

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 3467/2014

DATE: 01 AUGUST 2016

In the matter between:

THE SHERIFF OF THE HIGH COURT,

First Applicant

PIKETBERG

THE STANDARD BANK OF SOUTH AFRICA

Second Applicant

LTD

And

PIERRE GERHARDUS LOURENS

Respondent

In re:

THE STANDARD BANK OF SOUTH AFRICA

Plaintiff

LTD

And

THE TRUSTEES FOR THE TIME BEING OF THE

First Defendant

EILA TRUST

Second Defendant Third Defendant

EBEN BESTER MARGUERITE MADELINE BESTER

HEARD: 15 JUNE 2016 DELIVERED: 1 AUGUST 2016

JUDGMENT

Introduction

[1] In *casu*, after the second applicant (judgment creditor) obtained judgment in its favour, a writ of execution was issued for the first applicant to attach and sell the property. Upon receipt of the writ for the sale, the first applicant ascertained what

real rights (such as bonds and any encumbrances) were registered against the property. The first applicant was obliged to inform the parties of these real rights, if any, and who the holders of these rights and their addresses were.

- [2] The second applicant, presumably after consultation with the first applicant, prepared the two documents essential to the sale in execution i.e. the notice of sale and the conditions of sale. The notice stated the conditions of sale may be inspected at the office of the Sheriff, which the respondent did and in so doing he no doubt became aware of the conditions of sale.
- [3] It would appear by ordinary accounts that the applicants adhered to the practice under the Court Rules and the Consumer Protection Act 68 of 2008 ("the Act") and its regulations for the sale in execution by public auction. The first applicant was empowered by the Uniform Rules of Court to "*do anything necessary to effect registration of transfer*". However the transfer of ownership could not take place because of the respondent's recalcitrant stance in regard to payment of the Value Added Tax ("VAT") amount on the transaction, notwithstanding the fact that clause 4.7 of the conditions of sale peremptorily placed the obligation to pay "*transfer duty or VAT attracted by the sale*" on the purchaser (respondent). The respondent also did not respond to the second applicant's demands for payment of the VAT amount of R88, 200.00.
- [4] In the main application the applicants sought an order in terms of Rule 46(11)(a) and (b) of the Uniform Rules of Court for the cancellation of the sale in execution of Erf 3 L, situated at 1 C C, P O, in the Berg River Municipality, Piketberg, Western Province ("the property"). The sale was held on 14 April 2015.
- [5] The reason for the application is the respondent's alleged failure to comply with his obligations to pay an amount of R88 200.00 for VAT due and owing to the second applicant before transfer can occur. The applicants sought an order that the respondent pay the costs in the main application.
- [6] The respondent opposed the application and launched a counterapplication disputing the validity of the sale in execution on the basis that it does not comply with Regulation 22(2) of the Act¹, and seeking an order that the sale in execution in respect of the property be declared *null and void*, together with an order that the first applicant (main application) repay the deposit paid by the respondent in

¹ The Consumer Protection Act Regulations, GN R 293, GG 34180 of 1 April 2011.

the amount of R75,285.78 with interest *a tempora morae* from the date of the sale in execution (i.e. 14 April 2015). For ease of reference, this court will refer to the parties as they are cited in the main application.

[7] The respondent also averred that no valid auction was held on 14 April 2015 due to the first applicant's failure to comply with Regulation 22(5)(d) of the Act. The respondent sought an order that the applicants pay the costs in the counter-application.

[8] The following facts are not in dispute: the sale in execution was advertised lawfully; the conditions of sale were open for inspection at the offices of the first applicant and were read out at the auction prior to the commencement of the bidding on the property; Ms Beatrix Suzette Louw ("Mrs. Louw") represented the respondent at the auction where the sale in execution occurred and was the successful bidder; the respondent inspected the property and conditions of sale; the respondent and his representative did not make enquiries about the VAT status of The Eila Trust (first defendant) prior to the sale or whether the sale would attract VAT; the second applicant's attorneys informed the respondent that an amount of R88 200.00 in VAT was payable on the sale before transfer could occur; and the respondent informed the second applicant's attorneys that he would not pay VAT on the transaction as it was not disclosed to him prior to the sale in execution.

Conditions of Sale

[9] The relevant clauses in the conditions of sale are:

9.1. Clause 4.7 provides:

"The purchaser shall be responsible for the payment of all costs and charges necessary to effect transfer, including but not limited to conveyancing costs, transfer duty or VAT attracted by the sale and any Deeds Registration Office levies."

9.2. Clause 8.1 provides:

"If the purchaser fails to carry out any of his obligations under these Conditions of Sale, the sale may be cancelled by a Judge summarily on the report of the Sheriff after due notice to the purchaser, and the property may again be put up for sale; and the purchaser shall be responsible for any loss sustained by reason of his default,

which loss may, on the application of any aggrieved creditor whose name appears on the Sheriff's distribution account, be recovered from him under judgment of the Judge pronounced summarily on a written report by the Sheriff...".

9.3. Clause 8.2 provides:

"In the event of the sale being cancelled as aforesaid the deposit shall be retained by the Sheriff in trust for such period that is stipulated in the judgment in terms of Rule 46(11) or if no such period is stipulated therein then until such time that the property has been sold to a third party and the plaintiff's damages have been quantified and judgment has been granted in respect thereof."

Issues in Dispute

[10] The salient issues in dispute agreed to by the parties are whether:

10.1 The applicants had a duty to establish the VAT status on the property and disclose this information to the respondent.

10.2 The first applicant failed to comply with the provisions of the Act and regulations.

10.3 There was a valid auction held in respect of the sale in execution of the property on 14 April 2015.

[11] Counsel for the first and second applicants, Ms. M Treurnicht, argued that prior to the sale in execution the conditions of sale were available for inspection at the offices of the first applicant, and that the respondent and his agent, Ms. Louw, had undertaken an inspection thereof. The conditions of sale were also read out in full prior to the commencement of the bidding on the property. The respondent and his agent did not raise any queries on the conditions of sale and proceeded to enter his bid, which was accepted on 14 April 2015. They also did not enquire from the first applicant whether the owner of the property is a VAT vendor and whether the sale will attract VAT.

[12] According to Ms Treurnicht, the respondents refusal to comply with the conditions of sale and to pay the amount of R88 200.00 in VAT on the transaction, effectively held up the transfer of the property, with the result that the second applicant could not benefit from the sale or address the respondent's indebtedness. She argued that the respondent's conduct was severely prejudicial to the second applicant, who also had to incur substantial legal costs in obtaining judgment and in executing on that judgment.

[13] In her submissions, there was no basis upon which the respondent could legitimately claim that he was not liable for VAT because it was disclosed to him

prior to the sale in execution. The duty to ascertain whether VAT was payable lay with the respondent and not the applicants. She argued that the respondent misunderstood the application of VAT to the sale of the property and was mistaken in his averment that the applicants did not act in good faith by “*not inquiring from the South African Revenue Service what the outstanding VAT was*”. Accordingly, since he was not entitled to withhold the payment of the VAT on the transaction, his refusal to pay placed him in breach of the conditions of sale, especially clause 4.7 thereof.

[14] Ms Treurnicht further argued that a Sheriff has the same rights to sell a property at execution and to give transfer of the property as if he is the rightful owner thereof. She argued that Regulation 22(2) to the Act did not apply to a sale in execution pursuant to a court order declaring the property executable. The sale was not voluntary but occurred in the context where judgment was granted in favour of the judgment creditor (second applicant) and the court then issued a writ placing a duty on the Sheriff (first applicant) to execute the order. It was absurd to suggest that in these circumstances a written agreement needed to be concluded between the owner of the property and the first applicant before the sale in execution could take place.

[15] Ms Treurnicht argued that the respondent misunderstood Rule 46 of the Uniform Rules of Court as well as the provisions of the Act and Regulations. This was evidenced from his suggestion that the sale in execution was not valid due to the first applicant’s non-compliance with Regulations 22(2) and 22(5)(d) of the Act. In the first applicant’s view, he performed his duties to the highest of standards and in accordance with the Uniform Rules of Court. There was accordingly no merit in the respondent’s averment that the sale in execution is *null and void* and should be declared as such.

[16] Counsel for the respondent, Mr. J Lourens, argued that the conditions of sale were not binding because, a material condition of the contract of sale, namely the VAT payable on the transaction, was not brought to his attention. The applicants were guilty of misrepresentation by failing to inform the respondent beforehand that VAT had to be paid on the transaction. The second applicant or its attorney ought to have known (or suspected) that the first defendant (The Eila Trust) was a VAT vendor and that VAT was meant to be paid on the transaction. Further, he

argued that the applicants had a legal duty to ascertain whether the owner of the property was a VAT vendor and to disclose the VAT costs to the respondent who was the successful bidder. The applicants therefore failed to adhere to the Act and regulations and did not act in good faith, by declaring that VAT would be payable.

[17] Mr. Lourens argued that clause 4.7 of the conditions of sale was unfair, unreasonable or unjust because it was one-sided and did not favour the respondent. If the auction were to be conducted on a risk basis, and the respondent were held responsible for his own due diligence in relation to the terms and conditions applicable to the sale, then in his submission, the contract of sale was unfair to the respondent.

[18] Mr. Lourens further argued that there was no written agreement between the first applicant and the second applicant (judgment creditor) or the first defendant (owner/judgment debtor) for the property to be sold. In his view, the first applicant was not the rightful owner of the property and acts as an organ of state in whose custody the property was held. Accordingly, due to the first applicant's non-compliance with Regulation 22(2) to the Act, the sale in execution was *null and void* since the first applicant had no authority to transfer ownership of the property to the respondent. In his submission the first applicant, as auctioneer, failed to perform its duties in accordance with the highest standards applicable to auctions and did not comply with Regulation 22(5)(d) to the Act.

Applicable Law and Conventions

[19] The legal principle that a judgment debtor retains ownership until it passes to the successful purchaser upon registration of transfer has been applied in cases involving immovable property². In essence the courts have held that, at common law, a debtor could redeem his attached property '*up to the last moment before the actual sale*'. It was originally stated by Kotze JA in *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co*³, albeit in the context of the attachment of moveable property, as follows:

"But although the effect of a pignus judiciale is that the control of the property

² *Ex parte Vermaak NO: In re Kloppe NO v Lavdas* 1980 (2) SA 696 (T) 698G; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz* [2003] 3 ALL SA 690 (C) 703704 para 45

³ 1922 AD 549 at 558

arrested in execution passes from the judgment debtor, and therefore on his insolvency supervening does not come under the administration of the curator of the insolvent estate, the dominium remains in the debtor, who can, up to the last moment before the actual sale, redeem his attached property: that is to say, the property subject to pignus judiciale, for while the pignus lasts he remains the owner of the pledge (dominus pignoris, Dig. 20.5.12: Cod. 4.24.9)."

[20] Rule 46(11)(a) and (b) of the Uniform Rules of Court corresponds with the relevant clauses in the Conditions of Sale:

"(a) If the purchaser fails to carry out any of his or her obligations under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser, and the property may again be put up for sale.

(b) The purchaser shall be responsible for any loss sustained by reason of his or her default, which loss may, on the application of any aggrieved creditor whose name appears on the sheriff's distribution account, be recovered from him or her under judgment of the judge pronounced summarily on a written report by the said sheriff, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purpose."

[21] Sales in execution at the instance of banks were recently brought into the realm of the Act. Section 45(1) provides:

"(1) In this section, 'auction' includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by auction."

[22] Subsequently, the regulations promulgated in terms of the Act also dealt with auctions. Regulation 22(2) of the Act is particularly relevant to this case and provides:

"(2) Unless the auctioneer is also the owner or the rightful holder (who has the right to sell) of the goods to be auctioned, no auctioneer may sell goods on auction until he or she has first entered into a written agreement with the owner or rightful holder (who has the right to sell) of such goods to be sold, whether for a specific auction or auctions in general, which agreement contains the terms and conditions upon which that auctioneer accepts the goods for sale."

[23] Another regulation that is relevant to this case is Regulation 22(5)(d) of the

Act, which provides:

“In performing the duties of an auctioneer, every auctioneer - (d) must otherwise perform his or her duties in accordance with the highest standards applicable to auctions.”

[24] It is axiomatic that the sale of fixed property cannot attract both VAT and transfer duty. The now commonly-known convention, which operates in accordance with the 2012 amendments to the Value Added Tax Act 89 of 1991 ("the VAT Act"), is that if property is sold by a VAT vendor in terms of the VAT Act then only VAT will be payable by the seller on the sale transaction to the South African Revenue Service ("SARS"). Thus at the point where the sale of the property would be considered a VAT transaction, having regard to two factors namely the status of the seller as a VAT vendor and the type of transaction, the seller would be liable for payment of VAT at the time of registration of transfer of the property. Where the seller is a non-vendor, transfer duty will be payable thereon by the purchaser; and if the seller and the purchaser are non-vendors, the purchaser is liable for the transfer duty that is payable to SARS.

[25] Consistent with this convention, there is the notion that operates in respect of VAT transactions that the purchase price of the property is deemed to be VAT inclusive, except if the conditions of sale provide otherwise. This means that the seller as VAT vendor is liable to SARS for the output tax of 14% of the purchase price of the fixed property at the point of transfer.

Analysis

[26] In *casu*, it emerged that this was a VAT transaction because of the status of the seller (first defendant) as a VAT vendor, and in those circumstances ordinarily the obligation would have laid with the seller to pay VAT to SARS out of the purchase price. However the type of transaction was a sale in execution, which occurred at an auction, totally independent from the second applicant and first defendant's (owner/judgment debtor) input into the purchase price or the transaction.

[27] Since the first defendant, as judgment debtor, was unable to pay the VAT to SARS this obligation fell on the second applicant (judgment creditor), as holder of rights over the property, to raise the money to pay the VAT over to SARS. The second applicant therefore demanded, and correctly so in my view, the VAT amount of R88, 200.00 from the respondent to effect transfer of the property.

- [28] The question arose whether there is a general duty on the applicants to establish the VAT status of the owner of the property and disclose this information to the respondent. While these issues are significant to the respondent, in my view they are self-evidently issues that the respondent ought to have investigated and fully appraised himself of prior to the auction.
- [29] The first applicant was not required in law to extend its enquiries beyond what the real rights attached to the property that was the subject of the sale in execution were. The respondent did not submit any authority or evidence to the contrary. On the facts of the case, there was no evidence that the first applicant was instructed to enquire into the status of the owner (first defendant) i.e. whether the owner was a VAT vendor or not.
- [30] The court is not persuaded by the respondent's argument that the applicants did not act in good faith by declaring that VAT would be payable on the sale transaction, because the conditions of sale clearly stipulated that VAT would be payable by the purchaser.
- [31] Evidently, and the court accepts this to be the case, the respondent and his agent were again made aware of the conditions of sale at the time of the auction, but oddly did not query it or raise any concerns they may have had. In these circumstances, there is no material basis for the respondent to suggest that the conditions of sale were not binding on the parties to the transaction or that he was not liable for the VAT amount. There is accordingly no basis for this court to conclude that the applicants violated any of the consumer protections afforded the respondent by the Act and regulations.
- [32] Moreover, it would be inappropriate for the court to invoke an onerous interpretation of the Act and regulations in order to place additional regulatory burdens on the first applicant, who is already operating with limited capacity and resources within the terrain of increased consumer protections.
- [33] These factors are in any event inconsequential for purposes of considering the merits of the main application, which in my view turns on the issue of pricing in the context of a VAT transaction arising from a sale in execution, and the amount that the respondent was legally obliged to pay in order to effect transfer of the property.
- [34] I am satisfied that in the circumstances of this case all the parties were

properly sensitised to the issue of pricing in regard to the property, and particularly the respondent who carried the liability for the VAT amount. Accordingly, the applicants are entitled to the cancellation of the sale in execution, in view of the respondents failure to comply with his obligations and pay an amount of R88 200.00 for VAT due and owing before transfer can occur.

[35] In *casu*, the auction took place as it were in the context of a sale in execution pursuant to a court order. This meant that Rule 46 of the Uniform Rules of Court regulated the sale in execution in some detail. However, the applicants also needed to apply the Act and regulations, since section 45(1) provides that a sale in execution is an “*auction*” as contemplated in the Act.

[36] Since the Act and its regulations incorporate sales in execution and are binding on the first applicant who was authorised in terms of a warrant issued by the court to give effect to the order, it was therefore required to be fully compliant with the provisions therein, failing which the legitimacy of the sale in execution would be open to question. In assessing the issue of compliance by the first applicant, it is necessary for the court to briefly consider the application of Regulations 22(2) and 22(5)(d) to the Act, to the first applicant in the role of auctioneer *per se*.

[37] Regulation 22(2) of the Act establishes three categories of auctioneers which may legally sell the fixed property to be auctioned. The first category refers to an ‘owner’ auctioneer, in terms of which full *dominium* in the property vests in the person holding title therein; the second refers to a ‘rightful holder’ auctioneer, in terms of which a person who does not hold title is placed in charge of the fixed property for a defined purpose and whose *dominium* therein is limited; and the third is a ‘commercial’ auctioneer, typically an auctioneer from a commercial enterprise who is required to enter into a written contract with the owner or rightful holder of the property to be auctioned.

[38] It is glaringly obvious from the above that a structural *lacuna* exists in that none of these categories explicitly envisages the Sheriff of the High Court in the role of auctioneer appointed in terms of an order of court.

[39] The conclusion drawn from this is that there is a need to harmonise the Rule 46 of the Uniform Rules of Court with the Act and its regulations, essentially for the purpose of catering for the unique role of the Sheriff as auctioneer in regard to

sales in execution.

[40] The *lacuna* has sensitised the court to the fact that Regulation 22(2) to the Act has been targeted primarily at standard commercial auctions with typical 'owner', 'rights holder' or 'commercial' auctioneers appointed to sell fixed property on auction. However, the fact that the regulations to the Act do not specifically cater for the role that the Sheriff of the High Court plays in the context of an auction, does not in my view delegitimise or invalidate the sales in execution that are undertaken pursuant to an order of court.

[41] In considering the merits of the counter-application herein, there are three important factors that weigh heavily with the court:

41.1. Firstly, it must be recognised that the first applicant is now operating in an era of increased consumer protection and that while Rule 46 of the Uniform Rules of Court and the Act and regulations may operate from different premises, the application of these provisions is very wide and caters for both standard commercial auctions and auctions conducted by the Sheriff of the High Court. This means that while the first applicant's interest in and control over the property to be auctioned is considerably limited, it cannot act *ultra vires* the court's mandate and the provisions of Rule 46 read with the Act and regulations.

41.2. Secondly, there is a great need to regulate the property market and to ensure the necessary protections against manipulation, corruption, malfeasance, etc. Rule 46 of the Uniform Rules and the Act and regulations sought amongst other things to ensure that auctioneers regulate and where possible constrain anticompetitive behavior and corruption in the property market, and to intervene in the wanton manipulation and unbridled increases in the commercial values of properties. In my view, these regulatory goals and standards were meant to apply to all types of auctions regardless whether auctioneers are appointed to sell the property on behalf of the seller or in terms of a warrant of execution issued by the court.

41.3. Thirdly, the Sheriff of the High Court's unique role as auctioneer of the property to be sold in execution is no less important to, and is simultaneously distinct from, standard commercial auctioneers in certain key respects. For instance, the Sheriff merely becomes the lawful custodian of the property to be auctioned based on the authority given to it by the court and not the seller. This means that it's *dominium* in the property to be auctioned does not extend to full

ownership, which remains vested in the owner (judgment debtor/first defendant) until the registration of transfer takes place. Also, the Sheriff is merely a messenger of the court and therefore operates unlike an auctioneer from a commercial enterprise conducting an auction, who carries its mandate exclusively from the seller.

[42] In light of the above considerations, this court takes the view that Regulation 22(2) of the Act does indeed apply to a sale in execution pursuant to a court order declaring the property executable. Further, in the circumstances of this case, there are compelling reasons to bring the first applicant within the ambit of Regulation 22(2) of the Act and that, having regard to the nature of its unique role in the context of an auction, the first applicant (Sheriff) can be regarded as “*the rightful holder (who has the right to sell)*”.

[43] This interpretation may address the *lacuna* that exists to some degree, however it remains necessary for the legislature and the Rules Board to harmonise the regulations in regard to sales in execution by: broadening the premise thereof to cater for the role of Sheriff’s as auctioneers *per se* and bringing certainty regarding sales in execution undertaken by the Sheriff of the High Court; and increasing the protections for indebted consumers and judgment creditors in the context of auctions.

[44] Turning to the remaining issues before this court, the respondents submission that the sale in execution must be treated as *null and void*, cannot hold water, especially when having regard to the status of the first applicant as the rightful holder (who has the right to sell) in terms of Regulation 22(2). I find that the first applicant was indeed authorised by the court to transfer ownership of the property to the respondent.

[45] The first applicant was not legally required to additionally enter into a written agreement with either the registered owner of the property (the first defendant) or with the second applicant (judgment creditor), for the property to be sold in execution. Accordingly, the first applicant did not breach Regulation 22(2) of the Act.

[46] Similarly, I find that there is nothing unlawful or inappropriate in the conduct of the first applicant prior to or during the auction, and accordingly here is no breach of Regulation 22(5)(d) of the Act. Consequently, the court finds that there was

indeed a valid auction of the property on 14 April 2015.

Order

[47] In the result, the following order is made:

- 1. The application succeeds and the sale in execution of Erf 3 L, situated at 1 C C, P O, in the Berg River Municipality, Piketberg, Western Province (“the property”), that was held on 14 April 2015, is set aside. The property may be put up for sale again.**
- 2. The deposit paid by the respondent in the amount of R75,285.78 shall be retained by the first applicant in trust for a period of ninety (90) days from the date of this order or the sale of the property, whichever occurs first.**
- 3. The Respondent is ordered to pay the costs of the application.**
- 4. The counter-application is dismissed with costs.**

MAHOMED AJ