IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

NOT REPORTABLE

Case No: 6960/2016
In the matter between:
BONGIWE RITA MZIMELA Applicant
And

ABSA BANK LIMITED 1st Respondent

SHERIFF, DURBAN NORTH 2nd Respondent

ROSHALEN NAIDOO 3rd Respondent

JUDGMENT
Gorven J:

[1] In 2007, the first respondent lent and advanced moneys to the applicant. As security for the indebtedness, a mortgage bond was registered over the applicant's immovable property situated at 3…. S….. C……, D…. N…. (the property). The applicant was unable to meet her obligations under the loan and the mortgage bond and judgement was taken against her by the first respondent in the sum of R5 734 733 along with interest on that sum and costs of suit on an attorney and client scale. In addition, the property was declared to be executable. Pursuant to that judgement, the property was attached by the second respondent. A sale in execution was advertised for and held on 9 June 2016. At the sale, the property was sold to the third respondent for the sum of R4 050 000.

[2] Prior to the sale in execution, the applicant attempted to sell the property through the offices of an estate agency. She puts up a sale agreement which she says was. concluded as a result for R7 200 000 where the purchase price was payable on or before 3 June 2016. She gives no explanation for why this sale did not proceed. The first respondent's attorney says that the conveyancing department undertook to inform him once the purchase price had been paid so that the sale in execution could be stayed. When he heard nothing from them, the first respondent's attorney established from the

conveyancing attorneys that no monies had been received by them pursuant to that agreement.

[3] In this application, the applicant seeks to set aside the sale in execution. Her complaint is that the description of the property in the advertisement for the sale did not meet the criteria of rule 46(7). She says that, as a result, the value of the property was not achieved at the sale in execution and that she has accordingly been prejudiced. She sets the value at the purchase price in the sale agreement which was not proceeded with. There is no other basis on which the applicant relies to set aside the sale in execution. Only the first respondent opposes the application.

[4] The description of the property put up in the advertisement, and in the conditions of sale, gave the property description contained in the title deed, the address of 3…. S…… C……., D….. N……. and went on to describe the property in the following terms: 'Dwelling under brick and tile consisting of: entrance hall, lounge, dining room, study, family room, sun room, kitchen, 7x bedrooms, 5x bathrooms, scullery, laundry, building, walling, paving, swimming pool.'

[5] In the founding affidavit, the applicant claims that a number of features of the property which ought to have been included in the advertisement were omitted. These are a double lock-up garage, a triple open plan garage, a double garage at the rear of the property, an entertainment area with built in braai facilities on the ground floor adjoining the pool, a koi pond located in the garden area, a barroom, air conditioners in all the rooms, jacuzzi baths in three of the bedrooms, the fact that the house is a multi-story dwelling, the fact that the property has two road frontages, an entertainment area on the second floor with unhindered sea views, that all six bedrooms are en suite and that there is also a custom-made fireproof strong room on the property.

[6] The requirement for the description in the advertisement is governed by rule 46(7)(b) which, in its material parts, requires 'a notice of sale containing a short description of the property, its situation and street number, if any . .

[7] In argument, the applicant relied primarily on the failure of the advertisement to

mention the garages and the fact that the property had two road frontages. It was submitted that these omissions meant that the provisions of rule 46(7)(b) were not complied with in the advertisement.

[8] It is clear that the provisions of the rule are peremptory.[1] The purpose is to guard against a debtor being 'despoiled without a corresponding reduction of his liabilities and satisfaction of his creditors.'[2] It stands to reason, accordingly, that the purpose of the advertisement is to attract bidders. There is, as was submitted by the first respondent, a continuum stretching from a bare, technical description of the property to what has been termed the eulogistic style of auctioneers' advertisements.[2] Neither of these two extremes meets the requirement of the rule. They are met by a description which is somewhere between them.

[9] The first respondent submitted the following as principles by which to judge whether or not the rule has been satisfied. The description must be short. It must contain more than the basic cadastral or technical description. It should state whether or not there are buildings or improvements on the land.[3] What must be inserted are the main characteristics of the property which might reasonably be expected to attract the interest of potential purchasers.[4] It neither requires nor allows the listing of all the features in the eulogistic style of auctioneers. A submission in *Rossiter* that where there was no indication in the advertisement as to whether there were any buildings on the property, the reasonable reader could only have concluded that the land was vacant land, was rejected.

[10] The above principles are not attacked by the applicant and I agree with them. Taking this into account, it is my view that the advertisement complied with the provisions of the rule. I see no reason why a potential purchaser would not have been attracted to the property by the omissions highlighted by the applicant. It is clearly a luxury property. It clearly has a number of facilities and a highly sought after street address. It seems unlikely that a person reading the advertisement would come to the

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[1] *Messenger of the Magistrate's Court, Durban* v *Pillay* 1952 (3) SA 678 (A) at 683-4.

[J] *Pillay v Messenger of the Magistrate's Court, Durban & others* 1951 (1) SA 259 (N) at 264. This judgment was upheld on appeal. See note 1.

[4] *Nepaul* v *Messenger, Magistrate's Court, Port Alfred & others* 1962 (1) SA 553 (N) at 555A-B.

[5] *Pillay v Messenger* at 264.

[6] *Rossiter & another* v *Rand Natal Trust Co. Ltd & others* 1984 (1) SA 385 (N).

[7] At388A-C.

conclusion that there were no garages on the

the property simply because they were not specifically mentioned. It is certainly not

necessary to mention each potential feature of a property.
In the result, the application is dismissed with costs.
Govern J

DATE OF HEARING:

DATE OF JUDGMENT:

FOR THE APPLICANT:
FOR THE FIRST RESPONDENT:

10 August 2016.

10 August 2016.

S Ameer, instructed by Shabeer Joosab Attorneys.

AJ Boulle, instructed by Geyser Du Toit Louw & Kitching Pinetown Inc.

[2] *Ibid.* The gender exclusive language is that of the judgment.