IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE CASE NO: 26556/2002

DATE: 9/5/2006

IN THE MATTER BETWEEN

LESLIE KGANG	APPLICANT
AND	
JOYCE VILAKAZI	1ST RESPONDENT
SHERIFF ODI	2ND RESPONDENT
HACK STUPEL & ROSS ATTORNEYS	3RD RESPONDENT
BESTPROP CONSTRUCTION CC	4TH RESPONDENT
WILLIE DREYER	5TH RESPONDENT

JUDGMENT

SERITI, J

1. INTRODUCTION

This matter came before court by way of motion.

In his notice of motion the applicant prays for an order in the following terms:

"1. That a sale in execution of the applicant's property made on the 6th June 2002, as a result of the writ of execution granted against the applicant on the 12th of December 2000 under case number 2203/94 in the magistrate's court for the district of 0di held at GaRankuwa be rescinded.

2. That the market value of the executed property be paid by the third respondent to the applicant as alternative to the first prayer.

3. Costs of suit in case of opposition of this application.

4. Further and/or alternative relief."

2. FOUNDING AFFIDAVIT

In the founding affidavit, the applicant alleges that the nature of the application is to stay the transfer of a property registered in his name, which the respondents received unlawfully.

Prior to the sale in execution, he entered into an agreement with the first respondent, in terms of which he acknowledged that he was indebted to the first respondent in an amount of R31 160,00.

In terms of the acknowledgement of debt which he signed he was indebted to the first respondent in the amount of R31 160,00 plus interest at the rate of 25% per annum.

In terms of the said acknowledgement of debt, he was supposed to pay R1 000,00 on or before 5 April 1994 and thereafter R1 200,00 per month until the debt is liquidated.

He failed to comply with the terms of the agreement, but to the best of his ability, he paid what he could.

0n 17 September 1994 the first respondent caused summons to be issued against him and thereafter default judgment was applied for which was granted on 14 0ctober 1994 in the amount of R31 160,00.

After default judgment was granted against him, he immediately made arrangements with the first respondent's attorneys to pay the amounts owing. He made monthly payments and during 1994 and 1995 he paid a total amount of R7 600,00.

During 1995 it came to his knowledge that Monama Attorneys who were acting on behalf of the first respondent are no longer acting for her. He did not make further payments as he did not know where to make the said payments.

The next thing he heard about the matter was when a warrant of execution was issued against him on 15 September 1995. At that stage, he then realised that the third respondent which is a firm of attorneys, is now acting on behalf of the first respondent. Their offices were situated at GaRankuwa. He proceeded with his agreed monthly instalments.

At some stage he visited the third respondent's offices to make his payment and he found that their offices were closed and they had moved. He did not know where to go and make his monthly instalments.

Later he received a letter from the third respondent advising him about their new address where he can go and make his payments. He immediately commenced with his monthly payments.

During 1998 a warrant of execution issued by the third respondent was served on him at his residential address, namely 361 Block E, Mabopane. He negotiated with the third respondent and the warrant of execution was suspended.

He requested a detailed statement from the third respondent as he was of the opinion that he has paid the full amount which was owing.

The third respondent failed to give him a detailed statement despite several requests. He stopped making further payments as he was of the view that the full amount he owed was paid.

During December 2000 the third respondent re-issued the warrant of execution. The said warrant was for a total amount of R32 156,68. The said warrant indicated that interest is still to be calculated.

He again requested a detailed statement of account and again the third respondent failed to provide him with the said statement.

He paid a certain amount of money to get his attached goods released.

He again went to the third respondent and demanded a statement of account. He informed them that if he does not receive a statement of account, he will not make any further payments.

No statement of account was send to him up to the date of signing the founding affidavit.

In August 2001 the third respondent re-issued a warrant of execution, and his assets were attached. He was told to pay an amount of R5 000,00 in order to secure release of his assets. He again insisted on receiving a detailed statement of account. He was given a statement of account, copy of which was attached to the papers. The said statement reads as follows:

"Date: 18/02/2002

Ref: V314

Without prejudice – balance

Capital	R31 160,00
Interest – 25% - ex 17/2/1994	R31 160,00

Costs			R 1 510,00
A/c cost			R 2 888,68
Post & petties			R 20,00
Collection commission			R 2 872,00
			R69 610,73
Less paid: Monama Attorneys	R 7 600,00		
HSR	R24 700,00	=	R32 300,00
			R37 310,73
Plus 10% collection commission			R 350,00
Plus 14% VAT on collection/c			R 49,00
0utstanding balance			R37 709,73 "

He further alleges that the above statement does not reflect all the payments he made and is not in accordance with the default judgment granted against him.

0n 9 June 2002 his wife received a letter from "Tshepang Legal and Property Hearing" wherein they advised her that their house will be sold by auction on 6 June 2002.

The abovementioned letter was delivered to their neighbours.

0n the day they received the letter his house was apparently sold three days prior to their receipt of the said letter. He approached attorneys for assistance. His attorneys

discovered that the warrant of execution was served at house 206, Block D, Mabopane which is not his address. The address where the warrant of execution was served is unknown to him.

All documents that were served on him were served at his address being 361 Block E, Mabopane. From April 2000 he has been residing at 490 Block A, Mabopane.

The service of the warrant of execution for the attachment of his house is invalid together with the subsequent sale in execution as he was never advised about the said sale.

His address as contained in the acknowledgement of debt referred to earlier is 361 Block E, Mabopane and the said address "is his chosen *domicilium citandi et executandi* for all matters flowing or arising from the acknowledgement of debt".

The third respondent has failed to attach his movable property which it was suppose to do before attaching his immovable property.

He is the owner of two mini taxis and furniture.

To date he has paid a total amount of R40 750,00 towards the judgment debt and he attached the relevant receipts. If he was made aware of the auction of his house, he would have taken the necessary steps to protect his property.

3. THE THIRD RESPONDENT'S OPPOSING AFFIDAVIT

The said affidavit was deposed to by Mr H C Smalberger, a practising attorney and a partner in the firm of the third respondent. He is also the attorney of record for the first respondent.

He alleges that the file was first handled by Mr Botha and thereafter Mr Soley and both have since left their employment and are currently residing in Botswana and Netherlands respectively. He further alleges that the third respondent acted as attorneys of record for the first respondent in a debt collection matter in the magistrate's court. He is handling the matter personally although previously it was handled by other staff members under his supervision.

The first respondent obtained judgment against the applicant in the magistrate's court, 0di, for payment of the amount of R31 160,00 together with interest at 25% per annum and costs on an attorney and client scale.

Pursuant to the judgment, a warrant of execution against immovable property was issued in terms whereof the immovable property of the applicant known as stand 601,

Block D, Mabopane was attached and sold in execution to the fifth respondent as nominee of the fourth respondent on 6 June 2002.

Pursuant to the sale in execution the immovable property was transferred to and registered in the name of the fourth respondent on 12 December 2002.

This application serves no purpose as the immovable property has already been transferred into the name of the fourth respondent.

All notices were properly served on the applicant.

Applicant failed to make the monthly payments in terms of the acknowledgement of debt and only paid when he was threatened with legal action.

Summons was issued against the applicant and default judgment was granted against him on 14 0ctober 1994. Judgment was granted for the capital amount of R31 160,00 together with interest at 25% per annum and costs on an attorney and client scale as "per acknowledgement of debt dated 18 March 1994".

His firm received instructions to handle the matter on behalf of the first respondent during November 1995. Their instructions were to terminate the mandate of Monama Attorneys and to proceed with execution steps without delay as the applicant did not pay the judgment amount and did not meet his undertaking to pay monthly

instalments – the last payment that the applicant made to Monama Attorneys was on 8 February 1995.

It is not true that the applicant did not know where to make the payments. The first respondent was still residing at same place as she did when acknowledgement of debt was signed.

The warrant of execution was issued against the applicant on 15 December 1995. He resumed making monthly payment in respect of the judgment debt after further execution steps were taken and his movable assets were attached. Payments were made by the applicant erratically.

Their GaRankuwa offices were closed and all debtors were informed two months in advance about that fact. Their receipts had their Pretoria offices' address. A notice advising debtors about closure of their GaRankuwa offices was attached to the principal door of the offices approximately two months prior to the offices closing.

He admits that a warrant of execution was issued and served on the applicant during 1998. After the attachment of his assets, the applicant made further payments in respect of the judgment debt. The applicant did not make punctual payments after his assets were released from attachment.

The applicant attended their offices on 19 0ctober 1998 and requested a breakdown and calculation of the balance still outstanding on the judgment amount. The breakdown and balance was prepared while the applicant was present at their offices and handed to him personally on same date. The said breakdown was attached to the opposing affidavit as an annexure.

In terms of the said annexure, the capital amount is reflected as R31 160,00, interest at the rate of 15,5% was R14 489,30, costs R686,65, collection commission of R2 325,60 plus petties and a/c cost making a subtotal of R48 797,50. Amount paid is reflected as R20 700,00 and balance is reflected as R20 975,00 – further 10% collection commission of R250,00 plus 14% VAT on collection commission of R250,00 is added and outstanding balance is reflected as R29 475,00.

Applicant again stopped making payments in September 1999. A warrant of execution was consequently issued and served in terms whereof the applicant's movable assets were once again attached. The attached assets were, however, not removed as the applicant attended their offices during February 2000 requesting a breakdown of the balance still outstanding on the judgment amount. The request of the applicant was complied with and he was presented with a full breakdown of the balance, showing that the outstanding balance amounts to R35 325,67. Copy of the said breakdown is attached as an annexure and it shows that payments made were R15 450, interest charged R19 899,36, capital R31 160,00 and outstanding balance R35 325,67.

Despite being given the above statement, applicant failed to make further payments. Sheriff was given instructions to remove the attached goods, but he could not as applicant left address where the goods were attached. The address of service is indicated on the return of non-service as 361 Block E, Mabopane.

Applicant did not inform them about his new address. Tracing agent was appointed and on 14 September 2000 they received tracing agent's report stating that the applicant's new address is Stand 206, Block D, Mabopane.

During 2000 and 2001 applicant made no payments.

Due to the fact that the movable property of the applicant that they were able to attach were not sufficient to satisfy the judgment and the fact that the applicant unlawfully removed the attached assets from the premises, an order was obtained in terms of section 66(1) of the Magistrates' Courts Act, for leave to attach the immovable property of the applicant – order was obtained on 16 March 2001.

A warrant of execution against immovable property was issued on 28 August 2001.

The warrant of execution was duly served on the applicant on 1 September 2001. Notice of the attachment was also given to the occupier of the property, Registrar of Deeds and Town Manager Mabopane.

The return of service was attached as an annexure. The said return reads as follows:

> "By proper service on the defendant by affixing of a copy of the process to the principal door at the given address. No other service was possible after performing a diligent search. Rule 9(6)."

The said return of service is described as "warrant of execution against property" and the address where same was served is Erf 601, D – Mabopane and it was served on 1 September 2001.

Shortly after the warrant of execution against immovable property was served on the applicant, applicant attended their offices on 25 0ctober 2001. Applicant was advised that he should pay an amount of R5 000,00 in respect of the arrear instalments on or before 12 November 2001, failing which they would proceed with the sale in execution of the immovable property.

No payment was received from the applicant. 0n 17 January 2002 the applicant made a payment in the amount of R500,00. By that time a date for the sale in execution of the immovable property had already been arranged. Due to the insufficient nature of the aforesaid payment they were not prepared to stay the sale in execution and the applicant was informed accordingly.

0n 13 February 2002 applicant attended their offices and he was advised that unless he makes a payment of R5 000,00, the sale in execution will go ahead. Applicant, during said meeting or conversation, again requested a statement and outstanding balance, which was supplied to him. The said statement is the one referred to by the applicant in his founding affidavit.

0n date of the execution sale applicant attended their offices and made payment of R5 000,00. In view of the said payment it was agreed that they will not proceed with the sale in execution of the immovable property. It was, however, made clear to the applicant the immovable property will remain under attachment and if he fails to make further payments they will proceed with the sale in execution.

No documents relating to the attachment and sale of immovable property were served at Stand 206, Block D, Mabopane.

Notice of sale in execution was published in the *Government Gazette* and the *Pretoria News* newspaper.

He denies that the movable assets of the applicant were not attached prior to the attachment of the immovable property. Movable assets of the applicant were attached on more than one occasion. 0n the last occasion applicant unlawfully removed the attached assets from the premises despite the fact that they were under attachment.

According to their calculations the total amount paid by the applicant is R41 250,00. During August 2002 when the applicant's founding affidavit was attested to the outstanding balance due by the applicant, including interest was R32 234,28. The immovable property in question has since been transferred and registered in the name of the fourth respondent.

4. FIFTH RESPONDENT'S ANSWERING AFFIDAVIT

He alleges that he is a businessman, and the only member of the fourth respondent. The prayers contained in the notice of motion are of academic nature as they could not have an effect on the *de facto* position. The property in question is already transferred to another party.

The property was bought at a lawful sale in execution conducted by the sheriff in terms of a court order and he was a *bona fide* buyer of the said property at an auction. The dispute is between the applicant and the third respondent.

Property was transferred to him and he later sold the said property to Mr M S Molebaloa and Ms S Molebaloa, in terms of written sale agreement signed at Pretoria on 28 February 2003.

In terms of the sale agreement referred to here above the property was sold for an amount of R300 000,00.

5. APPLICANT'S REPLYING AFFIDAVIT

In this affidavit he alleges, *inter alia*, that the allegations made by Mr Smalberger in the answering affidavit of first, second and third respondents are hearsay, the court should ignore same as there is no confirmatory affidavits of Messrs Botha, Soley, Van Wyk and Moatshe who dealt with this matter in the offices of the third respondent.

He made several arrangements as set out below with Messrs Moatshe and/or Van Wyk and/or Soley and/or Botha and Mr Smalberger was not present when the said arrangements were made. If the arrangements he made with the abovementioned people were adhered to his immovable property would not have been sold in a sale in execution. He has never dealt with Mr Smalberger and his view is that Mr Smalberger does not have personal knowledge of the facts contained in his answering affidavit.

The file, in the third respondent's office, was first handled by a certain Mr Moatshe during the period 1995 to 1998. Thereafter, a certain Mr Van Wyk dealt with the matter as clearly set out in a letter dated 3 April 2000 attached to the replying affidavit deposed to by Mr Smalberger. In the said letter, Messrs Van Wyk and Moatshe are indicated on the letterhead as partners and Mr Botha as a professional assistant.

0n 14 0ctober 1994 at 0di magistrate's court default judgment was granted against him for payment of the amount of R31 160,00 plus costs to be taxed. No order for payment of interest was granted.

According to his calculations he has paid in full the money he owed the first respondent and he paid a total amount of R40 750,00 as at time of auction of his house.

He referred to a letter dated 24 June 1995 addressed by Monama Attorneys to Attorney Vilakazi wherein the former advised the latter that the latter should proceed with the collection matter and that on several occasions the debtor has tendered payments which they could not receive as the client (the creditor) had instructed them not to receive part-payments.

During February/March 2002 he agreed with Mr Botha who was dealing with the file that the sale in execution will not take place and he (Mr Botha) will investigate and determine if the whole amount owing was paid in full and also the question of interest. It was further agreed that he will not make further payments until Mr Botha reverts to him. Without reverting to him, his house was sold at an auction on 6 June 2002.

He referred to the warrant of execution issued by Mr Moatshe on 6 April 1998 and which indicates that the capital amount owing is R31 188,50 and the one issued by Mr Botha on 28 August 2001 indicating that the capital amount outstanding is R31 160,00, and pointed out that same are incorrect as several payments were made before the issuing of both warrants.

His movable assets which were attached were released from the attachment after he made arrangements with Mr Moatshe. 0n some of the statements he received from

third respondent, interest was calculated at a rate of 15,5% as clearly indicated in annexure "HS7" attached to the third respondent's answering affidavit and this clearly demonstrates that Mr Smalberger is incorrect when he claims that interest should have been calculated at the rate of 25%, and he still maintains that no interest should have been added to the capital amount he owed the creditor.

He referred to another warrant of execution issued by Mr Van Wyk on 2 February 2000 which indicated that the capital amount outstanding is R31 279,16 and interest will be added later. The capital owing as stated on the said warrant is also incorrect as several payments were made prior to the issuing of the said warrant. Same applies to warrant of execution issued by Mr Botha on 12 December 2000 which states that amount from previous warrant was R31 816,39 and that interest will be added later.

When matter was transferred from Mr Moatshe to Mr Van Wyk, he had a discussion with Mr Van Wyk and advised him about arrangements he made with Mr Moatshe. It was again agreed that he will make further payments after receipt of a detailed account. He never heard from Mr Van Wyk until he received another warrant of execution.

He denies that as at 23 August 2000 when the sheriff attempted to remove the attached movable property he had left his address at 361 Block E, Mabopane.

He denies that he ever lived at 206 Block D, Mabopane and consequently the *nulla bona* return of the sheriff dated 10 July 2001 was incorrect as he had movable property which could have been attached.

The several attempts to attach movable property were made by the sheriff at a place where he was not living nor did he ever live at the said place.

During March 2001 he had a meeting with Mr Botha. He advised him about the arrangements he (the deponent) had with Messrs Moatshe and Van Wyk about detailed statement of account and Mr Botha advised him to start paying otherwise he would proceed with the reissuing of the warrant of execution. He advised Mr Botha about the fact that he disputes the outstanding balance and Mr Botha insisted that he will proceed with the issuing of the warrant of execution without providing him with a detailed account.

He continued making payments and he later reached an agreement with Mr Botha during February/March 2002 that he will not proceed with sale in execution of his immovable property until he investigates the outstanding balance.

He denies that his movable property was attached as the first attachment had lapsed.

The warrant of execution to attach his immovable property states the judgment debt to be R31 160,00, costs to be added and costs of the warrant in the amount of R42,75. There is no mention of interest and same does not take into account the amounts he already paid. His view is that by the time the said warrant was issued, he had already paid the whole judgment debt.

He did not have any knowledge of the sale in execution of his immovable property prior to the said sale.

6. FACTUAL FINDINGS

It is common cause that the applicant was indebted to the first respondent in the amount of R31 160,00 and that his immovable property was sold at an auction on 6 June 2002. It is also common cause that by the time of the sale in execution, the applicant had already paid an amount of R41 250,00.

The immovable property was bought at the auction by the fifth respondent for an amount of R63 000,00 who later sold it to another party after effecting certain improvements to the property for an amount of R300 000,00.

Applicant alleges that prior to the sale in execution he had an arrangement with Mr Botha, a professional assistant at the firm of third respondent that the sale in execution will not proceed and that the applicant will be provided with a detailed

account, as the applicant was of the view that the amount owing has been settled in full. Mr Botha proceeded with the sale in execution despite the arrangements they made.

Prior to the sale in execution the movable property of the applicant were attached on 28 May 1998.

According to the sheriff's return of service on 23 August 2000 there was an attempt to remove the attached movable assets, but same was not possible as the debtor had moved from the said address being 206 Block D, Mabopane.

The applicant denies that he ever stayed at 206 Block D, Mabopane.

I find that the applicant never stayed at 206 Block D, Mabopane.

The above finding of necessity implies that the third respondent did not first resort to the movable assets of the applicant before attaching the immovable property.

Besides that, the applicant alleges that he, at the relevant time had movable assets, namely furniture and two mini taxis. The sheriff in the return of service dated 10 July 2001 stated that after several attempts the process could not be executed as the premises were found locked. It was impossible to ascertain if the debtor resides at the said address. The address is the one allegedly provided by the tracing agent.

The sheriff and the third respondent should have served the warrant on the applicant which they failed to do. If the warrant of execution of movables was served on the applicant the probabilities are that sufficient movable property would have been found as the applicant owned, *inter alia*, two taxis.

There is no indication that the applicant did not have sufficient movable property to satisfy the judgment. The sheriff did not ask the applicant to point out any movable assets he might have nor did he endeavour to find any. In his return of service he stated that after failing to serve the warrant as premises were locked on several occasions, sheriff returned the warrant of execution to third respondent because of the escalating costs.

If the movable assets of the applicant were attached and sold in execution, the amount thereof could have been enough to cover whatever outstanding debt.

0n the papers, it is also clear to me that Mr Botha proceeded with the sale in execution of the immovable property despite the fact that he had arrangements with the applicant that the sale would not proceed and he (Mr Botha) will revert to the applicant with a detailed account showing, *inter alia*, outstanding amount, if any.

I find that the sale in execution of the immovable property of the applicant was not in accordance with section 66(1) of the Magistrates' Courts Act 32 of 1944.

0ne disturbing feature of this case is that the various warrants of execution issued against the applicant at different times had almost the same amount as the outstanding debt despite the fact that the applicant had made several payments over a period of time.

Furthermore, there is also no indication on the papers that the applicant was provided with a detailed statement of account, indicating *inter alia* how the money received from the auction was utilised by the third respondent.

According to a letter dated 12 September 2002, addressed to applicant's attorneys by fourth and fifth respondent's attorneys, apparently fifth respondent bought the immovable property at the said auction for an amount of R63 000,00.

If the immovable property was sold at an auction for R63 000,00 there is no indication on the papers as to how the said amount was utilised.

7. CONCLUSION

In the notice of motion the applicant *inter alia* prayed for an order that the market value of the executed property be paid to him by the third respondent as his damages.

The executed property has already been transferred by the fifth respondent who bought it at the sale in execution to another party. The said party bought the property from the fifth respondent for an amount of R300 000,00.

The applicant has suffered damages because his immovable property was illegally sold at an auction by the sheriff on instructions of the third respondent. At the time that the said property was sold at an auction, applicant had already paid over R41 000,00 towards repaying of the judgment debt.

The third respondent, who is in a position to give a detailed statement of account indicating how much was outstanding of the judgment debt before receipt of the proceeds of the sale and thereafter, has failed to provide the court with such information.

Third respondent has also failed to indicate to the court how the proceeds of the sale in execution of the immovable property were utilised.

In cases of this nature courts should endeavour on the basis of available evidence to award the prejudiced party fair compensation – see *Mkhwanazi v Van der Merwe* 1970 1 SA 609 (AD) at 631H.

Applicant alleges that at time of sale of his immovable property, he had already paid the judgment debt in full and he demonstrated, which fact is admitted by the third respondent, that he has paid over R41 000,00 towards the judgment debt.

In the light of the failure of third respondent to provide the court with detailed statement of account showing the outstanding amount, if any, the court should accept the

version of the applicant that prior to the sale of his immovable property, he had paid the judgment debt in full.

My view is that the damages of the applicant is the fair market value of the immovable property as at time of the sale in execution.

As indicated earlier, the fifth respondent bought the immovable property at an auction for an amount of R63 000,00 which amount in my view represents the market value of the said property as at the date of the said auction.

The court therefore makes the following order:

1. The third respondent is ordered to pay the applicant an amount of R63 000,00.
2. Third respondent is ordered to pay the costs of the applicant.

W L SERITI
JUDGE OF THE HIGH COURT

26556-2002

HEARD ON:

FOR THE APPLICANT:

INSTRUCTED BY:

FOR THE RESPONDENTS:

INSTRUCTED BY: