

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2015/19591

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED. NO

...30/3/2017.....
DATE

.....
SIGNATURE

In the matter between:

**THE RCS HOME LOANS WAREHOUSE
(PTY) LTD**

Applicant

and

FAKUDE, ISAAC MHIKELELI

First Respondent

FAKUDE, RENEE NOMBULELO

Second Respondent

J U D G M E N T

FISHER J:

[1] This is an application for the eviction of the respondents from the residential dwelling [...] M. Street, Kwa Thema Ext 1, Springs, Gauteng (*“the property”*). The respondents are married in community of property. The property forms part of their community estate.

[2] The background to this application is as follows:

1. On 15 April 2013 a summons was delivered to the respondents based on indebtedness of the respondents to the applicant arising out of a written loan agreement. This action was not opposed. The applicant alleges that the first respondent, Mr Fakude personally dealt with the applicant's attorneys by telephone in relation to a possible settlement of the action and engaged attorneys. There is evidence that these attorneys sought documentation from the applicant's attorneys in relation to the action.
2. On 30 September 2013 judgment was taken by default against the respondents. An application in terms of rule 46 was subsequently brought on behalf of the RSC Trust (an associated entity of the applicant) as bondholder of the property, which application was granted. The sheriffs return of service in respect of this rule 46 application shows that it was served personally on the second respondent, Mrs Fakude. The respondents did not oppose this application either and on 30 May 2014 the property was declared specially executable. On 11 August 2014 the property was judicially attached. The writ of attachment was also served personally on Mrs Fakude.

3. The applicant gave details of separate telephone calls received from each of the respondents in terms of which they both asked that the execution process be stopped. An attorney then made telephonic contact with the applicant's attorneys on behalf of the respondents on 3 October 2014 and advised the applicants attorneys that he had been instructed to attend to stop the planned sale in execution. Notwithstanding this approach, no steps were taken to halt the sale and the property was sold in execution to the applicant on 15 October 2014. In December 2014 the respondents were given notice to vacate the property.
4. On 12 March 2015 the applicant took transfer of the property. On 29 May 2015 this eviction application was launched and was served personally on Mrs Fakude.

[3] Against this background, the defence of Mr Fukude is essentially that he had no knowledge of the judgement debt and the execution process that resulted in the sale in execution of the property until he found the eviction application pinned to the door of the property on his return from work '*one day*'.

[4] Central to his version is that the events leading up to the sale of the property were orchestrated and dealt with by his wife without his knowledge. He alleges that the loan agreement was not signed by him and that his signature thereon was forged. He denies any knowledge of or involvement in

the legal processes which are described until he obtained notice of this eviction application. This appears to have occurred in June 2015.

[5] This elaborate version of fraud needed to be properly and fully explained in the context of the detailed allegations in relation to Mr Fakude's involvement in the process put up by the applicant. It is compelling that such allegations are, for the most part, borne out by contemporaneous correspondence and notes of employees of the applicant and its attorneys .

[6] Mr Fakude brought a counter application in which he sought extensive relief - being the postponement of the eviction application *sine die* pending the finalisation of an application to rescind the default judgement and an order that all execution proceedings be stayed. Mr Fakude thus had the right to answer to the detailed allegations put forward by the applicant in relation to his engagement with the process and, more importantly, was himself required to make out a case for the relief claimed by him.

[7] The relief sought in this counter application gives further disquiet in that it is, even on the version of Mr Fakude, brought very late in the process. On his version he found the eviction application pinned to his door during June 2015. The fact that he has taken no steps for some 21 months to rescind the judgment was not explained. This is despite his being represented by attorneys. Furthermore, the relief that is sought relating to the staying of execution processes loses sight of the fact that such processes are complete at this stage,

[8] I heard argument on behalf of Mr Fakude and the applicant and reserved judgment. It was subsequently brought to my attention on the same day that Mrs Fakude had been in court all along and that she wished to make representations.

[9] I thus reconvened court and heard Mrs Fakude in person. She told me that she and Mr Fakude were in the process of divorcing and that Mr Fakude no longer lived in the property. She stated that she had taken advice from the

Johannesburg Justice Centre and confirmed she was not opposing the application for eviction. This was further confirmed by letter from the Johannesburg Justice Centre the which was handed up by Mrs Fakude. It is not in dispute that the parties are in the process of divorcing but I was told from the bar by counsel for Mr Fakude that his instructions are that Mr Fakude still resided in the property. Mrs Fakude informed me that she was of the view that she would, from the divorce distribution, be in a position to obtain funds especially from the pension funds avialabe from the joint estate and hoped to make an offer to purchase the property.

[10] The general rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) is that final relief may be granted only if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavit, justify the granting of such relief. However if the court finds the version of the respondent to be fanciful and untenable, then it may be rejected on the papers by adopting a robust, common-sense approach. (see: *Soffiantini v Mould* 1956 (4) SA 150 (E) ; *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998 2 SA 689 (W), at 699F–G. See also *NDPP v Geyser* [2008] ZASCA 15 (25 March 2008), at para 11)

[11] In my view, Mr Fakude has not made out his defence or his counterclaim in a manner that is tenable or credible. Accordingly, I reject the version put up by Mr Fakude. The approach taken by him emerges as nothing more than a stratagem to delay the eviction proceedings.

[12] Given the circumstances in this matter, including the fact that the respondents have lived in the property for approximately 30 years, they should be allowed until 30 June 2017 to vacate the property.

I thus grant an order as follows:

1. The First and Second Respondents are to vacate the property described as [...] **M. Street, Kwa Thema Ext 1, Springs, Gauteng** by

30 June 2017 - failing which the sheriff or his deputy is authorised to evict them from the property.

2. The First respondent is to pay the costs of the application.

**D FISHER
HIGH COURT JUDGE
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date of Hearing: 09 March 2017

Judgment Delivered: 30 March 2017

APPEARANCES:

For the Applicant: Adv A W Pullinger instructed by Moodie & Robertson

For the First Respondent: Adv A P Bruwer instructed by Kitching Attorneys

For the Second Respondent: No opposition