

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 6076/2021P

3293/2021P

In the matter between:

NEDBANK LIMITED

APPLICANT

versus

THE ROSSITER FAMILY TRUST

FIRST RESPONDENT

GAIL WINGROVE ROSSITER

SECOND RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] This matter has a long history as it started some years back and Applicant now seeks the eviction of Second Respondent and all other persons occupying the premises at 25 Reservoir Road Winston Park Gillits and 25 Windsor Avenue Umhlanga Rocks. On 27 October 2022 an order was granted that the matters under case number 6076/2021P and 3294/2021P be consolidated under a new case number. This appears not to have been done and the two matter are thus being dealt with together. It however appears that the affidavits were filed under case number 6076/21P. Both applications are opposed by Respondents. Originally there was a third Respondent one Reeve Luke Rossiter who had died in the interim and the matter is proceeding only against First and Second Respondent.

[2] On 12 March 2018, an order was granted against First Respondent in this court under case number 8244/2010P that *inter alia* the properties described as Erf 30 Winston Park Registration Division FT KwaZulu-Natal in extent 2.068 hectares, Erf 1692 Umhlanga Rocks (extension number 14) registration division FU, in the Durban Metropolitan Uicity Municipality, province of KwaZulu-Natal and portion 35 (2) of Erf 210 Zimbali, registration division FU, province of KwaZulu-Natal be declared to be immediately executable. First Respondent sought leave to appeal against the said order which was refused on 26 April 2018. On 28 September 2018 leave to appeal to the Full Court of the KwaZulu-Natal Division was granted by the Supreme Court of Appeal.

[3] The appeal was heard on 14 February 2020 and the appeal was dismissed and Appellant Gail Wingrove Rossiter N.O., (Second Respondent) herein was ordered to bear the costs of the appeal personally. Second Respondent on 8 July 2020 sought special leave to appeal against the appeal judgment AR 94/19 which was dismissed with costs on the grounds that there were no prospects of success for special leave to appeal to the Supreme Court of Appeal. Thereafter Second Respondent sought leave to appeal from the Constitutional Court. This was also dismissed with costs on 18 August 2021.

[4] Thereafter Second and Third Respondent were requested to vacate the said properties by Applicant's attorney. As they did not do so an application was brought during August 2021 to evict them from the said properties based on the orders granted on 12 March 2018.

[5] On 13 September 2021 in terms of the PIE Act 19 of 1998 orders were granted by this court in both matters that a notice be served on Respondents and the municipality in terms of section 4(2) of Act 19 of 1998 at least fourteen (14) days prior to the hearing of the matter and the applications were then adjourned to 11 October 2021

for the second order prayed. The orders in both matters were served on Respondents. On 11 October 2021 both applications were adjourned *sine die*. In both applications Respondents had to deliver an application seeking condonation for the late delivery of their answering affidavits within seven (7) days of the order and were ordered to pay the wasted costs of the adjournment. An answering affidavit was then filed by First and Second Respondent on 7 October 2021.

[6] Prior to the order of 12 March 2018 and other steps taken as set out above default judgment was granted against Respondents and Third Respondent on 30 May 2012. On 14 August 2012 an application was brought for the rescission of the default judgment which was opposed and was dismissed on 27 February 2013. On 17 November 2015 the judgment was set aside by the Supreme Court of Appeal did not deal with the merits of the defences raised but on the basis that Respondents had not been given notice of the time when the default judgment was to be dealt with by the Registrar. An amendment to the pleadings was thereafter argued and was granted as the trustees of the Trust had changed. On 12 March 2018 after a further hearing judgment was granted in favour of Applicant against the Trust (First Respondent) that the properties referred to in paragraph 3 above be declared executable.

[7] Pending the hearing by the Supreme Court of Appeal the judgment which had been granted against First Respondent was then executed on and the properties were sold and purchased by Applicant during 2014. Applicant thereafter took transfer of the said properties and is the registered owner thereof at this stage. As set out above judgment was then again granted against the Trust in 2018 and various steps taken by Respondents thereafter as set out above. All remedies were exhausted by Respondents and the 2018 judgment therefore still remained. Despite all of this Second Respondent is still in occupation of the said premises.

[8] It is also common cause that the said properties are presently registered in the name of Applicant and this has also not been disputed. Section 4(2) of the PIE Act has been complied with and that due notice was given to Respondents of the hearing of the eviction application. It must now be considered whether the second order prayed, namely the eviction of Second Respondent, is to be granted or not.

[9] Applicant's ownership of the properties arises from a valid judgment and a lawful execution process. The property was bonded and accordingly an order could be granted that the property be declared executable without first pursuing an order against movables. The order that was granted on 12 March 2018 declaring the properties executable was appealed by Respondents on various grounds in various courts until it was finally refused by the Constitutional Court. Loans were granted and the properties were security for the loans which entitled Applicant to execute against these properties.

[10] Respondents do not contend that they occupy the said properties with the consent of Applicant and accordingly they are unlawful occupiers in terms of the PIE act.

[11] Applicant has fulfilled all the procedural requirements as owner and Respondents disclose no circumstances relevant to the eviction and therefore it is contended that Applicant is entitled to an order for eviction. *Nldovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA).

[12] It was submitted on behalf of Applicant that Respondents have not by way of a counter application sought to have the sale in execution of the immovable properties set aside and for them to be retransferred to First Respondent. It was further submitted that First Respondent has exhausted all its remedies and that the judgment remains intact.

[13] It was submitted on behalf of Respondents that leave to appeal was granted on 24 May 2013 and that the property was transferred to Applicant on 8 June 2015. It was therefore submitted that the judgment upon which Applicant issued the writ and transferred the properties was set aside by the Supreme Court of Appeal on 1 December 2015. It is further submitted that Applicant's contention that the properties were declared executable on 12 March 2018 confirmed that it was unlawfully transferred on 8 June 2015. At that stage Rule 46 could not be complied with as an auction could not be advertised as it was already registered in the name of Applicant. It is therefore contended that the Trust is still the owner of the property even though it is registered in the name of Applicant. It was submitted that the execution was invalid and the sheriff had no authority to pass transfer and that it should be set aside even against a *bona fide* possessor.

[14] In the answering affidavit filed on behalf of Respondents it was submitted that while there was an appeal pending before the Supreme Court of Appeal, Applicant transferred the properties into its name. It is contended that the properties were sold in execution unlawfully and that the Supreme Court of Appeal on 1 December 2015 set aside the default judgment granted. A copy of the appeal judgment is attached to the answering affidavit wherein the Supreme Court of Appeal in paragraph 11 held:

“In any event the properties were transferred in the face of a pending appeal and the respondent transferred them into its name. That process can be easily undone.”

It held in paragraph 15 of the judgment that it was procedurally defective. It therefore concluded that the default judgment had been erroneously granted and that the applicants were entitled to have it rescinded. The default judgment was accordingly set aside. In paragraph 11 of the judgment of the Supreme Court of Appeal it states:

“I find it disturbing that the respondent still saw fit to thereafter proceed to transfer in execution of judgment the Winston Park property on 19 February 2014 and to have the Umhlanga property declared specially executable on 13 August 2014.”

[15] It is further contended in the answering affidavit that there was no reserve price when the properties were sold in execution. It is contended that before Second Respondent can be evicted or any other occupiers, Applicant must bring an application to declare the property specially executable and a reserve price be set.

[16] It was submitted by Mr Combrinck on behalf of Applicant that when the Supreme Court of Appeal granted its judgment, to which I have referred it may have indicated that it was disturbing that Applicant sold and transferred the properties but that there is nothing in their order setting aside the said transfer. It is therefore submitted that the transfer still stands and accordingly does not affect the transfer of the properties into the name of Applicant.

[17] It is further contended on behalf of Applicant that in 2018 the properties were once again declared executable and that that order was appealed and proceeded all the way to the Constitutional Court where it was dismissed. Accordingly at no stage was there any order granted or sought to have the transfer of the said properties to Applicant set aside.

[18] When the properties were declared executable even at the latest date which was 2018 Rule 46A had come into operation during November 2017 but the issue of a reserve price is not compulsory but is discretionary. The issue whether a reserve price is set or not is accordingly not a defence.

[19] After the order of the Supreme Court of Appeal on 17 November 2015 the parties were indeed in the position they would have been before default judgment was granted by the Registrar. Except there was already the transfer of the Windsor Park Avenue Property to Applicant. The matter was opposed and the action defended and judgment was granted by this court on 12 March 2018 declaring the properties executable. It appears that this was never raised at that stage, that the properties had already been transferred. The appeal processes proceeded to the Constitutional Court where it was dismissed. The 2018 judgment therefore was still applicable and there was never any order granted that the registration of the property into the name of Applicant should be declared *null* and *void* or set aside.

[20] As set out in the judgment of the Supreme Court of Appeal the transfer of the properties into the name of Applicant could be undone. However the Supreme court of Appeal did not grant such an order nor did any other court. There has also to date not been any application to undo the registration of the said properties in the name of Applicant. Applicant therefore remains the registered owner of the properties. It does not follow that because the monetary judgment was set aside the sale of the properties would automatically be reserved. As stated by the Supreme Court of Appeal it had to be undone which was not done.

[21] As set out above Applicant has complied with all the necessary requirements in terms of the PIE Act and it has also not been suggested by Respondents that they do not have access to any other accommodation or cannot afford to pay rent for other accommodation.

The following order is therefore granted:

1. First and Second Respondent and all members of Second Respondent's family and any other person who occupy the premises at 25 Reservoir Road, Winston Park, Gillits and 25 Windsor Avenue, Umhlanga Rocks in or under First alternatively Second Respondent be and are hereby directed to vacate the said properties within thirty (30) days of service of this order.
2. Should the order in paragraph 1 above not be complied with the Sheriff or his deputy be and is hereby authorised to eject Second Respondent and all other persons occupying the said properties.
3. Costs of the applications to be paid by Respondents jointly and severally the one paying the other to be absolved.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED:

11 APRIL 2023

JUDGMENT HANDED DOWN:

8 MAY 2023

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