



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable
Case no: 122/2023

In the matter between:

DAYALAN MUNSAMI

APPELLANT

and

**THE STANDARD BANK OF SOUTH AFRICA LTD
THE SHERIFF RANDBURG SOUTH WEST
THE REGISTRAR OF DEEDS JOHANNESBURG
HAZEL IRENE KNOWLER**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

Neutral citation: *Munsami v The Standard Bank of SA & Others* (122/2023) [2024]
ZASCA 167 (5 December 2024)

Coram: DAMBUZA, MOCUMIE, MBATHA and SMITH JJA and MAKUME AJA

Heard: 7 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 5 December 2024.

Summary: Application for leave to appeal in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 – reasonable prospects of success on appeal – litigant aggrieved by adverse court order not allowed to impeach order in proceedings before another court of equal standing – sale in execution of immovable residential property and transfer of ownership - may be impeached only in exceptional circumstances, including where the purchaser took transfer of the property in bad faith and with knowledge of a defect in the sale – failure to establish bad faith on part of purchaser – no reasonable prospects that the appeal would be successful.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Moultrie AJ, sitting as a court of first instance):

The application for leave to appeal is dismissed with costs.

JUDGMENT

Smith JA (Dambuza, Mocumie and Mbatha JJA and Makume AJA concurring):

[1] This is an application for leave to appeal against the judgment and order of the Gauteng Division of the High Court, Johannesburg, per Moultrie AJ (the high court). The high court dismissed the application brought by the applicant, Mr Dayalan Munsami (Mr Munsami), to set aside the sale in execution of his immovable residential property, situated at Lyme Park Extension 4, Johannesburg (the property). The fourth respondent, Mrs Hazel Knowler (Mrs Knowler) bought the property at the sale on 24 June 2021 and took transfer of ownership in November 2022. The sale in execution was pursuant to summary judgment granted by Mtati AJ (the summary judgment order), on 9 May 2019, in favour of the first respondent, the Standard Bank of South Africa Limited (the bank).

[2] The second and third respondents, namely the Sheriff of the high court and the Registrar of Deeds were cited as interested parties only and were consequently not involved in the application for leave to appeal. This Court referred the application for leave to appeal for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Act) and the parties were notified that they must be prepared, if called upon by this Court, to address the merits of the application.

Factual background

[3] On 20 December 2018, the bank issued a combined summons against Mr Munsami wherein it, inter alia, claimed payment of various debts, including the sum of R2 486 766.52 in respect of a mortgage bond registered over the property. The bank also sought orders declaring the property specially executable and authorising the Registrar to issue a writ of execution against the property.

[4] Importantly, in support of its claim to have the property declared executable, the bank, in its particulars of claim:

(a) averred that the property was Mr Munsami's primary residence and drew his attention to the provisions of ss 26(1) and 26(3) of the Constitution, which accord everyone the right to access to adequate housing;

(b) informed Mr Munsami that in terms of s 26(3) of the Constitution, he could not be evicted from his home and his home may not be declared executable and sold in execution, without an order of court made after the court had considered all the relevant circumstances;

(c) explained to Mr Munsami the provisions of Uniform rule 46(1)(a)(ii), which provide that no writ of execution shall be issued against his primary residence unless a court, having considered all the relevant circumstances, orders execution against it;

(d) informed Mr Munsami that if he objected to his home being declared executable, he was called upon to place facts and submissions before the court for consideration in terms of rule 46(1)(a)(ii). He was cautioned that a failure to do so may result in an order declaring the property specially executable, which could result in it being sold in execution;

(e) regarding the valuation of the property, attached an automated valuation report which indicated that 'the expected high value' of the property was R4 940 000, and the 'expected low value' was R3 380 000; and

(f) averred that it was unable to obtain a sworn valuation as Mr Munsami was unwilling to cooperate.

[5] After appearance to defend was filed by an attorney acting on behalf of Mr Munsami, the bank applied for summary judgment in March 2019. The application having been filed before the amendment of Uniform rule 32, the bank was only required to file an affidavit by an authorised official swearing positively to facts averred in the particulars of claim and verifying the cause of action. Despite being legally represented at the time, Mr Munsami did not file an opposing affidavit and consequently did not place any further information before the high court (other than that contained in the particulars of claim), relevant to the exercise of its discretion in terms of rule 46A.

In the high court

[6] As mentioned, summary judgment was granted against Mr Munsami on 9 May 2019, inter alia, declaring the property specially executable without setting a reserve price. It is common cause that Mr Munsami did not appeal against the summary judgement order, neither did he apply for it to be rescinded. Instead, he launched urgent proceedings, in December 2020, seeking to stay the sale in execution on the ground that the notice of sale did not include a short description of the property.

[7] The sale in execution was postponed on four occasions for various reasons, which are not relevant for the purposes of this application for leave to appeal. The property was eventually sold at a public auction to Mrs Knowler for the sum of R360 000 and ownership was transferred to her on 25 November 2021. Mr Munsami consequently still owes the bank more than R3 million in respect of the mortgage bond.

[8] When, on 16 February 2022, Mrs Knowler filed an application for an order evicting Mr Munsami from the property, he launched an urgent application in the high court seeking to set aside the sale in execution on the grounds that: (a) the bank had failed to comply with the provisions of Uniform rule 46A; (b) the high court's failure to set a reserve price vitiates the summary judgment and renders it void *ab initio*; and (c) there had been collusion between Mrs Knowler and the bank and she had acted in bad faith in buying the property for a price well below its market value. Mr Munsami further contended that although he did not seek to impugn the summary judgment order, he was entitled to the

relief simply based on the bank's non-compliance with rule 46A and the prejudice he had suffered as a result of the property having been sold without a reserve price.

[9] In a written judgment delivered on 10 October 2022, the high court dismissed Mr Munsami's application with costs. The high court found that Mr Munsami was unable to establish collusion between Mrs Knowler and the bank or that she had taken transfer of the property in bad faith with knowledge of the alleged defects in the sale. It further found that Mr Munsami's contention that the bank failed to comply with the provisions of rule 46A because it did not bring a separate application for relief in terms of that rule, was unsustainable.

[10] The high court was satisfied that the relevant allegations contained in the particulars of claim constituted sufficient compliance with the rule. In this regard the high court found that 'the two procedures were indeed effectively and properly married'¹ and that 'the provisions of [Uniform] rule 46A were substantially complied with'. The high court also made short shrift of Mr Munsami's argument that the failure to set a reserve price vitiated the summary judgment order and rendered it void ab initio. In this regard the high court found that there was no evidence 'to suggest that when Mtati AJ made the . . . orders, he did not as required by Rule 46A(9), consider whether a reserve price was to be set'.

Discussion and analysis

[11] In terms of s 17(1) of the Act, leave to appeal may only be granted if there are reasonable prospects that the appeal would succeed. In *Ramakatsa and Others v African National Congress and Another*² this Court held that even if the court is not satisfied that there are reasonable prospects of success, it must still consider whether there are other compelling reasons why, in the interests of justice, the appeal should nevertheless be heard. Such reasons would include 'an important question of law or a discrete issue of public importance that will have an effect on future disputes'. This Court further held that

¹ Namely, the summary judgment and rule 46A procedures.

² *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31; [2021] JOL 49993 (SCA) para 10.

the test regarding reasonable prospects of success 'postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court'.

[12] As mentioned earlier, it is common cause that Mr Munsami did not apply for leave to appeal against the summary judgment order nor did he apply for it to be rescinded. It was at that stage that the property was declared specially executable and the provisions of rule 46A were applicable. The order therefore remains effectual and immune to challenge by other means, such as, amongst others, interdictory relief by another court of equal standing.

[13] Mr Munsami's argument regarding the alleged defects in the rule 46A application and his reliance on the jurisprudence regarding the court's discretion to set a reserve price for sale in execution of residential immovable property impermissibly seeks to impugn the summary judgment order without appealing against it. It is trite that a litigant who is aggrieved by an adverse judgment and wishes to challenge it can only do so by filing an appeal or, in certain circumstances, applying to have it rescinded. In my view, the application brought before Moultrie AJ, which is the subject of this application for leave to appeal, was an impermissible attempt by Mr Munsami to circumvent the immutable rule regarding the finality of court judgments and the adjectival law remedies available to an aggrieved litigant.

[14] Counsel for Mr Munsami correctly conceded that he was not entitled to impugn the summary judgment order in another court of equal standing, without appealing against that order. It follows that the arguments pertaining to the contended non-compliance with Uniform rule 46A and the high court's failure to set a reserve price were not available to Mr Munsami in the context of an appeal against a different judgment, namely that of Moultrie AJ.

[15] Mr Munsami was, however, entitled to raise the arguments that the sale in execution was vitiated by undue collusion between the bank and Mrs Knowles and that

the latter took transfer of the property in bad faith. Those points do not seek to impeach the summary judgment order but assails the lawfulness of the sale, based on alleged defects in how it was conducted.

[16] It is established law that a sale in execution of immovable property, as well as the consequent transfer of the property, may be impeached only in exceptional circumstances, including where the purchaser took transfer of the property in bad faith and with knowledge of a defect in the sale.³ And, unfortunately for Mr Munsami, he must now also contend with the consequences of a *bona fide* public auction and the principles of the abstract theory of transfer. In terms of the latter doctrine the validity of a transfer of ownership is not dependent on the validity of the underlying transaction.⁴

[17] However, nowhere in his founding affidavit does Mr Munsami proffer any evidence, or for that matter even allege, that there was collusion between the bank and Mrs Knowler or that Mrs Knowler took transfer of the property with knowledge of a fundamental defect in the sale. Mr Munsami nevertheless contends that this Court must infer such collusion and bad faith on the part of Mrs Knowler based on the following pleaded averments: (a) Mrs Knowler purchased the property at a price well below its true value, which according to Mr Munsami was some R6million; (b) he was 'shocked and outraged' that she was allowed to purchase the property at 6% of its approximate value; (c) the facts demonstrate the bank's lack of respect, 'bullying tactics' and total disregard for the rules of court; and (d) it is 'inconceivable' that the bank could have allowed the sale to take place without a reserve price, the result being that he still owes it more than R3 million.

[18] I agree with the high court's finding that these allegations are patently inadequate to justify an inference of collusion or bad faith contended for by Mr Munsami. At best for him, the pleaded facts sought to impute some unreasonableness on the part of the bank and perhaps abuse of its economic power. There was, however, no allegation of any

³ *Sookdeyi and Others v Sahadeo and Others* 1952 (4) SA 568 (A) at 571H-572B.

⁴ *Legator McKenna Inc and Another v Shea and Others* 2008] ZASCA 144; 2010 (1) SA 35 (SCA); [2009]. 2 All SA 45 para 20.

collusion between the bank and Mrs Knowler or that she had taken transfer of the property with the knowledge that the sale was allegedly tainted by the bank's failure to comply with rule 46A and the high court's failure to set a reserve price. In any event, and as the high court correctly observed, Mr Munsami only raised these points after the sale in execution and the subsequent transfer of the property. It is therefore manifest that Mrs Knowler could not have known about any alleged defects in the sale. The fact that she had purchased the property at a public auction for a price well below its value cannot by any stretch of the imagination justify an inference of *mala fides* or fraudulent intent on her part.

[19] In the final analysis, Mr Munsami only has himself to blame for his unfortunate dilemma. He had enough opportunities to challenge the summary judgment order or to apply for the stay of the sale in execution. Even though the sale in execution was postponed for various reasons on four different occasions before it was sold in June 2021, Mr Munsami had legal representation throughout, and on each occasion been duly notified thereof, he failed to challenge the validity of the sale on any of the grounds which he advanced before the high court. It was only after Mrs Knowler had launched eviction proceedings against him that Mr Munsami filed his application to set aside the sale and transfer of the property, some three years after the order declaring the property executable and eight months after the sale in execution.

[20] Mr Munsami's belated attempt to 'unscramble the egg', some eight months after the transfer of ownership of the property, is based on unsustainable and tenuous averments which are not grounded either in fact or law. I am accordingly of the view that there are no reasonable prospects that the appeal would succeed, neither are there any other compelling reasons why the appeal should be heard.

[21] In the result, I make the following:

The application for leave to appeal is dismissed with costs.

J E SMITH
JUDGE OF APPEAL

Appearances

For the appellant:

MC Molefi

Instructed by:

Leseka Attorneys, Johannesburg

Pieter Skein Attorneys, Bloemfontein

For the first respondent:

JC Coetzer

Instructed by:

Stupel & Berman Inc., Johannesburg

Lovius Block Attorneys, Bloemfontein

For the fourth respondent:

L Mhlanga

Instructed by:

Precious Muleya Inc., Johannesburg

Phatshoane Henney Attorneys, Bloemfontein.