THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 560/06

In the matter between:

HACK STUPEL AND ROSS ATTORNEYS Appellant

and

LESLIE KGANG Respondent

Coram: **HARMS ADP, NAVSA JA, MTHIYANE JA, HURT AJA and KGOMO AJA**

Date of hearing: 28 August 2007

Date of delivery: 28 September 2007

Summary: **The Respondent claimed damages by way of motion proceedings – no basis for damages appears from affidavits or how damages were computed.**

Neutral citation: This judgment may be referred to as Hack Stupel & Ross v Kgang [2007] SCA 132 (RSA).

KGOMO AJA:

[1] This is an appeal against a judgment of the Pretoria High Court (Seriti J) in terms of which the appellant, a firm of attorneys, was ordered to pay the respondent an amount of R63 000.00 and his costs. The court held that this amount constituted the fair market value of immovable property formerly owned by the respondent and represented damages sustained by him as a result of the property being wrongfully sold at a judicial sale in execution. The sale took place at the instance of the appellant, acting on the instructions of its client, Ms Joyce Vilakazi. The appeal is before us with the leave of this Court.

The background

[2] The respondent's troubles began when, more than 13 years ago, he borrowed money from Ms Vilakazi. In March 1994 he signed a written acknowledgment of debt in terms of which he acknowledged his indebtedness to her in an amount of R31 160. He was unable to meet his obligations in terms of the acknowledgment of debt. On 19 September 1994 she issued summons against him out of the magistrates' court, Odi, in Garankuwa and, on 14 October 1994, obtained default judgment against him for payment of R31 160. There is a dispute about whether the magistrate's court order included the payment of interest as provided for in the acknowledgment of debt, but for reasons that will become apparent that issue need not detain us.

[3] The respondent made arrangements to pay the amount owing in instalments. During 1994 and 1995 the respondent made several payments to attorneys then acting for Ms Vilakazi. Subsequently the appellant became her attorneys.

[4] On 15 December 1995, after the respondent had defaulted once again, the appellant caused a writ of execution against property to be issued. After it was served, the respondent immediately made new arrangements to pay off his indebtedness. The respondent defaulted once again. During 1998 a new writ of execution was issued by the appellant and served on the respondent at his home situated at 361 Block 3, Mabopane (the affected immovable property). An amount of money was paid by the respondent and his movable property that had been attached was released. The matter dragged on.

[5] During December 2000 the appellant caused the writ to be reissued for payment of an amount of R 32 156.68, but the Sheriff was unable to effect service. By this time, given the long and convoluted history of the matter, the respondent had made a substantial number of payments. On the appellant's version of events, the respondent had at that time already paid an amount of R20 700. On his version of events he had paid much more.

[6] On 16 March 2001 acting on its client's instructions, the appellant applied, in terms of s 66(1) of the Magistrates' Court Act 32 of 1944, to attach the respondent's immovable property. An order to that effect was obtained and a warrant of execution against immovable property was subsequently issued on 28 August 2001. The appellant demanded an amount of R5 000.00 from the respondent in order for it not to proceed with the warrant of execution. This was not forthcoming and the appellant proceeded to arrange a sale in execution. On the day of the sale in execution the respondent paid an amount of R5 000.00. Although this staved off the sale in execution, the appellant was not prepared to release the property from attachment because it considered that the respondent still owed an amount in excess of R30 000. 00.

[7] Because the respondent had not made payment to the satisfaction of the appellant, a sale in execution finally took place and the property in question was sold to Mr Willie Dreyer who purchased it as a nominee for a close corporation which he controlled, namely, Bestprop Construction.

[8] In the court below there were several disputes. One of the disputes concerned the question whether the appellant ought first to have proceeded with a writ against the respondent's movable property. Another, whether the proceeds from the sale of movable property would have been sufficient to have met the outstanding debt. On the respondent's own version of events he was aware of the warrant against immovable property. In light of the view I ultimately take of

the matter it is also unnecessary to deal with these aspects other than in the limited manner that appears later in this judgment.

[9] After the property had been sold in execution, the respondent applied, in September 2002, to the Pretoria High Court for an order that the warrant of execution against immovable property granted by the Magistrates' Court, Odi, be rescinded and that the sale in execution be set aside. Ms Vilakazi, the Sheriff, the appellant, Bestprop Construction and Mr Dreyer were all cited as respondents. The Registrar of Deeds was not cited as an interested party.

[10] At the time of the application to the Pretoria High Court the respondent had paid a total of at least R41 250.00 towards settling the debt. This was clearly a factor that understandably evoked sympathy for the respondent in the court below.

[11] There is no explanation for the considerable delay between the time that the application was first brought in the court below and the time that it was heard – apparently a period of at least three years. Judgment was delivered on 9 May 2006, three years and seven months after the application was launched and close to twelve years from the time that the respondent first defaulted in his loan obligations.

[12] Probably because there had been no service on the Registrar of Deeds and because of the considerable delay before the matter was finally set down for hearing, the property in question has, since the litigation started in the Pretoria High Court, been transferred to subsequent purchasers. This in turn, led the respondent, during 2005, to serve a notice of amendment, claiming in the alternative an order that he be paid the market value of the property sold in execution.

[13] The court below found ─ despite a dispute in this regard, and even though this was raised for the first time by the respondent in reply ─ that the appellant had undertaken not to sell the property in execution until it had provided the respondent with a detailed account, setting out the amounts paid and providing a calculation of the amount outstanding. This procedure was impermissible. (*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A)). It held further, that the warrant of execution had not been properly served on the respondent. The court below found, without the benefit of oral evidence, that if the respondent's movable property had been attached and sold in execution, it would have yielded enough to satisfy the outstanding amount, if any. Thus, it concluded that the sale in execution had not taken place in accordance with the provisions of s 66 (1)*(a)* of the Act.[1] Further, the court below stated the following:

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[1] Section 66(1) *(a)* of the Act provides:
' Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court on good cause shown,

'One disturbing feature of this case is that the various warrants of execution issued against the applicant at different times had almost the same amount as the outstanding debt despite the fact that the applicant had made several payments over a period of time.'

[14] Whilst the last-mentioned concern was not wholly unjustified, it certainly did not justify the conclusions that followed. Considering the alternative relief claimed by the respondent, the court below held that the Bestprop Construction had subsequently sold the immovable property in question for an amount of R300 000.00. The court then went on to refer to the decision in *Mkhwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 631H, where it was stated that courts should endeavour on the basis of available evidence to award a party who suffered damages fair compensation. Seriti J found that Mr Dreyer had purchased the property in question for an amount of R63 000.00 and stated that, in his view, it represented the fair market value of the property. He consequently awarded that amount as the respondent's damages.

Conclusions

[15] The judgment of the high court is in a number of respects fundamentally flawed. The claim for damages was admittedly only presaged by the belated alternative prayer introduced many years after the launch of the proceedings.

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so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.'

[16] The first problem with the judgment is that it granted judgment for damages in motion proceedings contrary to the basic rule that damages are not claimable in motion proceedings. (*Room Hire Co (Pty) Ltd V J*eppe *Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1161; *Miller v Roussot* 1975 (3) SA 876 (R) at 876H – 877H). The second problem with the approach of the court below is that nowhere in his affidavits did the respondent allege that he had suffered any damages: he adduced no evidence at all concerning the damages the court held he had sustained, nor is there any allegation in any of the affidavits filed concerning the amount for which the property was sold at the sale in execution. Even more importantly, the basis of the appellant's liability, as distinct from its client's liability, on any ground at all, is not foreshadowed in the affidavits.

[17] The court below appears to have reached its conclusion on the amount for which the property was sold in execution from correspondence, not authenticated or confirmed by affidavit. Apart from the fact that the relevant correspondence is marked 'without prejudice' it did not emanate from the appellant and was not evidence against it. What is more, the learned judge quite inappropriately, after he had reserved judgment and without notice to the parties, made his own enquiries by writing to Mr Dreyer's attorney requesting a copy of the agreement of sale. He based his conclusions on the purchase price on the evidence he had obtained in this irregular manner. His actions were in this regard irregular in two respects. First, he failed to have regard to the rule that a judge is not entitled in civil proceedings to obtain evidence. Secondly, it was a breach of fundamental

justice to go behind the backs of litigants and obtain information which was potentially prejudicial to one of them. Importantly, it also does not follow that the purchase price automatically translates into damages suffered by the respondent. We do not, for example, know whether there was a mortgage bond registered over the property. How does one in these circumstances determine quantum?

[18] In *Mkhwanazi* (631E-F) the following dictum from *Hersman v Shapiro & Company* 1926 TPD 367 at 379 was quoted with approval:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

[19] Immediately thereafter, the court in *Mkhwanazi* (631G) stated the following:

'In soverre ek dit kon nagaan is hierdie sienswyse deur ons Howe deurgaans onderhewig gestel aan die voorwaarde dat die eiser alle beskikbare getuienis wat sou kon bydra tot die berekening van die skade voor die hof gelê het.'

[20] In *Esso Standard SA [Pty] Ltd v Katz* 1981 (1) SA 964 (A) at 970 E-H, this Court stated the following:

'Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial…The critical question then is whether the

plaintiff… has produced all the evidence that he could reasonably have produced to enable the court to assess the *quantum* of damage.'

[21] In the present case, in respect of damages, the respondent did not even get past first base. To sum up: The court below arrived at factual conclusions in motion proceedings where the facts in question were seriously disputed. It erred fundamentally in awarding damages in motion proceedings especially when no basis was provided for holding the appellant liable and where no acceptable evidence of damages was adduced. This case illustrates how well-intentioned, but misplaced, sympathy for a litigant by a court of first instance translates into an even more costly exercise for the same litigant.

[22] In the result the following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:

'The application is dismissed with costs'.

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F D KGOMO
ACTING JUDGE OF APPEAL

CONCUR :) HARMS ADP
) NAVSA JA
) MTHIYANE JA
) HURT AJA