IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 8309/2010

Reportable

In the matter between

THEMBINKOSI NICHOLUS MSOMI	Applicant
And	
MYENKENI PHINEAS BIYELA	First Respondent
LINDIWE DOMINICA BIYELA	Second Respondent
THE ACTING SHERIFF OF THE HIGH COURT EMLAZI	Third Respondent

JUDGMENT

Cele AJ

Introduction

[1] In this application it is sought to have a *rule nisi* granted by this court on 21 July 2010 confirmed. It was granted in the following terms:

- That a rule nisi do hereby issue calling on the respondents to show cause, if any, to this court on 24 August 2010, at 0h930, or so soon thereafter as

Counsel may be heard, why an order should not be granted in the following terms:

1. Pending an action to be instituted by the applicant against the first and second respondents, within 30 days from the date of this order for, inter alia, payment of the sum of R70 249, 00 and damages, the third respondent be and is hereby directed to retain the sum of R70 240,00 and R30 000,00 in an interest bearing account, such interest to accrue for the benefit of the successful party in the aforementioned proposed action; and

2. The first and second respondents be and are hereby directed to pay the costs of this application.

- That pending the final determination of this application, the provisions of paragraph 1.1 above shall apply as an interim order with immediate effect.

[2] The first and second respondents opposed the confirmation of the rule nisi which was granted in their absence. The third respondent abides the decision of the court.

Background facts

[3] The first and second respondents are husband and wife married to each other in community of property in terms of South African law. They are the erstwhile registered owners of the immovable property situated at BB1030 Umlazi Township, Umlazi, KwaZulu-Natal, more fully described as *"Erf 1030, Umlazi, Umlazi BB, Registration Division FT, Province of KwaZulu-Natal, in extent 374 (Three Hundred and Seventy Four) square metres" held under Deed of Grant No TG4495 / 1986 KZ*, hereafter referred to as the property. The first and second

respondents will henceforth be referred to as the respondents.

[4] The property was bonded in favour of Standard Bank of South Africa (the Bank) and as a result of the respondent's default on their monthly installments, the Bank foreclosed on their home loan. The Bank having obtained judgment against them the property was duly sold to the applicant at a sale in execution, held at the third respondent's offices on 14 October 2009 at R260 000,00. The third respondent declared an amount of R276 219, 73 to be payable by the purchaser. An amount of R116 324, 70 was paid to the Bank and amount of R158 637, 98 was to be refunded to the respondents. The applicant came to know about the refund and he sought to have the respondents pay him an amount of R70 249 he had paid to the EThekwini Municipality for outstanding rates, electricity and water charges for the property.

[5] In terms of paragraph 21 (a) of the "Conditions of sale in Execution of Immovable Property", the purchaser of the property shall be liable to pay all arrear rates and outstanding charges for electricity and water as well as outstanding levies if applicable. During the registration of the transfer of the property, the applicant was required to and did pay, inter alia, the outstanding rates, electricity and water charges due to the EThekwini Municipality in the sum of R70 249, 00. The applicant arranged with the respondents to have the property sold to their son but, when that deal fell through, he sold the property to a Ms Mbatha. The property was then transferred to the applicant and simultaneously to Ms Mbatha.

[6] The respondents continued to occupy the property until the beginning of July 2010 when they vacated and delivered it to Ms Mbatha. They are presently residing at Flat 16, 16 Khan Lane, Isipingo Rail, Isipingo, KwaZulu-Natal. The respondents are the registered owners of another immovable property described

as Erf 714, Umlazi F, Umlazi Township, Umlazi, KwaZulu-Natal.

[7] The applicant also seeks payment of R30 000, 00 from the respondents as outstanding rent allegedly owed to him by them, calculated at the rate of R3000 per month, for the period November 2009 to end of June 2010. On 29 January 2010 the applicant wrote a letter to the respondents demanding the payment of rent by them which he said was at the time, R12 000.

The issue

[8] It is to be determined whether the applicant has shown an entitlement to the relief he seeks, an interdict to freeze or preserve an asset, which is money in possession of the third respondent, instead of refunding it to the respondents, pending the results of an action the applicant seeks to institute against them.

The evidence

Applicant's version

[9] Applicant has a valid and bona fide claim against the respondents for the sum of R70 249. The respondents were liable, in law, for this amount to the EThekwini Municipality for outstanding rates, electricity and water charges. The applicant merely effected payment of that sum on their behalf and in order to obtain the necessary rates clearance certificate and other clearances to effect registration of transfer of the property to his name and to Ms Mbatha. The applicant conversed on various occasions with the first respondent, who has, at all material times, been aware of the Bank's foreclosure and his purchase of the property. To

the best of his understanding and knowledge, the respondents have not challenged the Bank's judgment or the transfer of the property to his name.

[10] When the applicant obtained the rates clearance certificate he learned from the third respondent of the credit balance due to the respondents from the sale of the property, being about R150 000, 00. He then conversed with the first respondent and requested the first respondent to direct the third respondent to pay him back the R70 249, 00. The first respondent acknowledged the claim but said that he would obtain the money from the third respondent and only thereafter pay the applicant. The first respondent threatened to sue the third respondent if he paid that money directly to the applicant. The applicant is left with inescapable inference that the first respondent intends to obtain payment from the third respondent and thereafter to squander the money in order to thwart his claim of R70 249, 00.

[11] In the course of the registration of the transfer of the property the applicant advised the respondents that by failing to vacate the property they were preventing him from renting it out and thus causing him to suffer damages. In November 2009, when the sale of the property to respondents' son did not materialize, he entered into a verbal lease agreement with the respondents in term of which they would pay him R3000, 00 per month as rent for the property, notwithstanding his not having taken registration of transfer of the property. They would then vacate the property on registration of a transfer. The respondents subsequently breached the oral agreement and he wrote them the letter of 29 January 2010 in which he demanded the payment of the arrear rent and that they were to vacate the property. He hand delivered the letter to the first respondent. The respondents did not vacate the property until the end of June 2010. The applicant's assessment is that the respondents owe him rent of R30 000, 00 for the period November 2009 to July 2010.

[12] The applicant's submission is that it is abundantly clear that the respondents do not have sufficient property to satisfy any judgment he might obtain against them in due course and the only funds from which such a judgment might be satisfied would be from the proceeds to be paid to the respondents by the third respondent.

[13] The applicant is concerned that the third respondent will soon pay over the balance of the money from the sale to the respondents once the third respondent shall have received clearance from attorneys of the Bank. The applicant believes that the clearance is imminent. On 15 July 2010 the first respondent indicated to the applicant, in a telephone discussion that he wanted the third respondent to effect payment of the balance of the fund to him, as a matter of urgency. The applicant believes that once payment is made to the respondents the fund will be dissipated to his financial prejudice. He contends that the respondents are in financial difficulties, hence the Bank's foreclosure and respondents' breach of the oral lease agreement with him. The total amount of money sought to be preserved is R100 249, 00.

Legal submissions

[14] The applicant seeks a prejudgment Mareva type interim interdict, pending the results of an action he intends to institute against the respondents. Through the interdict, the money to be refunded to the respondents will be frozen or preserved by restraining the respondents and any third party, such as the third respondent, who comes to be in possession of that money, even though the applicant does not have a proprietary title or a vindicatory claim over it.

[15] It is submitted that the applicant has a clear right to the relief he seeks. The respondents failed to service the bond with the Bank and it foreclosed on their home loan. The property was then sold to the applicant. In a sale in execution a purchaser pays the outstanding rates, water and electricity charges to ensure that the relevant municipality receives the amount owed to it and as they have generally not been paid by the execution debtor. It is the execution debtor however who is liable for any outstanding rates, water and electricity charges as at the date of the sale in execution. Such payments are made on behalf of the execution debtor and are recoverable from him or her. In the premises the applicant has established, at the very least, a *prima facie* right against the respondents for payment of the sums of R70 249 and R30 000, sufficient for the purposes of the interim interdict.

[16] The applicant has a well grounded apprehension of harm. The first respondent's *ipse dixit* that there is no proof that the respondents will dissipate the funds received from the third respondent is not sufficient. The respondents were clearly in sufficient financial difficulties such that their immovable property was sold at a sale in execution. The respondents have placed no evidence whatsoever before court as to what they intend to do with the funds to be received from the third respondent or that, in the absence of the interdict sought, they have sufficient funds to satisfy any judgment that may be granted against them and in favour of the applicant. Should applicant be refused the interdict and ultimately succeed in the action against the respondents, they simply do not have the means to satisfy any judgment that made be issued against them.

[17 It is submitted that the applicant has established that he does not have any suitable alternative remedy against the respondents and that the balance of convenience favours the applicant. The rule nisi ought therefore to be confirmed.

Respondents' version

[18] The notice of motion served on the first respondent by the third respondent on 20 July 2010 had prejudicial consequences on the respondents. He was told that the application would be heard on 21 July 2010 yet the notice of motion reflected the court date as 19 July 2010. The respondents were prejudiced in that they were not able to oppose the interim relief. The interim rule had therefore to be discharged until court shall have heard their version.

[19] First respondent believed that the respondents were not liable to reimburse the applicant for any payment made on the outstanding rates as paragraph 21 (a) of the conditions of sale stated that the purchaser was to be liable to pay all arrear rates and outstanding charges for electricity and water as well as outstanding levies if applicable. The applicant knew or ought reasonably to have known that if he purchased the property at a sale in execution, he would be liable for the arrear rates, if any. The applicant lied about the first respondent's alleged undertaking to reimburse him for settling the outstanding rates.

[20] The applicant did present himself as the new owner of the property. When he was asked to produce proof of such ownership he failed to provide it. The first time when the conditions of sale of the property came to the knowledge of the first respondent was when court papers for this application were served on him. The first respondent refused to pay for the rental until such time as he was satisfied that the applicant was the owner of the property. Up until June 2010 the first respondent was still paying the Bank monthly installments for the bond. When he became aware that Ms Mbatha was the new owner, the respondents moved out of the property.

[21] There is no need for the confirmation of the *rule nisi* as it is evident from applicant's annexure to the founding affidavit that the respondents own immovable property which is sufficient to satisfy the judgment, should the applicant succeed in the action he intends to institute. The first respondent denied having entered into a verbal agreement with the applicant to pay for the rental for their occupation on the property.

Legal submissions

[22] The respondents seek an order dismissing the rule nisi granted on 21 July 2010, with costs. The applicant abused the court process and acted with *mala fides* by fabricating facts in order to get the interim order granted. Service of the application papers on the 1st respondent was defective in that the Sheriff served the application papers on him on 20 July 2010 and was informed that the application was set-down on the following day but was not informed of the time of the application. The Notice of Motion served on the 1st Respondent reflected, the date and time of set-down of the application as the 19 July 2010 at 15h00.

[23] The applicant failed to establish a *prima facie* right that the respondents will dissipate the money once they receive it. Neither the first respondent nor his family has given the applicant the indication that they intend to dissipate the monies.

[24] The respondents are not liable to reimburse the applicant for any payment made on the outstanding rates. Paragraph 21(a) of the Conditions of Sale state the purchaser shall be liable to pay all arrear rates and outstanding charges for electricity and water as well as outstanding levies if applicable. Further, Section 24 of the Municipal Rates Act No 6 of 2004 makes no mention of the purchaser's right in a sale in execution, such as the applicant, to claim the money he paid

towards the outstanding rates on the property.

[25] In March 2010, the applicant was aware that the respondents were represented by an attorney but failed to mention same in his papers. He also failed to provide the respondents with sufficient proof that he had purchased their property at the sale in execution. The first respondent refused to pay the applicant rent until he was satisfied that the applicant was the owner. Up until June 2010, the first respondent continued to pay the bond installments to the Bank. Once the respondents became aware that Ms Mbatha was the owner of the property, they moved out of it.

[26] There is no well grounded apprehension of irreparable harm to be suffered by the applicant if the interim relief is not granted and the final relief is eventually granted as the applicant has failed to show that the respondents will dissipate the monies once paid.

[27] The balance of convenience favours the respondents as it has not been proved that they are in financial difficulties. The applicant has shown that the respondents own immovable property sufficient to satisfy the judgment in the event that the applicant succeeds in his action. The applicant had a satisfactory remedy available in that he ought to have instituted the action against the respondents instead of instituting this application. The *rule nisi* must therefore be dismissed with costs.

Evaluation

[28] The applicant seeks to have confirmation of a rule nisi but has described the relief he seeks as an interim interdict. The relief is intended to endure until the results of an action he intends instituting against the respondents. There is no dispute about whether or not the money kept by the third respondent, after the sale in execution in this matter, belongs to the respondents. If the applicant is successful in this application but is not successful in that action, the respondents will get their money back, with interest that shall have then accumulated. A consideration of the form of the order sought and most importantly, its effect inform me that the relief sought is indeed interlocutory in nature even though ownership of the money in question will not come for consideration in the action yet to be instituted by the applicant, see in this approach *Metlika Trading Ltd and others v Commissioner, SARS 2005 (3) SA 1 (SCA).*

[29] The success of this application lies in the applicant proving either that he has a clear right or a *prima facie* right, though open to some doubt and that there is a well grounded apprehension of irreparable harm to him if the relief is not granted. He has to show that there is no other satisfactory remedy available to him and, in the case of a *prima facie* right, he has to show further that the balance of convenience favours the granting of the interdict, see *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son (Pty) Ltd 1995 (1) SA 725 (T)*.

The right to the relief sought

[30] During the course of the registration of the property the applicant was required to pay the outstanding rates, electricity and water charges to the eThekwini Municipality in respect of the property. The applicant alleges that the first respondent agreed to pay him back the R70 249, 00. He contends also that he

entered into a verbal lease agreement with the respondents in terms of which they agreed to pay R3000,00 rent per month. The respondents dispute the claims of the applicant and the first respondent denies having agreed to pay back the R70 249,00 to the applicant. They take the point that clause 21 (a) of the conditions of sale stipulated that the applicant was liable for the rates and electricity and water charges.

[31] Had the respondents not been in default of the payment of these tariffs the applicant would not have had to pay and part with R70 249,00. There is no evidence before me which suggests that the applicant was in any way indebted to the respondents on the date of sale so that he would be expected to discharge their financial obligations, in which case the payment could be off-set against that debt. As regards the disputed facts on whether there was an agreement to refund the R70 249,00 and to pay a monthly rent of R3000,00 the proper approach is to take the facts as set out by the applicant together with the facts set out by the respondents which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at a trial. The facts set up in contradistinction by the respondents should then be considered, and if serious doubt is thrown upon the case of the applicant, he could not success, see for this approach *Gool Minister of Justice and Another 1955 (2) SA (C.P.D.)* at page 688 C- E. Simply stated, in my view, the applicant has shown that he stands a good chance of succeeding at the trial. The facts set up by the respondents to negate those of the applicant amount to a bare denial. They are without substantiation and lack credence.

[32] In *Thirlwell v Johannesburg Building Society and Others 1962 (4) 581* this court had to determine, *inter alia*, whether an auctioneer had properly exercised his discretion in accordance with a condition of sale which stated that there would be no sale unless the auctioneer was satisfied that the highest bid reflected a fair

value of the property. Henning J said:

> *"In my opinion the Sheriff has no power to impose a condition against the creditor's will which infringes his substantive rights."*

[33] When considering a counter-application where an order sought was to interdict and restrain the selling, disposal or encumbering of the property in question in … 2009 (1) SA 636 at page 631, Ntshangase J said:

> "..the sheriff does not act as an agent of the execution creditor. In the *Syfrets* case (*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*) it was stated:
>
> > *"When the sheriff attaches and sells the property in execution he does not act as an agent of the judgment creditor or the judgment debtor but does so as an executive of the law."*

[34] While the sheriff becomes a party to the contract *suo nomine* and as if he were the owner of the property, when immovable property is sold by him or her in terms of Rule 46, see *Syfrets* case supra, the sheriff cannot therefore simultaneously have a mandate or authority to extinguish any debts of the execution debtor whom he or she is not an agent of. Clause 21 (a) was included as a condition of sale of an immovable property in terms of rule 46 so that there would be compliance with section 92 (1) of the Deeds Registries Act Number 47 of 1937 which section reads:

> *"**92. Taxes and transfer duty to be paid before transfer of land**-(1) No deed of grant or transfer of land shall be registered unless accompanied by a receipt or certificate of a competent public revenue officer that the taxes, duties, fees and quitrent (if any) payable to the Government or any*

provincial administration on the property to be granted or transferred have been paid."

[35] I conclude therefore that the applicant has shown that the respondents may be liable to him for the debt emanating from the outstanding rates, electricity and water charges on the property. He has therefore shown for purposes of this application that he has a right to recover the R70 249 he paid to the eThekwini Municipality.

A well grounded apprehension of harm

[36] The respondents were in default with their monthly installments as a result of which the Bank foreclosed on their home loan. The home loan was in relation to the house they were living in. Their house had to be sold at a sale in execution and they did not challenge the judgment in favour of the Bank against them. They were also in default of their rates, electricity and water charges to the value of R70 249. The probabilities of this matter point strongly towards the respondents going through a difficult financial period. They have not shown that in the absence of the interdict sought, they will have sufficient funds to satisfy a judgment, should one be granted against them and in favour of the applicant. I am satisfied that a well grounded apprehension of irreparable harm has been shown to exist, in the event the interdict is not granted and the applicant is ultimately successful in the legal action against the respondents.

Absence of a suitable alternative remedy.

[37] The applicant disclosed that the respondents have another immovable property. It was open to the respondents to indicate to court their financial position in relation to this property. It is registered in their names and therefore they are the ones who would know whether it is encumbered in any manner. They made a bold but unsubstantiated claim that it will be able to satisfy a judgment against them, if one is granted in favour of the applicant. They chose not to disclose the basis for that claim so that court could make its own assessment. They chose not to reveal the available equity in the property. In my view, it has been shown that the applicant does not have any other suitable alternative remedy against the respondents.

[38] Consequently, the following order will issue:

1. The rule nisi is confirmed.
2. The respondents are to pay costs of this application.

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CELE A J

Date of Judgment : 5 NOVEMBER 2010

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