

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN  
REPUBLIC OF SOUTH AFRICA**

**CASE NO.467/2009**

**SENTOSHNEE PETER**

**APPLICANT**

and

**SOOBRAMONEY PERIMAL**

**RESPONDENT**

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**JUDGMENT** Delivered on 26 November 2009

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**SWAIN J**

[1] The applicant wishes to obtain an order evicting the respondent from an immovable property, more fully described as:

“Remainder of portion 1110 of Erf 85 Chatsworth, Registration Division F.T, Province of KwaZulu-Natal, situated at 42 Mountainview Drive, Silverglen, Chatsworth, Durban”.

which I will refer to as “the property”. The ground upon which the applicant advances its claim is that it is the registered owner of the property, which is not disputed by the respondent.

[2] The application is brought in terms of Section 4 of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act No. 19 of 1998 (hereafter referred to as “the Act”). It is not disputed that the procedural requirements of the Act, have been complied with.

[3] In order to understand the basis upon which the respondent resists his eviction from the property, it is necessary to briefly set out the history of the matter. The following facts are common cause:

[3.1] Default judgment was granted in favour of Absa Bank Limited against the respondent on 07 June 2005.

[3.2] Pursuant to the judgment, a sale in execution of the property took place, at which the applicant purchased the property from the Sheriff for R491,000.00 and signed the conditions of sale on the same date.

[3.3] Clause 18 of the conditions of sale provided that the applicant was not guaranteed vacant possession of the property. The applicant was therefore obliged to take any steps to obtain vacant possession.

[3.4] Registration of transfer of the property into the name of the applicant, was effected in the Deeds Office on 25 November 2008.

[3.5] The respondent remains in occupation of the property.

[4] The basis upon which the respondent resists his eviction is the following:

[4.1] The respondent has launched proceedings under Case No. 11264/2008, for the sale in execution of the property from the Sheriff to the applicant, to be set aside.

[4.2] The respondent intends amending the relief claimed to include a setting aside of the transfer of the property. This relief was not claimed initially because the application was launched before registration of transfer was effected.

[4.3] To grant the order of eviction in the present application would render the proceedings in Case No. 11264/2008 superfluous.

[5] The proceedings in Case No. 11264/2008 are not before me, but the relevant Court file has been provided to me. In this regard Mr. Naidoo, who appeared for the respondent, made various submissions in his heads of argument on the merits of this application. The central submission, upon which he relied, was an allegation that Johnston & Partners, the attorneys acting for the execution creditors, Absa Bank Limited, had acted fraudulently in selling the property in execution.

[6] As I understood the argument of Mr. Naidoo, its purpose was to persuade me of the merits of the application under Case No. 11264/2008 and consequently to refrain from ordering the eviction of the respondent from the property in the interim, in the present application.

[7] It seems to me however that the present application is capable of resolution on its own merits, regard being had to the following issues:

[7.1] No challenge is raised by the respondent that the attachment or sale in execution was a nullity, because of a lack of compliance with the statutory formalities. Consequently, there can be no argument that the sale did not confer title to the property upon the applicant.

***Joosub v J I Case SA (Pty) Ltd.***

***1992 (2) SA 665 (N) at 679 D – E***

[7.2] It is clear that the execution process does not end when the sale itself is concluded. In addition to the sale, a necessary further transaction is required whereby the purchaser becomes the owner of the property, i.e. registration of transfer into his name.

***Schoerie N O v Syfrets Bank Ltd. & Others***

***1997 (1) SA 764 (D) at 777 F – G***

[7.3] The general rule is that immovable property which has been sold in execution and transferred, cannot be recovered by the owner, as against a purchaser in good faith and without notice of any defect.

***Messenger of the Magistrate's Court Durban v Pillay***  
**1952 (3) SA 678 (A) at 683 G**

[8] No allegation is made by the respondent that the applicant purchased the property and had it transferred into his name, in bad faith and with knowledge of any defects. In response to an allegation by the applicant that the property was transferred into the applicant's name on 25 November 2008, the respondent only states "I do not admit the allegations herein". No allegation is made that the applicant acted in bad faith and with knowledge of any defects. A similar stock answer was provided by the respondent, to the allegation made by the applicant, that the respondent and those residing on the property had no legal entitlement to do so, as the property had been sold and transferred to the applicant, free of any lease agreements. Again, if the respondent wished to challenge the *bona fides* of the applicant, I would have expected the respondent to expressly raise this issue, in response to this allegation.

[9] In addition, the response by the respondent in identical terms, to the allegations made by the applicant as to the purchase of the property and the conclusion of the conditions of sale, obviously does not raise this issue.

[10] There is consequently no factual basis for the submission made by Mr. Naidoo in his heads of argument, that it is clearly disputed on the papers that the applicant is a *bona fide* purchaser.

[11] Mr. Naidoo also submits that the application for the setting aside of the sale (Case No. 11264/2008) and transfer of the property was launched and brought to the attention of the applicant, before registration of transfer into her name.

[12] However, it is quite clear that the relief sought was simply for the setting aside of the sale in execution and for an interdict preventing the Registrar of Deeds from transferring the property to the applicant. However, no order was granted when the matter came before Seegobin A J on 28 October 2008, and the matter was adjourned *sine die*. There is accordingly no basis for the submission made by Mr. Naidoo that transfer of the property should have been stayed, pending the outcome of litigation.

[13] In addition, in the application under Case No. 11264/2008 the respondent (in the present application) made no allegation that the applicant (in the present application) had acted *mala fide* with notice of any defects, in purchasing the property at the sale in execution. In fact the basis upon which the respondent sought to set aside the sale in execution, was that Absa Bank Limited and their attorneys of record, Johnston & Partners, had acted in breach of a settlement agreement concluded between the respondent and Absa Bank

Limited, by selling the property in execution to the applicant. The agreement in question had settled an application brought by the respondent to stay a sale in execution by Absa Bank Limited, in pursuance of a default judgment obtained by Absa Bank Limited against the respondent. No details were furnished in the application of the grounds upon which the respondent had alleged that he had in an “action” sought to rescind the judgment. In addition, although the respondent also alleged that he had filed a notice of appeal, with regard to the judgment granted by default, prior to the sale in execution, no details were furnished of the grounds of appeal.

[14] Consequently, even if the applicant was aware of the application under Case No. 11264/2008, prior to taking transfer of the property, there were no facts furnished by the respondent in that application, which would have given the applicant cause to question the validity of the default judgment obtained by Absa Bank Limited, which formed the whole basis for, and upon which Absa Bank Limited relied, for its entitlement to sell the property in execution.

[15] I therefore do not consider that knowledge by the applicant of the contents of the application under Case No. 11264/2008, before registration of transfer of the property into the name of the applicant, is sufficient to warrant an inference being drawn that the applicant was *mala fide*, with knowledge of any defects in the entitlement of Absa Bank Limited, to sell the property in execution, or for the applicant to take transfer of the property.

[16] In the result the order I make is the following:

1. The respondent and all persons occupying under his authority, be and are hereby ordered to vacate the property known as Remainder of Portion 1110 of Erf 85 Chatsworth, Registration Division F.T, Province of KwaZulu-Natal, situate at 42 Mountainview Drive, Silverglen, Chatsworth, Durban (“the property”) within ten (10) days of service of this order upon them and simultaneously to deliver the keys to the property to the applicant or her appointed agent.
2. In the event of the respondent and all persons occupying under his authority failing to comply with the order in paragraph 1 above, the Sheriff of this Court or his Deputy be and is hereby authorised and directed to eject the respondent and all those occupying under his authority from the property and to take all steps as may be necessary to give effect to the order in paragraph 1 above.
3. The respondent is ordered to pay the costs of this application.

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**SWAIN J.**

*Appearances: /*



**Appearances:**

For the Applicant : M/s L.K. Olsen

Instructed by : Shepstone & Wiley  
Durban

For the Respondent : Mr. R.M. Naidoo

Instructed by : Ramiah Narain & Associates  
Montford, Chatsworth, Durban

Date of Hearing : 13 November 2009

Date of Filing of Judgment : 26 November 2009