 as applying to 'sales' in execution that are void, whether by reason of the decision in Jaftha or for any other reason.'*(Emphasis added.)

[56] I therefore find that the sale in execution of the property to Van Tonder was a nullity and liable to be set aside. In the circumstances the sheriff had no authority to transfer ownership of the property to Van Tonder, who did not acquire ownership despite registration of transfer of the property into his name.As was stated by Van Heerden JA in *Menqa (supra)* at para [24]:

> *'The sheriff derives his or her duty and authority to transfer ownership pursuant to a sale in execution of immovable property from rule 43(13) of the Magistrates' Court Rules. If the sale in execution is null and void because it violates the principle of legality, as in the*

present case, then the sheriff can have no authority to transfer ownership of the property in question to the purchaser who will thus not acquire ownership despite registration of the property into his or her name.'

[57] Given that Van Tonder did not acquire ownership of the property, it follows that he could not pass valid title in the property to the Wehrs in terms of the subsequent sale thereof.

[58] The conclusion that the sale in execution is a nullity and liable to be set aside is, however, not the end of the matter. The question arises whether this review application should be dismissed on the ground that the applicant delayed unreasonably in bringing the application.

[59] Absa argues that the applicant should be denied relief on account of the fact that he delayed unreasonably in bringing this review application. It deals with the delay point as follows in its answering affidavit:

'I am advised that a review application must be brought within a reasonable period and that failure to do so requires detailed explanation and an application for condonation for such failure. The present application was not only delayed for a period far beyond the limits of what could be considered reasonable but furthermore lacks credible explanation or any prayer that the inordinate delay be condoned. I accordingly submit that the application should fail for this reason alone.'[2]

[2]Absa Answering Affidavit, Review Record p 35, para 8.

[60] Van Tonder does not pertinently raise the defence of unreasonable delay in his original or supplementary answering affidavits, but he complains that he is suffering prejudice as a result of the bringing of the application. He alleges in this regard that:

> *'1.8 I am suffering prejudice as a result of the Applicant's insistence in launching the review application, his dragging out the finalisation of the review application and his refusal to vacate the property.*
>
> *…*
>
> *1.9 I will suffer further prejudice should this Honourable Court find that the eviction proceedings were irregular (which I maintain they were not) in that:*
>
> *1.9.1 I acquired legal right and title in the property through due legal process. …*
>
> *1.9.2 I acted with the necessary bona fides throughout.*
>
> *1.9.3 I am the owner of the property.*
>
> *1.9.4 I will have to incur further legal costs as I would have to launch another application for the Applicant's eviction, despite having followed proper process.*
>
> *1.9.5 I am precluded from occupying the property.*
>
> *1.9.6 I am deprived of the opportunity to earn an income from the property through having it rented out to prospective tenants or selling the property.*
>
> *1.9.7 I have nevertheless, and being bona fide, managed to secure a purchaser and we have concluded a Deed of Sale. I respectfully submit that I am totally entitled to sell the property (if) I so choose. … I suffer prejudice in that I cannot have the property transferred to the purchaser and I fear that I will be held liable towards the purchaser for breach of contract.'*

[61] As was pointed out by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA)(‘*Associated Institutions’*) at para [46], the *raison d’être* of the delay rule in review proceedings is said to be twofold:

> *‘First, the failure to bring a review within a reasonable period of time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and administrative functions.’*

[62] The correct approach to the application of the delay rule was laid down as follows in *Wolgroeiers v Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad*(‘*Wolgroeiers*’) 1978 (1) SA 13 (A) at 39 C – D:

> *‘Word beweer dat die aansoekdoener nie binne redelike tyd die saak by die Hof aanhangig gemaak het nie moet die Hof beslis (a) of die verrigtinge wel na verloop van ’n redelike tydperk eers ingestel is en (b), indien wel, of die onredelike vertraging oor die hoof gesien te word. Weereens, soosdit my voorkom, met betrekking tot (b), oefen die Hof ’n regterlike diskresie uit, met inagneming van al die relevante omstandighede.’*

[63] In *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) (‘*Gwetha v TDC*’) at para [24], Nugent JA stated with reference to the first leg of this enquiry that:

> *‘Whether there has been an undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstancesincluding any explanation that is offered for the delay. (Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en ’n Ander 1986 (2) SA 57 (A) at 86D – F and 86I – 87A). A material fact to be taken into account in making that value judgment –*

bearing in mind the rationale for the rule – is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside.'

[64] If the delay is found to be unreasonable in all the circumstances, the court has a discretion to overlook the delay and entertain the review application nonetheless. (See *Gwetha v TDC(supra)* at para [31]; *Associated Institutions (supra)* at para [47] – [48].)

[65] I venture to suggest that, although the *Wolgroeiers* test is formulated with two legs, the application thereof does not appear to involve a mechanical two-step exercise, but a composite and comprehensive examination of all the relevant facts and circumstances in order to answer the two discrete questions posed. The question of prejudice – actual and potential – is an important consideration, both as regards the question whether the delay has been unreasonable, and, if so, whether it should be overlooked. With this in mind, I turn to consider the relevant facts and circumstances in the present case.

[66] It is striking that, whereas Absa obtained the default judgment on 18 December 2007, it apparently took no steps to execute on the judgment for three years, with the result that, as I have found, the writ superannuated and required the sanction of the court for reissue thereof. Even then, another year lapsed before the sale in execution took place. No explanation has been put up by Absa for its tardiness in this regard.

[67] Following the (unlawful) reissue of the writ by the clerk of the court on 18 December 2010, it appears from the returns of service that the warrant of execution and

notice of attachment of the property were served on the applicant on 11 February 2011, and that the 'nature and exigency of the said process' was explained to him by the sheriff. Given that the summons in the action had been served on the applicant as far back as 24 May 2007, the applicant could be forgiven for being confused about this unexpected turn of events.

[68] Having caused the writ of attachment to be served on the applicant on 11 February 2011, one sees that no further steps were taken in regard to execution until July 2011, when the applicant alleges he received a letter from Balsillies informing him that a sale in execution would take place on 5 August 2011. He states in this regard that:

> *'We were very worried and immediately approached Consumer Guardian Services, who interdicted ABSA Bank from selling the house. ABSA Bank cancelled the sale. (See Annexures H & I).'* (Emphasis added)

[69] It is not clear, given the applicant's failure to attach theseannexures, exactly what arrangements were made between Absa and Consumer Guardian Services on behalf of the Snymans in July 2011. What is plain, however, is that the applicant, having been afforded due notice before the sale in execution, soughthelp from a consumer protection organization.It would appear that the arrangements madewere of a temporary nature, since the house was again put up for sale in December 2011. Applicant states as follows in this regard:

> *'However, five months later, on the 5th of December 2011, I received another letter of sale of the house in execution scheduled for the following day the 6th of December 2011. With only one day before the sale took place! I had no sufficient time at all to get legal advice for another interdict. Besides, when ABSA Bank cancelled the first sale, I believed that the matter was settled. (See Annexure J).'*(Emphasis added.)

[70] It is evident from the applicant's founding affidavit that he was present at the sale in execution and that he was aware that the property was sold to Van Tonder on 6 December 2011. On 15 December 2011 Van Tonder caused a letter to be served on the Snymans personally in which they were formally notified that he had purchased the property on a sale in execution on 6 December 2011, and that they were required to vacate the property by 9 January 2012, failing which an eviction order would be sought. The sheriff's return of service indicates that the sheriff explained the nature and the content of the letter to the Snymans.What does not appear from the papers is whether the sheriff's explanation was understood by the Snymans.

[71] In the event, the Snymans did not vacate the property by 9 January 2011, and on 18 January 2012 applicant was served with notice of an eviction application in terms of PIE to be heard on 9 February 2012.The Snymans evidently sought legal assistance following receipt of the eviction application, for the magistrate's affidavit reveals that the Snymans were represented on 9 February 2012 by Ms Lakey of the Legal Aid Board, who was apparently only available to assist for the purposes of settling the matter. The matter was accordingly postponed to 16 February 2012 for that purpose. On that date Ms Lakey withdrew as attorney for the Snymans and the magistrate granted the eviction order, in terms whereof the sheriff was authorised to evict the Snymans from the

property on 14 May 2012 if they did not vacate by 11 May 2013. It does not appear from the papers why Ms Lakey withdrew as the Snymans' attorney, but it is clear that she was only prepared to offer limited assistance to the Snymans.

[72] The applicant then evidently sought the assistance of the Robertson Community Workers Forum. It does not appear from the papers when he first made contact with this organization. Judging by the typed dates on the affidavits of applicant and his wife, the papers in this application were prepared during April and early May 2012. The affidavits were finally signed on 14 May 2012, and on 15 May 2012 the applicant launched the present review application under case number 9619/2012 together with an application under case number 9620/2012 for an order that the eviction proceedings be stayed.

[73] In evaluating whether or not the time taken to launch the review application was reasonable, I consider that one has to take into account the fact that the applicant is an unsophisticated person who describes himself as 'semi-literate'. When he appeared before us, he had great difficulty understanding the import of the legal proceedings in which he was engaged.To my mind he should not be penalised for failing to react with the promptitude which one could reasonably expect from a more sophisticated person when faced with the same situation. One sees that from the time he received notice of the PIE application, the applicant did not display a supine attitude but took what I consider to be reasonable steps, with the resources available to him, to seek legal redress.

[74] In this regard it should not be ignored that the applicant was not represented by an attorney or advocate. The persons who assisted the applicant with this case do not appear to be qualified legal professionals. Indeed, Ka Mahwanqa adverted during the hearing to the fact that the applicant has experienced difficulties in procuring legal representation. To my mind these facts should be borne in mind when evaluating any shortcomings in the presentation of the applicant's case, including his failure to explain why the review application was not launched earlier.

[75] It is significant that Absa has not made out any case that it has been, or will be, prejudiced by the applicant's alleged delay in launching the review application. Given Absa's failure, without apology or explanation, to execute on the default judgment for nigh on four years, it hardly behoves Absa to complain about a delay of five months in bringing the application for the setting aside of the sale in execution.

[76] Van Tonder likewise has not made out a case in his affidavits that he has been prejudiced as a result of the alleged delay in bringing the review application.The prejudice of which he complains is linked to the Snymans' continued occupation of the property, and his alleged inability to perform in terms of his sale contract with the Wehrs – none of which has anything to do with the time when the review application was launched. What is pertinently missing from Van Tonder's affidavits, is any allegation that he would not have paid for and taken transfer of the property had applicant applied earlier for the setting aside of the sale in execution.In the absence of such an allegation

there is no basis, in my view, for finding that Van Tonder was prejudiced by the alleged delay in bringing the review application.

[77] Having regard to (a)the lack of any prejudice shown by Absa and Van Tonder on account of the alleged delay, (b) the prior delay on the part of Absa in executing on the default judgment, (c) the difficulties faced by the applicant in bringing the application effectively as an unrepresented person and (d) the general public interest in the lawful exercise of public power which requires that the invalid sale in execution be set aside, I am not persuaded that the delay of five months in launching the review was unreasonable. But even if it were, in my view this in an instance where, having regard to all the circumstances, the court should exercise its discretion in favour of the applicant and overlook such delay.

[78] I therefore find that the sale in execution of the property to Van Tonder on 6 December 2011 is null and void and falls to be set aside.

The eviction order

[79] It follows from this conclusion regarding the sale in execution that the Snymans were not in unlawful occupation of the property as at 16 February 2013, and that the eviction order falls to be set aside on this ground alone. I shall, for the sake of completeness, however, deal with the applicant's complaints regarding the eviction order as a separate challenge, on the assumption that the sale in execution was valid.

[80] The applicant's complaint in regard to the eviction order is that the Magistrate failed to give him a proper hearing. He alleges that:

> *'The magistrate called both of us in his office, and without giving me a chance to say anything, he warned me that I was breaking the law and undermining his court judgment. He ordered me and family (sic) to vacate the premises before May 11th 2012, failing which he would authorize the Sheriff to throw us out with all our belongings.'* (Emphasis added.)

[81] The magistrate deals as follows with the events leading to the granting of the eviction order:

> *'13. On the 9th of February 2012 an application in terms of Section 4(1) of Act 19/1998 (the "PIE" act), in which the Applicant and his wife were the First and Second Respondents served before me. Ms Lakey of the Legal Aid Board represented the Respondents. The matter was postponed by agreement to 16 February 2012 for the parties to try and reach an agreement.*
>
> *14. On 16 February 2012 Ms Lakey informed me that the Respondents do not wish to settle the matter as they had a dispute with Absa Bank. She further informed me that she was only on record for the Respondents to seek a settlement and then withdrew as Attorney of Record on behalf of the Respondents.*
>
> *15. I then informed the Respondents that their dispute with Absa Bank was a separate issue which they should take up with Absa Bank. I further explained to them that the Applicant bought the property on an Execution Auction and that he has a valid claim to the property and that they are illegally occupying the property. I then granted an Order that the Respondents must vacate the property on the 11th of May 2012, failing which the Sheriff of the Court could execute the*

Eviction Order on 14 May 2012. A copy of the Order is annexed hereto as Annexure "JHF 7".

16. *I once again reiterate that I in no way acted irregular or unreasonable (sic) in granting the Eviction Order. From the documents filed of record, it was clear that the Respondents did not have a valid defense to the Applicant's claim.'* (Emphasis added.)

[82] Section 4 of PIE deals with applications by an owner or person in charge of land for the eviction of an unlawful occupier. An unlawful occupier is defined in section 1 as 'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land' save for certain exclusions which are not relevant in this instance.

[83] The Snymans were notified by Van Tonder to vacate the property by 9 January 2013, on which date their occupation of the property allegedly became unlawful. The relevant provision, therefore,is subsections 4(6) of PIE, since the Snyman's had been in unlawful occupation of the property for less than six months at the time when the eviction application was launched. Section 4(6) read as follows:

'(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.'

[84] Section 4(6) contemplates a two-phase enquiry. The court is first called upon to determine whether or not the occupier is, in fact, an unlawful occupier and, if so, to determine whether or not it is just and equitable to grant an eviction order, having regard to all the relevant circumstances, including, but not limited to, those listed in the section.

[85] It was stated by Sachs J in the landmark decision of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) *(P E Municipality)* at para [36] that:

> *'The Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.'*

[86] Proper exercise of the judicial discretion conferred upon the court in terms of section 4 (6) requires that the court be informed regarding the circumstances of the occupier. As was pointed out in *P E Municipality (supra)* at para [32]:

> *'The obligation on the court is to "have regard to" the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them.'*

[87] Having regard to the contents of the magistrate's answering affidavit, it seems to me that the applicant's complaint that he did not receive a proper hearing is not without substance. Once Ms Lakey withdrew as the attorney of record for the applicant, he was

before the court as an unrepresented litigant. The matter was postponed from 9 to 16 February 2012 for purposes of settlement only, and the Snymans had not yet filed an answering affidavit setting out their case.

[88] It is difficult to fathom how the magistrate could properly reach the conclusion that the Snymans were in unlawful occupation of the property when he only had Van Tonder's application before him. The unavoidable impression conveyed by the contents of the magistrates' affidavit, is that he 'laid down the law' to the Snymans without giving them an opportunity to present their side of the story.

[89] Furthermore, it does not appear from the magistrates' affidavit that he paid any attention to the question of whether or not it was just and equitable to grant an eviction order in all the circumstances, as required by section 4(6) of PIE. In the absence of an answering affidavit from the Snymans, he had no information before him regarding the circumstances of the occupiers. He had no way of knowing whether or not the granting of an eviction order would have the effect of infringing the Snymans' constitutional rights to adequate housing.

[90] It is noteworthy that Van Tonder's affidavit in support of the application for eviction contains what appears to be an error with significant potential to mislead in this regard. He alleges that:

> *'Die Respondente is geskik om permanent werksaam te wees en behoort ook in staat te wees on alternatiewe akkomodasie te bekom onder andere as gevolg van die feit dat die*

balans van die koopsom soos terugbetaalbaar aan die Respondente ongeveer R50 000.00 behoort te beloop.'

[91] Given that Van Tonder paid R 95 000.00 for the property, whereas the default judgment and warrant of execution were for an amount of some R 89 000.00 (excluding costs), it seems clear that the Snymans will receive very little, if anything, from the proceeds of the sale. There exists a real need, therefore, to investigate the question of whether or not the granting of an eviction order would render them homeless.

[92] In my view the magistrate committed a gross irregularity in granting the eviction order in circumstances where the Snymans had not been granted a proper opportunity to present their case, where he did not have the requisite information before him to properly exercise his discretion in terms of section 4 (6) of PIE, and where he failed to apply his mind to the relevant considerations and to exercise the said discretion at all.

[93] For these reasons I would set aside the eviction order.

Costs

[94] As a party who has achieved substantial success, the applicant would ordinarily have been entitled to a costs order in his favour had he been represented by an attorney. As I have indicated, however, the applicant was assisted by the Robertson Community Workers Forum and Ka Mahwanqa of the Human Rights and Public Interest Law Forum, apparently on a gratuitous basis.

[95] I mention, for the sake of completeness, that in circumstances where the applicant has made serious allegations of impropriety, without any proof, against the first to third respondents, I would deem it appropriate to deprive him of an order for payment of any costs which he might have incurred in bringing this application.

Conclusion

[96] In the result I would make the following orders:

(i) The application for the review and setting aside of the default judgment granted on 18 December 2007 under case number 362/2007 in the Robertson Magistrates' Court is dismissed.

(ii) The sale in execution held on 6 December 2011 under Robertson Magistrates' Court case number 362/07 in terms whereof Erf 2866 Robertson situate at 35 Watsonia Street, Panorama, Western Cape ('the property') was sold to Eben Johannes Van Tonder (ID 730216 5088 082) is declared null and void and set aside.

(iii) The eviction order granted against the applicant and Rachael Snyman on 16 February 2012 under case number 02/2012 in the Robertson Magistrates' Court is set aside.

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D.M. DAVIS, AJ

I agree and it is so ordered.

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A.P. BLIGNAULT, J