THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No 22/2014

In the matter between:

ABSA BANK LTD **APPELLANT**

and

JOSEPH FREDERICK SNYMAN **RESPONDENT**

Neutral citation:	*Absa Bank Ltd v Snyman* (22/2014) [2015] ZASCA 67 (20 May 2015).
Coram:	Brand, Cachalia, Shongwe, Wallis *et* Petse JJA
Heard:	**7 May 2015**
Delivered:	**20 May 2015**

Summary: Section 63 of Magistrates' Courts Act 32 of 1944 – superannuation of judgment in terms of this section occurs unless actual execution effected within three years – date of warrant of execution or reissued warrant in terms of Magistrates' Courts rule 36 – within three year period – of no consequence.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Blignaut J and Davis AJ, sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court a quo in paragraph (ii) is set aside.

3 The question whether the sale in execution took place contrary to the provisions of s 63 of the Magistrates' Courts Act 32 of 1944 is referred back to the court a quo.

4 The respondent shall file an affidavit, strictly limited to the issues regarding (3) within 15 days of service of this order upon him at the behest of the appellant's attorneys.

5 The appellant shall file an affidavit, strictly limited to the issues regarding (3) within 15 days of receipt of the respondent's affidavit, or failing which, within 30 days of this order.

6 The application in the court a quo may be set down on a date to be determined by the registrar of that court.

7 The costs of appeal shall stand over until finalisation of the matter in the court a quo. The appellant is granted leave to apply to this court for an order awarding the costs of appeal in its favour, provided the application for such an order is filed with the registrar of this court within 21 days of the decision of the court a quo, failing which there will be no order as to the costs on appeal.

JUDGMENT

Brand JA (Cachalia, Shongwe, Wallis *et* Petse JJA concurring):

[1] The appellant in this appeal is Absa Bank Ltd (Absa) while the respondent is Mr J F Snyman (Snyman). The subject of their dispute is a house situated at 35 Watsonia Street, Panorama, Robertson in the Western Cape, with the Deeds Office description of Erf 2866, Robertson (the property). Snyman was the owner of the property. Technically it was registered in the names of both Snyman and his wife, to

whom he is married in community of property. But since Mrs Snyman was never joined as a party to these proceedings and Snyman at all times also acted on her behalf, I shall refer to him as acting, not only for himself, but also as a representative of his wife.

[2] During 2005 Snyman caused a bond to be registered over the property in favour of Absa. In terms of the bond, Snyman acknowledged his indebtedness of R82 000 towards capital owing to Absa and R20 000 in respect of costs, as defined in the bond. As is usual with bonds of this kind, this one provided that if Snyman were to default on the payment of any instalment due, Absa would be entitled to institute proceedings for all amounts outstanding, as well as for an order declaring the property executable. When Snyman fell into arrears with his bond instalments, Absa issued summons against him out of the Robertson Magistrates' Court for an amount of R89 690.46, together with interest and costs, as well as for an order declaring the property executable.

[3] Despite personal service of the summons on Snyman and his wife, they entered no appearance to defend. In consequence, default judgment in accordance with the terms sought in the summons was granted by the magistrate, Mr H Folscher, on 18 December 2007. On the same day a warrant of execution was issued against the property. For some reason not revealed in the papers, the warrant remained dormant until sometime in 2010. It was then reissued by the clerk of the Robertson Magistrates' Court. The exact date of the reissue subsequently proved to be of some significance. I shall return to that matter in due course.

[4] The reissued warrant of execution was served on Snyman personally on 1 February 2011. As with the summons, this again elicited no response from him. In the result the property was sold in execution. At the auction sale, which was attended by Snyman, the property was purchased by Mr E J van Tonder for R95 000. On 15 December 2011 Van Tonder gave notice to Snyman to vacate the property. When he failed to do so, Van Tonder brought an application for his eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The application was set down for 9 February 2012. On that day Snyman, for the first time, opposed the relief sought. At that stage he was

represented by an attorney from the Legal Aid Board. But when the matter was eventually heard on 16 February 2012, his attorney had in the meantime withdrawn. The magistrate, Mr Folscher, took the view that Snyman had no defence to the application, and granted the eviction order which directed Snyman to vacate the property by 11 May 2012, failing which the sheriff was authorised to evict him on 14 May 2012.

[5] That galvanised Snyman into action. On 14 May 2012 he brought an application in the Western Cape Division of the High Court in Cape Town for the review and setting aside of one or more of the decisions of the magistrate. The notice of motion was signed by Snyman in person. Although the suggestion was that Snyman had received some help from non-profit aid organisations, I infer from the way in which his founding papers were drafted, that those representing him were not legal practitioners with experience of any note. I say this because the papers do not identify the decisions sought to be set aside, as of course, they should. Nor do they set out the grounds of review relied upon or the factual basis advanced for those grounds. Instead, Snyman made wild, unsubstantiated, vexatious and even defamatory statements against all and sundry. So, for example, he alleged that the magistrate and the sheriff were racists who conspired with Absa to extract payment from him pursuant to a bond which he described as entirely forged and fictitious. His conduct is to be deprecated. Be that as it may, when the matter came before Blignaut J and Davis AJ in the court a quo, they concluded, however, that in accordance with a benevolent interpretation of Snyman's papers, he sought to review and set aside three orders, to wit: (a) the default judgment of 18 December 2007; (b) the sale in execution of the property on 6 December 2011; and (c) the eviction order of 16 February 2012.

[6] In due course the court a quo (Davis AJ with Blignaut J concurring) held that Snyman had failed to make out a case for the review of the default judgment. Accordingly, para (i) of the court a quo's order dated 9 September 2013, provided that the application for the setting aside of the default judgment, was dismissed. On the other hand, the court held the sale in execution to be null and void, and para (ii) of its order thus set that sale aside. The result was that Snyman was held not to have been in unlawful occupation of the property and that the eviction order of 16

February 2012 was bound to be set aside on that ground alone. But, the court a quo went further. It also held that Van Tonder had in any event failed to satisfy the requirements of PIE. For this reason too the eviction order was set aside in terms of para (iii) of the court a quo's order.

[7] Subsequently, Absa sought leave from the court a quo to appeal against para (ii) of the order, which pertained to the validity of the execution sale, as well as the setting aside of the eviction order in terms of para (iii). In the event, the court a quo granted leave to appeal to this court against para (ii) of the order, but not against para (iii). Since Snyman did not seek any leave to cross-appeal against the order in terms of para (i), the issues on appeal were thus confined to those pertaining to the validity of the execution sale, which was set aside in terms of para (ii).

[8] On appeal, the heads of argument by Snyman were signed and filed by him personally. But it seems that they had been drafted by the same person who assisted him in preparing his papers in the court a quo. I say that because these heads were accompanied by a document entitled 'Request to Continue as Friend of Court' and signed by someone who described himself as Professor Jozana Ka Mahwanqa of the Human Rights and Public Interest Law Forum in Port Elizabeth. In this document the signatory averred that he (Ka Mahwanqa) represented Snyman in the court a quo and therefore sought leave to continue representing him in this court, 'in terms of the Amicus Curiae principle'. In answer to this document Ka Mahwanqa was informed, through the registrar of this court, (a) that if he wanted to be admitted as an amicus curiae, properly so called, he should bring an application in terms of rule 16 of this court within a stipulated period, and (b), since it appeared that he was in fact seeking to represent Snyman, he would only be allowed to do so if he was an admitted advocate or attorney with a right of appearance in this court.

[9] Although there was no response to the registrar's letter, Ka Mahwanqa made an appearance at the hearing of this matter and announced that he was representing Snyman. He informed us that he was a professor of law, but did not respond to the enquiry as to the university or institution where he held this chair. He also told us that Snyman was not present in court, but that Snyman did not seek a postponement so as to enable him to attend. Ka Mahwanqa conceded that he was not an admitted

advocate or attorney with right of appearance in this court. He nonetheless sought our permission to address us on behalf of Snyman, because he had been allowed to do so in the court a quo. We then made it plain to him that, whatever happened in the court a quo, he had no right of appearance and that we could therefore not allow him to do so. In the result Snyman was not represented in the appeal.

[10] In the heads of argument signed and filed by Snyman, he sought to raise the correctness of the court a quo's refusal to set aside the default judgment granted against him in the magistrates' court, which is reflected in para (i) of the court's order. But I agree with Absa's argument that this court only has jurisdiction to hear an appeal against an order of the high court if leave to do so had been granted by that court or, in the event of a refusal by that court, by this court. The same holds true of para (iii) of the order. Absent any leave to appeal, we have no jurisdiction to entertain any argument against it (see eg *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25 (20 March 2015) para 14). As a matter of law, our focus must therefore be confined to the order in para (ii).

[11] Central to the court a quo's reasoning underlying that order stood the statement in the answering affidavit by the magistrate – who was cited as a respondent in the review proceedings – that the warrant of execution against the property was issued on 18 December 2007 and reissued by the clerk of the court on 18 December 2010. Relying on that statement, the court a quo held that the reissued warrant, on the strength of which the execution sale was held, fell foul of s 63 of the Magistrates' Courts Act 32 of 1944 (the Act), read with rules 36(1) and (5) of the Magistrates' Courts rules. These enactments provide:

'**63 Execution to be issued within three years**

Execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except upon an order of the court in which judgment was pronounced or of any court having jurisdiction, in respect of the judgment debtor . . . .'

Rule 36 provides in relevant part:

'**Process in execution**

36(1) The process for the execution of any judgment for the payment of money, for the delivery of property whether movable or immovable, or for ejectment shall be by warrant issued and signed by the registrar or clerk of the court and addressed to the Sheriff.

. . .

(5) The registrar or clerk of the court shall at the request of a party entitled thereto reissue process issued under subrule (i) without the court having sanctioned the reissue.'

[12] Starting out from these provisions, the court a quo's reasoning, as appears from its judgment (paras 47-53), went along the following lines:

'The record of the default judgment proceedings, read together with the magistrate's affidavit, reveals that the default judgment was granted on 18 December 2007 and a warrant of execution against immovable property was issued on the same day. On 18 December 2010, the clerk of the court reissued the warrant of execution against immovable property, and the property was attached and sold in execution on the strength of the reissued warrant.

The crisp question, therefore, is whether or not it was competent for the clerk of the court to reissue the warrant of execution on 18 December 2010 without sanction of the court.

It is clear that section 63 of the Magistrates' Courts Act operates to prohibit the issue of process in execution after three years from the date of the judgment, unless authorised by an order of court sought by the judgment creditor on notice to the judgment debtor. The question, then, is how the relevant period of three years is to be calculated.

The computation of calendar years is governed by the civil method of computation. (See *Fouche v Mutual Fire and General Insurance Co Ltd* 1969 (2) SA 519 (D) at 522H-523B . . .). This method involves including the first day of the period and excluding the last. When the civil method of computation is applied to the facts at hand, the result is that the three year period referred to in section 63 of the Magistrates' Courts Act commenced on 18 December 2007 and expired at midnight on 17 December 2010.

That being the case, it follows that the default judgment became superannuated at midnight on 17 December 2010, and the prohibition in section 63 operated with effect from 18 December 2010 to preclude the issue of any process in execution thereof without an order of court. It was therefore not competent, in my view, for the clerk of the court to reissue the warrant of execution on 18 December 2010 in terms of rule 36(5), and the reissued warrant was invalid for non-compliance with section 63 of the Magistrates' Courts Act . . .

A valid warrant of execution is clearly a pre-requisite for a valid attachment of immovable property . . . As such, it is an essential formality for a valid sale in execution. The invalidity of the warrant of execution carries the consequence that the property was not validly attached and the subsequent sale in execution was therefore a nullity . . . .

[13] Absa's first challenge to the correctness of this conclusion was aimed at its factual foundation. In this regard Absa pointed out that, according to the date stamps of the clerk of the court, which appear on the reissued warrant, it was issued either on 22 April 2010 or on 8 December 2010. The date referred to by the magistrate in his affidavit, ie 18 December 2010, does not appear on that document at all. In addition, it transpires that 18 December 2010 was a Saturday. On the probabilities, so Absa's argument went, the date referred to in the affidavit, which formed the sole basis of the court a quo's conclusion, was nothing more than a typographical error and the crucial finding based on that error was therefore incorrect. On the face of it, the argument appears to be unanswerable. But, on reflection and – as was rightly and fairly pointed out to us by Absa's counsel on appeal – the court a quo's mistake turns out to be of no consequence, because it was cancelled out, as it were, by the court's further mistake in the interpretation of s 63 read with rule 36(5). On the court's interpretation of s 63, the period of three years contemplated in the section – also referred to as the period of superannuation – limits the time period within which a warrant of execution may be validly issued or reissued. In consequence, the effect of superannuation may be stopped by the issue of a warrant of execution. Moreover, so the court obviously concluded, the period of superannuation can be extended – presumably for another period of three years – by the reissue of a warrant under rule 36(5) as long as the reissue occurs within the three year period.

[14] A number of older cases preceding the Act were also capable of the interpretation that superannuation – the period of which was then a year and a day – determined the time during which a warrant of execution may be issued, and that, once that had happened, superannuation could be avoided by the issue of further warrants. (see eg *Auret v Van Der Berg* 1911 CPD 1043 at 1044). Later cases, however, held that a warrant of execution, even though issued within the stipulated period, could not save a judgment from superannuation, unless it was acted upon within a year and a day from date of judgment (see eg *Rigg v Strydom* 1914 CPD 583; *Bezuidenhout v Deyzel* 1915 CPD 458 at 460). In the case of a judgment sounding in money, the result was that the execution sale had to occur within that period. I agree with the author D E van Loggerenberg of *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa* 10 ed (2012) vol 1, in his commentary on s 63, that the later cases also reflect the correct interpretation of this

section. Purely on the basis of logic, the legislature's intent could hardly have been that a judgment creditor can delay execution of a judgment indefinitely as long as he or she had obtained a warrant of execution within three years and caused it to be reissued on a regular basis thereafter. Secondly, the legislature must be presumed to have been aware of the law, as represented by these later decisions, when the Magistrates' Courts Act was promulgated in 1944. Thirdly, the Afrikaans text, which was signed by the executive, renders the position even clearer. It provides:

'Ten uitvoerlegging teen goedere kan nie uit hoofde van 'n vonnis *geskied* na verloop van drie jaar vanaf die datum waarop dit gefel is . . . nie . . .'

(My emphasis.)

[15] Properly construed, s 63 therefore provides that a judgment sounding in money becomes superannuated, unless the execution sale takes place within three years of that judgment. Hence the date on which the warrant of execution is issued, is of no consequence. It goes without saying that rule 36(5) cannot change the meaning of s 63 of the Act. It follows that the date of reissue of a warrant under this rule cannot avoid superannuation once the three year period from date of judgment elapses. In this context, it is equally of no consequence. Extension can only occur by order of court, which was admittedly not obtained by Absa in this case. It follows that the question whether or not the reissue occurred on 18 December 2010 or on an earlier date, is of no consequence. What is relevant, is the date of the sale in execution, which was 6 December 2011. This was clearly more than three years after the date of judgment on 18 December 2007. If this was the end of the matter, the court a quo would therefore have been correct in finding – albeit for different reasons – that the reissued warrant, on the strength of which the property was sold in execution was null and void.

[16] As it happens, however, this is not the end of the matter. Absa's further argument was that the court a quo's reasoning reflects another mistake in that it had failed to have regard to the alternative date for the commencement of the superannuation period contemplated by s 63, that is, the date 'of the last payment in respect' of their judgment. It follows that the reissued warrant would still be valid if the last payment by Snyman, in respect of his bond debt, was made less than three years prior to 6 December 2011, ie after 5 December 2008. In this regard it is

pertinent, so Absa pointed out, that according to Snyman's founding affidavit, he still made payments to Absa in settlement of his bond debt in 2008. It is true, so Absa argued, that the date during 2008 is not mentioned by Snyman, but since he bore the onus to establish the facts upon which his review application relied, it was for him to allege and prove that the last payment was made prior to 5 December 2008.

[17] Although there is obvious merit in Absa's argument, it left me with a sense of unease. The reason is that I simply cannot discount the real possibility that the date of payment was indeed more than three years before the date of the execution sale, but that the unrepresented Snyman had failed to raise it, since he did not appreciate its significance. The unpalatable consequence would be that a poor man's house – which he had bought in 1997 – would be sold on the strength of a warrant which was possibly invalid. In addition, during the course of argument with reference to payments that were made in settlement of the bond debt after the date of judgment, it became apparent that the amount for which the warrant was reissued in 2010 remained virtually the same as the amount of the original judgment debt in December 2007. On the face of it, payments made in settlement after 2007 had therefore not been taken into account. That would be in conflict with the following statement by D R Harms et al *Civil Procedure in the Magistrates' Courts* (2011) at B36.13 with which I find myself in full agreement:

'The wording of the warrant may not exceed or vary the scope of the judgment on which it is founded. If, however, the judgment has been satisfied in part, the warrant must be issued for the unsatisfied portion only.'

[18] In this light, counsel for Absa fairly conceded that the appropriate order would be to refer the matter back to the court a quo with the specific direction to determine, after receiving such further evidence as the parties may wish to present, whether the sale in execution took place contrary to the provisions of s 63 of the Act. As to the matter of costs on appeal, I find it appropriate that this should stand over until proceedings in the court a quo have been finalised.

[19] In the result it is ordered:

1 The appeal is upheld.

2 The order of the court a quo in paragraph (ii) is set aside.

3 The question whether the sale in execution took place contrary to the provisions of s 63 of the Magistrates' Courts Act 32 of 1944 is referred back to the court a quo.

4 The respondent shall file an affidavit, strictly limited to the issues regarding (3) within 15 days of service of this order upon him at the behest of the appellant's attorneys.

5 The appellant shall file an affidavit, strictly limited to the issues regarding (3) within 15 days of receipt of the respondent's affidavit, or failing which, within 30 days of this order.

6 The application in the court a quo may be set down on a date to be determined by the registrar of that court.

7 The costs of appeal shall stand over until finalisation of the matter in the court a quo. The appellant is granted leave to apply to this court for an order awarding the costs of appeal in its favour, provided the application for such an order is filed with the registrar of this court within 21 days of the decision of the court a quo, failing which there will be no order as to the costs on appeal.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	P Coetsee SC and L N Wessels Instructed by: Sandenbergh Nel Haggard, Bellville. c/o Spangenberg Zietsman & Bloem, Bloemfontein
For the Respondent:	No appearance