IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 21755/2012

DATE: 5 SEPTEMBER 2014

In the matter between:

GOYI GODFREY NXAZONKE & ANOTHER APPLICANT

And

THE CIVIL MAGISTRATE, MITCHELLS PLEIN & 7 OTHERS RESPONDENT

JUDGMENT

DAVIS, J

There are two aspects to the application which have come before this Court. The first is unopposed, the second the subject to contestation from the seventh respondent, and I will deal with it presently.

The substantive application was to set aside a default judgment and writ of execution against the applicant's home, as well as subsequent sales and transfers of their home at 2... N.... C....., K..... There are a series of justifications offered

by the applicant for the relief sought, including that the judgment & order were unconstitutional and

could not have been granted had there been proper judicial oversight. This relief is unopposed.

Briefly the facts are as follows;

1. Applicants, a married couple, moved into the property in 1986;

2. They became 99 year leaseholders in 1988, and ultimately full owners in 1991;

3. In 1990 first applicant borrowed R30 000 from NedPerm Bank (now fourth respondent in the form of Nedbank Group Limited) secured by way of a mortgage bond, in order to build on extra rooms and a bathroom;

4. It appears that no written consent to this transaction was obtained from the second applicant, as required in terms of the Matrimonial Property Act, 88 of 1984 (see section 15(2) thereof);

5. It appears that Nedbank was aware that first and second applicant were married in community of property.

6. First applicant made regular repayments of R500 to R600

every month until 2001 when he retired from his job as a hospital domestic worker and could no longer afford the repayments.

7. By this stage he estimated that he paid the bank over R66 000. In 2001 the bank obtained default judgment against the applicants, allegedly for an outstanding amount of R27 959, 49, which included interest.

8. Notwithstanding the value of the property being between R65 000 to R81 000, the bank proceeded to acquire the property in a sale in execution for R10. I shall deal presently with this point.

9. In 2004 the bank transferred the property to People's Bank which immediately sold it to together with 17 other similar properties to Mpisi Trading (Pty) Ltd.

10. Since 1986 it appears that the applicants had undisturbed occupation of the property and were, as set out in the papers, unaware of the 2001 default judgment and the subsequent sale of their home.

11. In 2008 the second respondent took transfer of the properties in an investment opportunity, using it to

secure a loan of R216 000.00 from the seventh respondent. The second respondent subsequently defaulted on this loan and seventh respondent obtained default judgment against him in 2012. A judicial sale in execution which was scheduled for 11 October 2012 was interdicted, pending the review on 4 October 2012.

12. On 15 March 2013 first applicant passed away and second applicant, in her capacity as executor of the estate, was substituted in his place in all further proceedings.

There can be no doubt, following the decision in Jaftha v Schoeman and Others, Van Rooyen v Stoltz & Others 2005(2) SA 140 (CC), that default judgment together with an order declaring the property executable as took place pursuant to the 2001 default judgment was unconstitutional and hence invalid. It was not made by a judicial officer, after having taken account of all the relevant circumstances, and, particularly, the enquiry to whether the order seriously compromised applicants' constitutional right to access to adequate housing.

The Constitutional Court declared in its judgment in Jaftha that section 66(1)(a) of the Magistrate's Court was unconstitutional,

to the extent that it failed to provide in a consideration of "all the relevant circumstances" before issuing a writ of execution. It followed therefore that the resultant sale in execution was null and void; hence valid title could not be passed. The purchaser in turn could not transfer ownership of the property to subsequent registered owners.

The *jurisprudence* in this connection has subsequently been expanded. In Gundwane v Steko Development & Others 2011(3) SA 608(CC) at para 41 the Constitutional Court said:

> "[e]xecution may only follow upon judgment in a court of law. And where execution against homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, further judicial oversight by a court of law, of the execution process is a must."

The present case presents another case study of how Courts are required to balance competing rights to property on the one hand and the right to housing on the other.

The act of the bank in selling the property and the earlier purchase of the property for R10 is a truly distressing manifestation of greed, undermining cure promises contained

in the Constitution and accordingly the very substructure upon which the constitutional guarantees to property and housing are predicated as set out in the Jaftha subject and the *juris prudence* that followed thereafter. The South African law of property, post the advent of the Constitution is a combination of private law based upon the common law and public law sourced in the Constitution. This holds implications for arguments based on averments based on a double right to ownership of property.

DELAY

Insofar as delay is concerned, in that the matter has taken a very long time, this concern is addressed by way of a full explanation by the applicants. It does not appear that the length of time taken should be an obstacle to the relief that the applicants now seek. As the applicants set out in their papers they did not bring an application to set aside the default judgment earlier because:

1. When the default judgment was granted they were unaware of the summons. They were subsequently unaware that their home had been sold in execution.

2. No one ever attempted to evict them or to assert any

ownership right over the property.

3. They were advised by the legal representatives once they became aware that their house had been sold, against taking further action.

THE SUBSTANCE

There can be no doubt that, faced with this factual matrix, a Court would not have granted judgment, particularly in the light of various defences, including that the bond was invalid, having been entered into without the consent of second applicant; the amount claimed which was just R28 000, and unsupported by information provided to the Court; the original loan had been in the amount of R30 000 and applicant had paid off approximately R66 000 over eleven years; further first applicant had paid to the bank regular monthly instalments until February 2001. Thus the unpaid arrears due to the bank by May 2001 and August 2001 could not have been in excess of R2 000 or R3 000.

Further the applicants were impoverished. Mr Nxazonke is an old age pensioner and his wife a part-time domestic worker. The house was their primary, indeed their only residence. It represented their one opportunity to access State subsidised housing which they received as a first time homeowner. This

is a heavy factor to be taken into account.

Furthermore, the applicants were lacking in legal knowledge, without the means to access legal representation and hence unable to defend themselves adequately. Fortunately they came across the Legal Resources Centre, which, to its great credit, has taken on their case and hence ensured that they are not deprived of their only home, in circumstances where they had no alternative accommodation, no access to adequate housing and thus would be left homeless. The impact would have been to prejudice them disproportionally when compared to the inconsequential pressures that will be suffered by the creditor, a large commercial bank.

The fact – to return again to the core issue – that the Bank purchased their house for R10 - is itself so gross a manifestation of bad faith and an abuse of dominance to be a cause of great concern. In his recent book, Thomas Piketty, Capital in the 21st Century, speaks about the serious and endemic problem of inequality. Significantly Piketty commences the book with two pages of description of the Marikana tragedy. Hence this seminal analysis narrative of inequality is foreshadowed by the South African pattern of inequality, and the manner in which the mining sector in South Africa has not delivered fairness, dignity and equality to

workers who work in dangerous conditions, even twenty years since the fall of Apartheid.

I would have thought that large commercial institutions such as banks should heed what Piketty has to say, and ensure that when these kind of proceedings are initiated, they are performed in good faith, indeed in the utmost good faith, with clear cognisance of the relevant constitutional rights, particularly and the rights of impoverished people not to be evicted from their homes, which action is reminiscent of our dark past. All of these factors are cause for grave concern in terms of the manner in which the bank sought to sell this property in execution.

In short, there is no basis by which the substantive relief upon which the application is predicated could have been resisted, nor was it in argument before this Court.

I turn to the second point, which was a question of costs. There has been opposition by the seventh respondent, which position is now set out in a fairly lengthy narrative. When this application was launched, it appears that seventh respondent opposed the application, but then failed to file any opposing papers until the applicants sought a chamber book application.

Once the opposing affidavit was filed, it was clear that the real concern which seventh respondent then had concerned certain allegations that had been made against them in the founding affidavit. The fundamental problems they raise were the following: when default judgment was granted against the second respondent under case number 503/2011, there were significant difficulties in relation to this application. In the first place the notice of service of the application for default judgment reflected that the applicant "stays at given address since 1985". Accordingly there was no indication on the service that it was the second respondent who resided at this particular address, which properly was the subject of the default judgment.

Furthermore the papers had caused certain concern to Baartman, J prior to granting the order. The attorney acting on behalf of the seventh respondent deposed to an affidavit on 25 August 2011, the day before the order was granted. In this she says:

> "I have confirmed with plaintiff that the risk mitigation officer visited the premises at 2... N.... C...., K....., on 3 February 2011. The officer personally spoke to the defendant, who was present at the premises on that date. The defendant confirmed that it was the correct address."

When the matter was stood down on 25 August 2011, prior to judgment which was to be given the next day, it appears that the doubts which had been expressed by the judge about the anomalies on the papers, generated a further affidavit, deposed this time on behalf of the seventh respondent by Mr Cyril Daniels, who described himself as risk mitigating officer appointed by the plaintiff. I can only assume that he was the same risk mitigating officer referred to by Ms Chandler in her affidavit.

Mr Daniels' affidavit is particularly interesting. He says:

> "I attend sites to inspect the properties to ascertain who is living at the property, what the stance of the property is and whether the physical address corresponds with the addresses per the bond.
>
> On 26 August 2011 I inspected Erf 3...., K.... being 2..... N..... C....., K..... I confirm herewith that the address corresponds with the erf and further confirm that the property is occupied by tenants claiming to be the owner."

This affidavit indicates that, read as a whole, the person who claimed to be owner was the applicant, not the second

respondent. Certainly what this affidavit did not do was to confirm the contents of the affidavit which had been deposed to the day before by seventh respondent's attorneys.

In short, this documentation does, in my view, justify the averment in paragraph 62 of the founding affidavit in these proceedings:

> "ABSA appears to have failed to comply with its obligation to bring all the relevant circumstances to the attention of the Court in an *ex parte* application and there are at least indications that this Court might have been misled in the course of the granting of default judgment against Wilkens."

Ms Treurnicht, who appeared on behalf of the seventh respondent, submitted, in essence, that there were two bases by which the costs of this application should not be paid for by the seventh respondent. In the first place, she submitted that as the Court had been satisfied on the papers that default judgment was justified, there could be no basis for the allegations which are now contained in the paragraph of the affidavit to which I have made reference, read together with the previous paragraph, the essential contents of which I summarised earlier in this judgment.

This can surely not be the test. Judges are generally placed under significant pressure when they grant default judgments in a busy unopposed court, with a long roll. They are dependent upon counsel to bring to their attention all of the details of the matter, or, at the very least, to ensure that attorneys acting on behalf of the applicant for default judgment, do the same. If Ms Treurnicht's submission was correct it would mean that it would be almost impossible to rescind a default judgment.

What this Court is required to do is to examine the contents of the affidavit, in this case the founding affidavit, and, at the very least, to divine whether there was some form of justification which necessitated opposition which, in turn, generated further costs for the applicants in that the entire application appears now to have been opposed.

It would have been far preferable, it seems to me, for the respondent to have placed on record an affidavit which explained its position, but without opposition. This would have allowed this matter to have gone forward on an unopposed basis and would have reduced the costs considerably insofar as the applicant is concerned.

Mr Hathorn, who appears together with Ms Harvey, on behalf of the applicants, was entirely correct to point out that in the opposition there was no further affidavit deposed to by Ms Chandler or Mr Daniels to clarify that which had been said. The opposing affidavit was deposed to by Ms Naidoo, who had no personal knowledge of any of the factors to which I have made reference.

The further possible opposition, which was prefigured, at least tangentially, in the founding affidavit, that the applicants might seek to set aside the default judgment to which I have made reference, was not placed in issue. In a letter of 3 June 2013 Mr Kahanowitz, applicants' attorney clarified that this was to be left to the discretion of the Court, for reasons which are clear, namely that there is no need for this Court not to exercise this discretion.

In my view, given the conduct of the seventh respondent, and in particular, that it sought to oppose the application and file an opposing affidavit, after noting its opposition, is sufficient justification, given the facts that I have analysed, to conclude that in this case and on these particular facts, seventh respondent should be ordered to pay the costs.

In the result I would make the following order:

1. THE ORDER GRANTED BY DEFAULT IN THE MITCHELLS PLEIN MAGISTRATE'S COURT on 1 August 2001, alternatively 14 May 2001, giving judgment against the applicants in favour of Nedcor Bank Limited (Nedcor) in the amount of R27 959, 49 declaring Erf 3.... K.... situated at 2... N..... C..... K..... Cape Town executable is HEREBY SET ASIDE.

2. The WARRANT OF EXECUTION against the property issued pursuant to default judgment referred to in paragraph 1 IS SET ASIDE.

3. THE SALE IN EXECUTION OF THE PROPERTY on 11 October 2001 in which the property was purchased by Nedcor for R10 AND ALL SUBSEQUENT SALES OF THE PROPERTY IS HEREBY DECLARED TO BE NULL AND VOID.

4. The APPLICANTS ARE DECLARED TO BE THE OWNER OF THE PROPERTY.

5. The EIGHTH RESPONDENTS OUGHT TO RECTIFY THE DEEDS REGISTRY TO RECTIFY THAT THE APPLICANTS ARE THE REGISTERED OWNERS OF THE

PROPERTY. SEVENTH RESPONDENT OUGHT TO PAY THE COSTS OF THIS APPLICATION, INCLUDING THE COST OF TWO COUNSEL.

It is so ordered.

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DAVIS, J

I agree,

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MANTAME, J