Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: 676/2011
Heard on: 07-11-2011
Delivered on: 19-12-2011

In the matter between:

MARINA DE WAAL	**1ST APPLICANT**
ERASMUS & DE WAAL BK	**2ND APPLICANT**
AND	
ABSA BANK LIMITED	**1ST RESPONDENT**
THE SHERIFF, UPINGTON	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS CAPE TOWN	**3RD RESPONDENT**
MARIUS LA COCK	**4TH RESPONDENT**

JUDGMENT

PHATSHOANE J:

1. The present proceedings were initiated on an urgent basis by Ms

Marina De Waal and Erasmus & De Waal CC, the first and the second applicants. They sought an *interdict pendente lite* couched substantially as follows:

That ABSA Bank, the Sheriff of Upington, and the Cape Town Registrar of Deeds, the first to the third respondents, be interdicted from transferring to Marius La Cock, the fourth respondent, the property known as Stand 228 Karosnedersetting, situated in the Khara Hais Municipality, District Kenhardt, Northern Cape, measuring 1,2848 hectares, held in terms of the deed of transfer No: T26489/2001, pending the determination of the action which the applicants intend instituting to set aside the sale in execution held on 10 February 2011 under Case Number 1523/2009.

2. The property was bonded in favour of ABSA Bank. Due to the applicants' default on their monthly repayments ABSA foreclosed on the mortgage bond and issued summons against them. On 29 September 2009 it obtained judgment against Erasmus & De Wall CC, the registered owner of the property and Ms De Waal, the sole member of this CC, in the amount of R150 297.62 with interest thereon at the rate of 10% per annum calculated from 02 July 2009 to date of final payment, and costs. On 10 February 2011 the property was sold to the fourth respondent at a sale in execution.

3. The first, second and fourth respondents (the respondents) launched a three-pronged attack against this application for an interdict. Firstly that De Waal did not have *locus standi* to bring the application. Secondly that the application was brought on self-created urgency and lastly that there was no legal basis set out in the papers in terms of which the sale in execution could be set

aside.

4. When this application was lodged Erasmus & De Wall CC, the second applicant, was not cited as a party. The question of De Waal's lack of *locus standi* fell away when on date the application was heard the CC sought leave to be joined as a party to the proceedings. Mr Grobler, for the respondents, argued that the joinder of the CC although proper cannot confer *locus standi* on De Waal. This argument in my view is fastidious and unconvincing. The judgment was also obtained against De Waal in her capacity as surety and co-principal debtor. There is ample evidence showing that De Waal has substantial interest in the subject-matter before Court. The point was not well taken and falls to be rejected.

5. Ms De Waal resides with her husband, her minor daughter and her elderly mother (aged 65) in the house in issue which is their primary residence. The respondents are of the view that the applicants did make out a case that De Waal is indigent. They contend that she is in a position to find alternative accommodation for her family. With regard to s 26 of the Constitution of the Republic of South Africa Act, 108 of 1996, which entrenches the right to have access to adequate housing in ***FirstRand Bank Ltd v Folscher and another, and similar matters*** **2011 (4) SA 314 (GNP)** at 328 para 25 the Full Bench held, *inter alia*, that this constitutional protection is extended to a debtor who may lose what is usually his/her only home.

6. De Waal's former husband, Mr Koos De Waal, died on 02 March 2007. She avers that it was her late husband's intention that she would be the beneficiary of the property in question. In an attempt to

explain why the CC has not been able to perform in terms of the bond obligations De Waal intimates that the administration of her deceased husband's estate was only finalized at the end of 2009. From this period onwards she became responsible for the payment of the outstanding bond instalments. She was not well versed with the affairs of the close corporation and had no knowledge of its financial statements.

7. De Waal states further that around March 2008, by means of registered post ABSA Bank informed her of the overdraft debt in the amount of R408 110.39 which was demanded in a matter of 10 days. She was not informed of any other bond on the property. She paid the aforesaid sum labouring under the impression that this was the only amount owing to the Bank.

8. Around 2009 De Waal received summons from ABSA at a time that her employment had been terminated. The particulars of claim brought to her attention that there was a debit order of R 3 156.82 against the account which was overdrawn by R408 110.39, as pointed out above. This account, in her view, was closed when she settled the balance. The estate of her late husband was not very liquid and she had to pay ABSA out of the little cash she had received. She contacted ABSA and informed them of her financial dilemma.

9. De Waal thereupon entered into an agreement with ABSA in terms of which she was to pay an amount of R4 190.00 per month and ABSA was to hold in abeyance any execution steps against the property. De Waal avers that she paid the agreed premiums for a period of 11

months. The respondents deny this arrangement. In any event, so they contend, even if this was the case it was not enough in that the debt was owed since 2009 and the applicants did nothing to service the bond and therefore ABSA was entitled to sell the property 18 months later. While acknowledging that some payments were made ABSA maintain that they were irregular.

10. On 08 February 2011 De Waal's brother-in-law, Mr Fanus De Waal, informed her that the property was advertised in the Volksblad news paper for sale in execution scheduled for 10 February 2011 at 10h00. Her last communication with ABSA was in October 2009 when the notice of attachment was served on her.

11. The next day (09/02/2011) De Waal contacted ABSA Bank, Upington branch, and spoke to one Jenine Stach who advised her that a warrant of attachment in execution was issued and that the arrear amount of R77 074.70 was immediately due and payable and only then would the sale in execution be stayed.

12. The afternoon before the scheduled sale in execution De Waal gave ABSA a letter from Remax Estate Agents dated 09 February 2011 which reads:

"hiermee bevestig ek dat ons tans besig is met die verkoop van 'n eiendom in Kathu (erf 2836-Leeubekkie 5) wat behoort aan W.P Eloff en L.R Hanekom. Uit die verkoop van transaksie is daar 'n bedrag van R80 000.00 (tagtigduisend rand) wat na Marina de Waal uitbetaal moet word. Die waarborge sal teen vrydag 11 Februarie 2011 in plek wees."

In the morning of the sale ABSA declined to accept the terms set out in the letter. De Waal was further informed that she had an hour to pay

the said R77 074.70. She scraped up the money and paid it at about 10h00 just before the sale commenced at 10h00. The respondents contend that the amount was not paid early enough to enable ABSA to verify payment and forward instructions to the sheriff to cancel the sale.

13. De Waal telephonically informed the sheriff of the payment immediately after it was made. She states that at 10h13 when she spoke to the sheriff the sale had not yet commenced. The sheriff explained that he could not stop the sale unless he was so notified by the instructing attorneys. The sheriff insisted on these instructions because in the past, he states, individuals would call him to cancel the sale when in fact they had not effected payment.

14. ABSA's functionaries informed De Waal to fax proof of payment to their head office. She was further advised that ABSA head office would give Mr Honiball, the instructing attorney, instructions to stop the sale. Due to her emotional state De Waal says that her partner, Mr Willie Eloff called Honiball. Eloff says that at 10h18 when he spoke to Honiball the latter informed him that he was still awaiting proof of payment from head office before instructing the sheriff to cancel the sale. When he later called again Honiball informed him that the property was already sold for R320 000.00. Honiball confirms that on receipt of the proof of payment he contacted the sheriff who advised him that the sale was concluded. Fanus De Waal intimates that he attended the sale and noted that the property was sold at 10h35. The respondents on the other hand contend that the sale commenced at 10h00.

15. De Waal argued that she had performed in terms of the agreement and now stands to suffer damages if the property is transferred to the fourth respondent. The respondents contend that the applicants created their own perilous situation and could not pay as they wished.

16. Returning to the preliminary attacks against the application. Mr Grobler contended strenuously that this was a case of a self-induced or created urgency in that on 10 February 2011 De Waal was informed that the property would be and was sold in execution yet she chose to bring the application only six weeks later on an urgent basis without setting out in her papers the steps she took since the date of the sale until she brought the matter to Court.

17. Initially in the founding papers De Waal outlines that the application was brought on an urgent basis in that the transfer of the property to the fourth respondent was looming. The Bank had allegedly given instructions that the property be transferred. Later in her replying affidavit she expatiates on this by submitting that the respondents' attorneys had received instruction to proceed with the transfer of the property to the purchaser despite the fact that all parties were aware of the dispute around the sale of the property and applicants' intention to have the sale set aside. She further states that if the respondents were prepared to give an undertaking to the effect that they were not to proceed with the transfer of the property the application would have been brought in the ordinary course.

18. The applicants did not admirably traverse the question of urgency in their founding papers. There is no correspondence demonstrating

why it took them almost two months to bring the application. Nonetheless the lack of urgency became antediluvian upon the respondents giving an undertaking not to proceed with the transfer of the property. This resulted in the matter been enrolled in the ordinary opposed Motion Court roll. From the background sketched above I am of the view that justice would be hamstrung should this application not be considered on the basis that it is semi-urgent.

19. The last point *in limine* broached somewhat conflates with the merits. Mr Grobler argued that there was no legal basis established in the papers for the relief sought. The sheriff obtained written instructions to conduct the sale in execution. When he acted in terms of these instructions he did not do so at command of the judgment creditor or as an agent but as an officer of the Court. In support of his argument Mr Grobler referred to ***Syfrets Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central, and Another; Schoerie NO v Syfrets Bank Ltd and Others*** **1997 (1) SA 764 (D)** at 773-774 where the following dictum appears:

"To be sure, in the case of immovable property dominium will only pass to the purchaser upon registration of transfer, but once the sale by auction is concluded, the judgment debtor would no longer be able to 'redeem his attached property', something which he would undoubtedly have been able to do before that.

When the Sheriff attaches and sells the property in execution he does not act as agent of the judgment creditor or the judgment debtor but does so as an executive of the law. See *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T)***, where the obiter dictum of Kuper J in*** *South African Permanent Building Society v Levy* 1959 (1) SA 228 (T) ***at 230B to the effect that in a sale of execution the Sheriff acts as a statutory agent on behalf of the judgment debtor, was disavowed as a correct reflection of our law by the Full***

Bench of the Transvaal Provincial Division per Eloff JP. In *Weekes and Another v Amalgamated Agencies Ltd* 1920 AD 218 ***at 225 De Villiers AJA (as he then was) said the following:***

'Now the Messenger is an officer of the Court who executes the orders of the Court.V Leeuwen ad Peckium: Deel XXIV 2, says of the Deurwaerders, the Messengers of the Higher Courts (but the principles also apply to Messengers of the Lower Courts): "sunt enim executores, manus regis et ministeriales judicis." And Voet (V i 62), speaks of them while discharging their functions as representing the Judge "cujus mandato instructi sunt". But he points out they are not protected and may be resisted when they either have no mandate or go outside the limits of their authority (mandati fines). The duties of the Deurwaerders were very carefully circumscribed in various Placaats. In the Instructie v/d Hove van Holland, etc of 20 August 1531 (Groot Placaatboek II art 91) they were enjoined "de brieven die aan hen gedirigeerd worden . . . terstond ten versoeke van partije, ter executie stellen na heur vorm en inhouden".

And that still applies today. The writ is the authority of the messenger for the attachment, and as all arrests are odious he must at his peril remain strictly within the four corners of the writ (V Leeuwen R-D Law V vi 12).'

As mentioned earlier, the authority of the sheriff in relation to the sale in execution of immovable property is created and defined by Rule 46 of the Uniform Rules of Court and he must remain strictly within the limits of his authority. Accordingly, when immovable property is sold by the sheriff in terms of Rule 46, he becomes a party to the contract suo nomine and he is bound to perform his obligations thereunder, which includes the giving of transfer of the property to the purchaser, which when effected is considered done as validly and as effectually 'as if he were the owner of the property' (vide Rule 46(13) and see, too, Sedibe's case supra at 676D).”

20. In my view Mr Grobler’s argument completely misses the true issue. At least with regard to this application the applicants are not requesting the Court to set aside the sale in execution. It should be reiterated that they approached the Court for an interim interdict

pending the institution and finalization of the action proceedings aimed at setting aside the sale in execution, nothing more. The relief sought is not definitive of the parties' rights nor does it involve their final determination.

21. Although the Court was dealing with a stay of execution in ***Le Roux v Yskor Landgoed (Edms) Bpk en Andere 1984 (4) SA 252 (T)***, it found that a stay of execution would be granted where the underlying *causa* is the subject-matter of an ongoing dispute between the parties. In ***Strime v Strime 1983 (4) SA 850 (C)*** the applicant applied for a stay of execution pending the outcome of a variation of a maintenance order. The court held:

"(W)hether or not the applicant is likely to succeed in obtaining a cancellation or variation of the maintenance order is not for this Court to determine. It would also be unwise to express any view because of the pending maintenance court application."

Therefore it is not necessary in my view for the applicants to demonstrate that the underlying *causa* would be removed in due course. On this basis the point taken cannot be sustained.

22. In respect of the Court's power to regulate its own processes Ponnan JA pronounced as follows in ***Manong & Associates (Pty) Ltd v Minister of Public Works and another 2010 (2) SA 167 (SCA)*** at 173 para 11:

"That our courts were endowed with such power even in our pre-constitutional era is evident from the following dictum of Corbett JA:

'There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice. . . .'

Courts now derive their power from the Constitution itself, which in s 173 provides:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common-law, taking into account the interests of justice.'

As it was put by the Constitutional Court in South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others:

'This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common-law . . . . The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power must take into account the interests of justice."

23.In ***Graham v Graham 1950 (1) SA 655 (T)*** at 658, Clayden J makes the following enunciation:

"Execution is a process of the Court and I think the Court must have an inherent power to control its own process subject to such rules as there are: See Mahomed v Ebraheim 1911 CPD 29. Making full allowance for the right of a wife to take out a writ of execution under Rule 67(a) - see Greathead v Greathead 1946 TPD 404 at 410 - the discretion must, I think, still be in the Court to stay the

use of its process where "real and substantial justice" requires such stay, where injustice would otherwise be caused."

24. The following requisites for an interim interdict are trite: (a) a prima facie right though open to some doubt; (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted but the ultimate relief is eventually granted; (c) the balance of convenience which should favour the granting of an interim interdict and (d) the absence of other satisfactory remedy. (See ***The Law of South Africa*** **Vol 11 at 291 para 316**.

25. The sale in execution is now a thing of the past. What remains is the transfer of the property to the purchaser. The Bank took a year and six months before setting in motion the sale in execution. This delay was inevitable, so it seems, because of an endeavour to make provision for the applicants to continue effecting payments as arranged. The applicants did not properly honour the arrangement they made with ABSA to repay the judgment debt in monthly instalments of R4 100.00. What is quite significant at this stage of the dispute is that the judgment ABSA obtained against the applicants appears to have been satisfied albeit at the 11th hour. For some reason the instructions to the sheriff to bring the sale to a halt appears not to have reached him in good time.

26. It is instructive to have regard to what the Constitutional Court said in ***Jaftha v Schoeman and others; Van Rooyen v Stoltz and others 2005 (2) SA 140 (CC)*** at 155 para 29:

"Section 26 [of the constitution of the Republic of South Africa Act 108 of 1996] must be seen as making that decisive break from the past. It emphasises the

importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the State must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified."

The Court proceeds as follows at 157-158 para 39:

"The importance of access to adequate housing and its link to the inherent dignity of a person has been well emphasised by this Court. In the present matter access to adequate housing already exists. Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience."

27. As I see it the *prima facie* right which the applicants are seeking to assert through this interdict is based on the agreement the applicants maintain ABSA breached by failing to stop the sale in execution. The existence of the agreement is common cause. Although the purchaser has also acquired a right or an interest in the property by virtue of the purchase at the auction, he nevertheless stands to earn interest on the R320 000.00 paid by him pending the transfer of the property into his name whether the sale is eventually set aside or not.

28. A benevolent approach should be adopted as the interest of justice dictate: that the applicants be afforded an opportunity to demonstrate that they have a legitimate claim to having the sale in execution set aside. The prejudice to the applicant is manifest if the property is transferred to the purchaser at this stage. The Bank will not suffer substantial prejudice if the interdict is granted in view of the fact that it still has a judgment in its favour should the Court in the end not set aside the sale. More importantly, the proceeds of the sale in

execution are secure in a trust account.

29. In the end I am satisfied that the applicants have made out a proper case that they have a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is finally granted; that the balance of convenience favour them and that they do not have other satisfactory or adequate remedy open to them. On the whole the applicants should obtain the relief sought. There is no reason why costs should not follow the result. As far as the sheriff is concerned there is no order as to costs.

30. In the result I make the following order:

Order:

1. ABSA Bank, the Sheriff of Upington, and the Registrar of the Deeds (Cape Town),(the first to the third respondents) are hereby interdicted from passing transfer of ownership and registration of the immovable property known as Stand 228, Karosnedersetting, situated in the Khara Hais Municipality, District Kenhardt, Northern Cape, measuring 1,2848 hectares, held in terms of the deed of transfer No: T26489/2001 to Marius La Cock, the fourth respondent, pending the determination of the action to be instituted within 21 days from date of this order by Marina De Waal and Erasmus & De Waal CC, (the first and second applicants) for the setting aside of the sale in execution held on 10 February 2011 under Case No:1523/2009.

2. The first and fourth respondents are to pay the applicants' costs jointly and severally on party and party scale.

MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the applicants	Adv FG Van Rensburg
Instructed by	Elliot Maris Wilmans & Hay
On behalf of the 1st, 2nd and 4th respondents	Adv S Globler
Instructed by	Van De Waal & Vennote