IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

CASE NO: 18100/2012

In the matter between:

GOYI GODFREY NXAZONKE	First Applicants
THEMBELA VERONIC NXAZONKE	Second Applicant

And

ABSA BANK LIMITED	First Respondent
VICTOR WILKENS	Second Respondent
THE SHERIFF FOR THE HIGH COURT MITCHELLS PLAIN	Third Respondent
REGISTRAR OF DEEDS	Fourth Respondent
NEDBANK GROUP LIMITED	Fifth Respondent

CORAM: D M DAVIS J

JUDGMENT BY: DAVIS J

FOR THE APPLICANTS: ADV PR HATHORN &

ADV S HARVEY

INSTRUCTED BY: LEGAL RESOURCES CENTRE

FOR THE RESPONDENTS: ADV M TREURNICHT

INSTRUCTED BY: STRAUSS DALY ATTORNEYS

DATE OF HEARINGS: 04 OCTOBER 2012

DATE OF JUDGMENT: 04 OCTOBER 2012

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NEDBANK GROUP LIMITED	Fifth Respondent

JUDGMENT

DAVIS. J:

This is an application for an interim interdict, pending an application for a review to set aside a 2001 default judgment granted against the applicants in a subsequent judicial sale and execution sale of a property. Briefly, the facts can be summarised thus. The applicants moved into the property in question in Khayelitsha in 1984. They became 99 year lease holders in 1988 and owners of the property in 1990. In 1990, first applicant, who is married in community of property to second applicant, without the latter's written consent, borrowed R30 000,00 from Nedcor Bank, secured by way of a mortgage bond, in order to build on extra rooms and a bathroom to the married home. It appears that repayments of the bond were made until 2001, when first applicant retired.

In his founding affidavit, he candidly told this court that:

> "On 31 January 2001 I retired and it is around this time that I stopped making repayments to Nedperm Bank, because I had no money to do so."

It is common cause that in 2001, the mortgage or bank obtained default judgment against the applicants for an outstanding amount of R27 959,49, which included interest. Subsequently, the property was sold in a sale in execution for R10,00. The property was then subsequently transferred to the People's Bank, who sold it together with 17 other similar properties to Pcmpisi Trading (Pty) Ltd.

According to first applicant, he and his wife, second applicant, had remained in undisturbed occupation of the property since 1984. No attempt had ever been made to evict the applicants, notwithstanding the sale in execution to which I have already made reference, or the subsequently sales. He informs the court, however, that in 2004:

> "I heard from certain estate agents, who were active in my area buying and selling houses, that many of us residents have lost ownership of the houses. A group of us went to the deeds office and I found that indeed the property was no longer registered in my name."

Certain of these residents then:

> "... pooled some money and hired a taxi to take us to Town to see a lawyer, who agreed to help us. However, we soon realised that we did not have enough money to pay this lawyer and we did not pursue the matter for some time."

In 2006, it appears that the applicants, together with other residents, approached the Legal Resources Centre. In 2007, they were informed by an attorney at the Legal Resources Centre of the facts as I have outlined them, namely that the property had been sold in 2001. According to the founding affidavit, first applicant informs the court that further information was provided to the applicants by the attorney

at the Legal Resources Centre and that:

> "Our attorney, having attempted unsuccessfully to persuade Nedbank to resolve this matter on a without prejudice basis, and noting that none of the registered owners had ever attempted to exercise any rights of ownership over us, until now advised us against launching any legal proceedings until the situation changed."

To complete the picture, it appears that the second respondent took transfer of the property in 2008, using it to secure a loan of R216 000,00, the first respondent. The second respondent defaulted on the loan. Absa Bank obtained default judgment against him in 2012. A judicial sale in execution is due to take place on 11 October 2012, which has precipitated the present proceedings.

With this background, I can turn to deal with the application brought on an urgent basis for interim relief. The requirements for an interim interdict are trite. They have been in our law in the present form since Setloqelo v Setloqelo 1914 AD 221 at 227, namely (1) a prima facie right, (2) a well grounded apprehension of irreparable harm to the applicant if interim relief is not granted, and he or she ultimately succeeds in establishing his or her right, (3) a balance of convenience that favours the granting of interim relief, (4) the absence of an alternative satisfactory remedy.

Ms Treurnicht, who appeared on behalf of the first respondent, sensibly adopted the approach that the real dispute between the parties, insofar as a justification of an interim interdict was concerned, was whether the applicants had shown a prima facie right sufficient for this court to grant the relief so sought. It is to this particular issue, therefore, that I must turn. I hasten to add that there was an argument by Ms Treurnicht with regard to balance of convenience, which also needs to be taken into

account.

The starting point, insofar as a prima facie right is concerned, is the decision in Jaftha v Schoeman & Others, Van Rooven v Stoltz & Others 2005 (2) SA 140 (CC), where the Constitutional Court held that an order which follows a default judgment declaring a property executable, was unconstitutionally invalid when it was not made by a judicial officer, after taking into account all the relevant considerations, in particular whether the order sought would infringe the applicant's right of access to adequate housing.

It has subsequently been held in a series of High Court decisions, confirmed in Menqa Another v Markom & Others 2008 (2) SA 120 (SCA), that the resultant sale in execution is accordingly null and void. Therefore, valid title cannot be passed. The clear principle is that, a default judgment, which is not granted by a judicial officer, taking a judicial approach to all the relevant considerations, is unconstitutional. The time of the finding of unconstitutionality is ex tunc, meaning the basic constitutional principle applies that unconstitutionality applies from the inception of the Constitution. That means that the present application for default judgment and subsequent order declaring the property executable, must be null and void on the basis of Jaftha's case and the subsequent jurisprudence as I have outlined it.

The further question which arises, was canvassed by Froneman, J in Gundwana v Steko Development 2011 (3) SA 608 (CC), and in particular the observations at paras 58-60 of that judgment. In these passages, the learned judge of the Constitutional Court says:

> "There may be a fear that the decision in this matter will lead to large scale legal uncertainty

about its effects on past matters, where homes were declared specially executable by the registrar and sales in execution and transfer followed. The experience following Jaftha, may be an indication that this fear is overstated ... In order to turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words the mere constitutional invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed. In order to do so, the debtors will have to explain the reason for not bringing a rescission application earlier and they will have to set out a defence to the claim for judgments against them."

From this dictum the following flows:

1. The default judgment, which confronts the court in this case and which was granted in 2001 is, on the basis of Jaftha, unconstitutional.

2. Based upon the judgments which I have cited and in particular Gundwana's case supra, the unconstitutionality of the process means that the resultant sale in execution is null and void and cannot pass valid title.

I am somewhat uncertain that, if an act is unconstitutional, why there is a need to bring a rescission application expeditiously. If it is unconstitutional, it has no validity anyway, i.e. it is void. Presumably certainty is required; hence the need for a speedy rescission application.

3. A party, such as applicant, must provide reasons for not bringing the rescission application earlier and set out a defence to the claim for judgment.

I turn to deal with the second of these two consequences. Mr Hathorn, who appeared together with Ms Harvey on behalf of the applicants, raised a number potential defences in his most excellent argument to the Court. In the first place, he submitted that there was an abuse of process. Secondly, the very mortgage bond which underpinned the debt, was null and void. Thirdly, the court had a discretion in a case such as the present, as to whether to order a sale in execution against immovable property, which was the applicants' home.

The first argument of abuse of process runs along the following lines. It is common cause that in 2001, the municipal value of the property was R81 000,00. According to the papers which have been placed before this court, after the fifth respondent, in the form of Nedcor Bank, obtained the default judgment on 1 August 2001, the property was sold in execution to Nedcor Bank itself for R10,00. Mr Hathorn correctly characterised this sale as an abuse of process.

There is something disturbing about an act in which property, on a municipal valuation (which is obviously a conservative one), which is valued at R81 000,00 is sold for R10,00. Consider the consequences: Applicants owed approximately R28 000,00 to the bank. If the property had been sold for say R50 000,00, they would have been able to receive R22 000,00, which presumably would have allowed them to put a deposit down on another house. By virtue of the property being sold on the basis of what appears to be a simulated transaction, the rights which applicant may have enjoyed to any surplus, were destroyed. Absent any plausible explanation, this is an abuse of process.

On the basis of this line of argument, Mr Hathorn referred to Jaftha's case and in particular paragraphs 43 and 58 thereof. They bear repeating. In paragraph 43, Mokqoro, J says:

> "However, it is clear that there will be circumstances, which will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors, has already been described. There will be many cases where execution will be unjustifiable, because the advantage that attracts to the creditor who seeks execution, will be far outweighed by the immense prejudice and hardship caused to the debtor. Beside the facts of the case, it also demonstrates the potential of the s 66(1)(a) process to be abused by unscrupulous people, who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable."

In paragraph 58, the learned judge of the Constitutional Court observes:

> "If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution will ordinarily be permitted where there has not been an abuse of court - procedure. The need to ensure that homes may be used by people to raise capital, is an important aspect of the value of the home which a court must be careful to acknowledge."

Ms Treurnicht correctly submitted that, in the examination of the requirements for default judgment, the issue of the sale in execution, and whether the sale would take place in a simulated or real fashion, could not be known by the court granting default judgment. Therefore, it was not a factor to be taken into account insofar as default judgement is concerned. That indeed may be correct. The difficulty is

that the practice, if properly proved, is egregious and cannot be sanctioned by a court.

It appears from an examination of the underlying approach adopted in the judgment of Froneman, J, in Gundwana, ^ that the Constitutional Court took the view that in reviews of this nature, the substance must trump the form. Clearly this means that the issue of a sale in execution and the manner in which it was implemented in this case, cannot be divorced from the issue of the default judgment; that is execution should not be permitted, absent a clear and acceptable explanation.

Assuming that I am incorrect in this particular regard, a further defence was put up with regard to the question of the mortgage bond. It is common cause that the mortgage was entered into between the first applicant and fifth respondent. It is further common cause that the parties are married in community of property, that is first and second applicant. On the available documentation, that fact was known to the fifth respondent at the time that the mortgage bond was concluded.

The law in this particular regard is clear. In section 15 of the Matrimonial Property Act 88 of 1984:

> "A spouse in a marriage in community of property may perform any juristic act with regard to the joint estate, without the consent of the other spouse, but such a spouse shall not, without the written consent of the other spouse;
>
> (a) alienate mortgage, burden with the servitude or confer any other real right and any immovable property forming party of the joint estate."

On these papers, the mortgage bond was entered into in breach of section 15(2)(a) of the Matrimonial Property Act. To the extent that there is a possible defence on these papers, section 15(9) provides that:

> "When a spouse entered into a transaction with a person contrary to the provisions of section 15(2) of the Act, and that person did not know and cannot reasonable have known that the transaction had been entered into contrary to these provisions, it is deemed that the transaction concerned has been entered with the consent required."

This provision is inapplicable in this case, for the reason articulated, namely it was common cause that the parties were married in community of property. That consequence has already been found to be fatal to mortgage bonds in this Division. In Visser v Hull & Others [2009] JOL 23670 (WCC), Dlodlo, J held, on the basis of these provisions, that such a contract was null and void and had to be set aside. Ms Treurnicht correctly conceded that she was confronted with the added difficulty, in that she did not have a version from fifth respondent. I agree. As I am only required to deal with an interim application, I must determine whether a prima facie right has been established. What that must mean in this case is the following: absent any explanation from the fifth respondent or any other respondent, which would disturb this factual basis, the transaction must be in breach of the Act. That, in turn, would provide a defence to the proceedings that are to be launched.

The third issue that Mr Hathorn raised, concerned the discretion of a court in these circumstances. I am mindful of the very carefully researched judgment in this Division of Binns-Ward, J in Absa Bank Limited v Petersen (unreported decision of WCC: 20 September 2012) in which the learned judge, at paras 32 et seq held, in dealing with the question of a sale in execution, that, if there is a finding in favour of a bank, which then wishes to proceed with a sale in execution of the defendant's home, there must be some plausible justification raised before a court can exercise its discretion and thus refuse to grant the order. I must also take account that R27 900,00 is not a trifling amount similar to the amount in Jaftha. However, the approach of Binns-Ward J requires an expressly articulated refinement: As

Mokgoro, J held at para 43 of Jaftha, supra, the severe impact of execution upon indigent debtors must always be taken into account. As the judgment in Jaftha makes clear (para 43) the doctrine of proportionality applies in these cases. Hence a court must weigh the immense prejudice, hardship and indignity of homelessness to a debtor against the rights of the creditor.

It is difficult, without a careful consideration of how applicants might discharge their debt, to evict vulnerable people who have retired. First applicant is 75 years old and has lived in this house for 28 years. Of course, banks have rights to ensure that their debts are paid and these rights have been carefully created in terms of contracts so concluded. But we live in a country with both a past and sadly a present of widespread homelessness and poverty and a long history of evictions of millions of South Africans from their homes. Courts must be careful before administering, what in this context, could be termed capital punishment, namely eviction from a home without careful consideration as to whether the default position must be the first position. Hence, the doctrine of proportionality allows for a justifiable exercise of a judicial discretion.

There is a further question, which Ms Treurnicht pressed with regard to the delay which the applicants have exhibited in dealing with this application for rescission. She correctly pointed out the first applicant said in effect ‘we don’t have any more money’ and thus in 2001 stopped paying and did no more. As noted above, in 2004 there was some activity, with further activity involving attorneys in 2007. By 2008 little further development took place. That submission is correct, save for the following. In 2007 the applicants, who until that point, had never been disturbed in the possession of their property (and continue not to have been disturbed thereafter), consulted the Legal Resources Centre. They were given advice by experienced lawyers, who investigated the situation and found that the property had been sold.

I am informed further that there were some ‘off the record’ negotiations thereafter, which culminated in advice given to the applicants, which was to the effect: “do not rock the boat until something happens”. ‘Something’ has now happened. Accordingly, the application has been brought as a matter of urgency. I accept that this is not an entirely satisfactory explanation, but I am mindful that in Jaftha’s case supra, at paras 3 to 5, the Court placed considerable emphasis on the fact that applicants were unemployed and poor people who did not have the resources to have access to lawyers on an immediate and regular basis.

I must take account of the social circumstances and economic position of these applicants. They are manifestly not in a position to litigate in an expansive way. They were given advice, which was of a conservative nature. It effectively meant that if they were to be in risk of a loss of possession of their home of 28 years, it would then be prudent to approach the court. In my view, given the circumstances of these litigants and the extremely expensive litigation process, I cannot regard their conduct as unreasonable.

There is one further point to which I must make reference, namely the balance of convenience. I accept that first respondent has an interest. I accept that people who wish to acquire the property have an interest and people are owed money on this property. This involves the other respondents. Their interests are not trivial. But the applicants have come to court and shown that they have, at least on a prima facie basis, a case. They are elderly people. To evict them, because the court considers that the balance of convenience is tilted the other way, would be an exercise in disproportionality which this court cannot countenance within the present context of the socio-economic situation in South Africa nor, might I add, in terms of a foundational constitutional principle of dignity. There can be not many greater erosions of dignity than being evicted at an advanced age from a home in which one has lived

for 28 years.

For these reasons, therefore, the following order is made:

1. The first and third respondents are interdicted and restrained from proceeding with the judicial sale in execution of the property at 10 Nakonya Crescent/Street, Khayelitsha, Cape Town, Western Cape (also known as erf 3644), pending the finalisation of the review application to be launched to set aside the 2001 default judgment granted against the applicants and the subsequent judicial sale in execution and sale of the properties.

2. First respondent is ordered to pay the costs of this application.

3. The order will be pending a finalisation of a review application to be launched by 15 November to 2012 to set aside the 2001 default judgment granted.

DAVIS, J