

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 56834/15

In the matter between:

15/3/2017

MATIKI SAMUEL CHIKALA

First Applicant

MATIKI SAMUEL CHIKALA NO

Second Applicant

MALEBO DESIREE MAPONYANE-CHIKALA NO

Third Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	13/03/17 DATE	 SIGNATURE

TOVANI TRADING 269 CC

First Respondent

OSCAR JABU MTHIMUNYE NO

Second Respondent

THOMAS ABRAM MHLANGA NO

Third Respondent

MABUTI SOLOMON MTHIMUNYE NO

Fourth Respondent

THE SHERIFF: PRETORIA SOUTH WEST

Fifth Respondent

REGISTRAR OF DEEDS

Sixth Respondent

JUDGMENT

Tuchten J:

- 1 In the application presently before me, the applicants seek a number of orders pursuant to a notice of motion dated 21 July 2015. Firstly, they seek an order declaring invalid and setting aside a writ of execution (the writ) taken out by the first respondent (the execution creditor) against a property owned by the KK Trust (the execution debtor). The second and third applicants are the trustees of the execution debtor. The first applicant has joined in the application in his personal capacity.
- 2 Secondly, the applicants seek an orders setting aside the transfer of the property, pursuant to what purported to be a sale under the writ, to the Mthimunye Trust (the execution purchaser) and directing the re-transfer of the property to the execution debtor. The second, third and fourth respondents are the trustees of the execution purchaser.
- 3 Thirdly, the applicants ask that the execution creditor be directed to repay the moneys paid to it pursuant to the sale in execution to the fifth respondent (the sheriff).¹

¹ In the alternative, this prayer seeks that the execution creditor repay these moneys to "the first respondent", ie itself. This alternative prayer makes no sense.

- 4 Fourthly, the applicants ask for an order directing themselves² to settle a judgment debt owed by the execution debtor to the execution creditor at a time after the grant of the order sought.³
- 5 In addition to its opposition to the application on its merits, the execution purchaser brought a conditional counter-application, which I shall discuss below.
- 6 To place the present application in context, considerable background will have to be given. Under an oral agreement the execution debtor, as owner of the property, engaged the execution creditor to build a house on the property. The execution creditor says the agreement was concluded on 15 August 2007. The execution debtor says that the contract was concluded during the period August 2007 to March 2008. Nothing turns on this.
- 7 The parties fell into dispute. The execution creditor issued summons in this court under case no. 62171/11 against the execution debtor on 31 October 2010, claiming payment of R1 407 540,61, interest and costs. The execution debtor defended the action. It was set down for trial on 13 March 2013. On the day of the trial, the execution debtor

² More accurately, the first and second respondents.

³ The prayer is internally contradictory. The prayer refers to "thirty (90) days".

applied for a postponement, which was granted. The execution debtor was ordered to file expert notices within a stated time and to pay the wasted costs on the attorney and client scale.

- 8 The expert notices were not filed by the execution debtor as directed and on 30 April 2013 the execution creditor gave notice of an application for the execution debtor's defence to be struck out. However, on 15 July 2013, Matojane J gave the execution debtor a further 60 days within which to file its expert notices.
- 9 In the mean time, the execution creditor sought to execute on its costs order. But on 3 July 2013, the sheriff's return reported that the writ against movables could not be executed because the premises were constantly locked and the second applicant did not react to written messages. On 30 August 2013, the execution creditor applied for an order that the property be declared specially executable. The execution debtor opposed the special execution application.
- 10 On 12 November 2013, Vorster AJ ordered that the execution debtor's defence against the execution creditor's claim for payment be struck out and granted default judgment against the execution debtor for R1 244 028,54, interest and costs. On 12 February 2014, the execution debtor applied for rescission of the default judgment.

- 11 On 10 March 2014, under case no. 62171/11, Hassim AJ declared the property specially executable at the instance of the execution creditor and authorised the issue of a warrant of execution for the purpose of obtaining an attachment over and ultimately the sale in execution of the property.
- 12 On 18 August 2014, the execution debtor's application for rescission of the judgment in favour of the execution creditor was dismissed by Strauss AJ with costs as between attorney and client. The execution creditor then proceeded to execution.
- 13 I need not detail the several steps which the execution creditor and the sheriff took towards effecting the attachment of the property, except to say that on 8 October 2014 the sheriff purported to serve the notice of attachment contemplated in rule 46(3)(a) on the execution debtor by affixing a copy to the principal door of the premises. It was common cause at the hearing before me that this mode of service was not permissible in terms of the Rules.⁴

4

Rule 46(3)(a) provides in relevant part: "The mode of attachment of immovable property shall be by notice in writing by the sheriff served upon the owner thereof ..."
Rule 46(3)(b) requires that such a notice be served on the owner in accordance with rule 4.

- 14 The sale in execution itself was fixed to take place by public auction on 16 October 2014. On 15 October 2014, the first applicant decided to take steps to stop the sale of the property. He provided the execution debtor's then attorney with cheques to the amount of R1 250 000. The attorney was instructed to pay the cheques into the attorney's own trust account and pay the money over to the attorneys for the execution creditor once the cheques had been cleared. The execution debtor's then attorney asked the execution creditor to postpone the sale. The execution creditor refused to postpone the sale and it went ahead.
- 15 The property was sold on that day to the execution purchaser for R1,8 million. Under the conditions of sale (the Conditions), with which I shall deal below, the execution purchaser had to pay a deposit of R180 000 to the sheriff. Condition 4.3 made it a condition of the sale (in the technical sense of the term *condition*) that if the execution purchaser should fail to pay the deposit *on completion of the sale*, the sale would be null and void and the sheriff must immediately put the property up for auction again.⁵

⁵ Clause 4.3 reads: "Should the Purchaser fail to pay the deposit on completion of the sale, then the sale shall be null and void and the Sheriff shall immediately put up the property for auction again."

- 16 The next relevant event is unique in my experience: the *execution debtor* then paid the precise amount of the deposit, R180 000, to the execution purchaser. It did so with the very purpose that the money so paid by the execution debtor would be used by the execution purchaser to pay the deposit required under the Conditions. And that is what happened. On 16 January 2015, the execution purchaser's attorney paid over the sum of R180 000 to the sheriff.
- 17 The cheques provided by the first applicant to the execution debtor's then attorney were cleared. But on 23 January 2015, the execution creditor attached the sum represented by the cleared cheques, R1 250 000, in the trust account of the execution debtor's then attorney.
- 18 If there were any residual doubt about the intention of the execution debtor actually to facilitate the sale in execution of its own property, that will be dispelled by the following fact which I shall recount: on 3 March 2015 the execution debtor's then attorney, on the instructions of the execution debtor, paid to the attorneys for the execution creditor the sum of R90 000 in respect of the costs of transfer of the property into the name of the execution purchaser.

- 19 On 22 June 2015 the property was transferred by the sheriff to the execution purchaser against payment of the balance of the execution purchase price with interest. The balance of the execution purchase price was provided by the execution purchaser from its own means. The sheriff then framed a distribution account dated 24 June 2015. According to the distribution account, there was an amount, after payment to the execution creditor of what the sheriff had on hand, still due to the execution creditor on its writ or writs. According to the sheriff's distribution account, only R1 915 694,25 was paid to the execution creditor, leaving a balance still owing to the execution creditor on the judgment debt.
- 20 The present application was instituted on 21 July 2015, less than a month after the transfer of the property. The reason the applicants brought the application is that the execution debtor and the execution purchaser had fallen out. They had apparently made an arrangement in regard to the property but had not reduced the arrangement to writing. Now they were in dispute as to the terms of their oral arrangement.
- 21 The execution debtor relied upon a number of grounds for the relief sought. One of those grounds was that the notice of attachment was not served on the execution debtor at least one month before the date

of the sale. This prompted a formal counter-application by notice of motion dated 22 September 2015 by the execution purchaser, conditional upon the success of the main application. The counter-application seeks the repayment, by one or both the execution creditor and the execution debtor, of the amounts paid by the execution purchaser in order to secure transfer of the property into its name. The ground for the claim for repayment was said to be enrichment.

22 During the hearing before me, the attorney representing the execution purchaser formally abandoned any relief against the execution creditor. So relief on this score is now sought only against the execution debtor. He also undertook to provide, and shortly after the conclusion of the hearing before me did provide, a formal consent to the cancellation of the bond which the execution purchaser caused to be registered against the property.

23 The adjudication of this case was considerably hampered by the way the that the applicants conducted themselves during the litigation. The driving force behind the applicants was the first applicant. This case came before this court on 17 November 2016. On that day, Strijdom AJ acceded to an application by the applicants for the postponement of the case on the ground that the ground that the

applicants had fallen out with their then attorney. On that occasion, the court made a punitive costs order against the applicants.

24 When this case was called before me, there was no appearance on behalf of the applicants. The first applicant however appeared in person. The execution creditor had, as was its right, succeeded in having the case placed on the roll for hearing on 27 February 2017 and, as is the practice in this Division, the rest of the week.

25 When the case began, the first applicant submitted a notice asking for the hearing of the case to be delayed until after 24 April 2017. I heard submissions on the request for postponement and refused it in an *ex tempore* judgment. The case then proceeded. Although heads of argument had been filed on behalf of the applicants, the first applicant was not able to contribute meaningfully to the adjudication of the issues which arose for decision. I shall therefore respond to the arguments raised in the heads of argument which were submitted on behalf of the applicants.

26 It was argued that the execution debtor had sufficient movable assets to meet the judgment debt and that no effort had been made to execute against the execution debtor's movables. The answer to this contention is that the property had been declared specially executable

at the instance of the execution creditor. Execution against movables was therefore not an essential prerequisite to execution against the property.

27 It was submitted that the property constituted the primary residence of the first and third applicants and that therefore the execution creditor was precluded by the proviso to rule 46(1)(a)(ii) which precludes such execution unless the court in the exercise of its constitutionally mandated oversight function, directs that such execution proceed.⁶ No such direction was obtained in this case. The short answer to this contention is that the protection of the proviso extends only to a property which is the primary residence of the judgment debtor and not to a property which is made available to a person as his or her primary residence by the judgment debtor. See *Firststrand Bank v Folscher and Another, and Similar Matters*.⁷

28 An argument of substance advanced on behalf of the execution debtor is that the sale in execution is rendered invalid by the failure to serve the notice of attachment on the execution debtor at least one month before the sale. It will be recalled that the notice was indeed

⁶ The proviso to rule 46(1)(a)(ii) reads: "Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."

⁷ 2011 4 SA 314 GNP para 32

served on the execution debtor on the day of the sale. This is therefore not a case in which no such notice was served on the debtor at all. In such a case it seems settled that a sale in execution is null and void. See *Campbell v Botha and Others*.⁸

- 29 The question in the present case, it seems to me, is whether the sheriff substantially fulfilled the requirements required for a sale on the date in question. In *Todd v First Rand Bank Ltd and others*,⁹ the rule of the common law was affirmed that non-fulfilment of a requirement will not vitiate a sale in execution if it does not go to the root of the matter. The question is whether the non-compliance defeated the object or purpose of the measure or whether prejudice was caused.
- 30 The purpose of the measure in the present context is to ensure that the execution debtor gets a specified time period in which to regulate its affairs, whether by making arrangements to pay the judgment debt or to attack the legal foundation of the attachment. Against that background, the late service of the notice of attachment caused the execution debtor no prejudice at all. The execution debtor *wanted* the sale in execution to go ahead. Its attempts to set aside the judgment on which execution had issued failed when the application for

⁸ 2009 1 SA 238 SCA paras 19-20

⁹ [2013] 3 All SA 500 SCA paras 11-12

rescission was dismissed. The execution debtor had, after its offer of cheques which required clearance had been declined, abandoned any attempt to make payment of the judgment debt in the conventional sense. It had no intention of trying to stop the sale.

31 So in the present context, the late service of the notice of attachment did not cause the judgment debtor prejudice. The papers demonstrate that even after the sale was concluded the execution debtor paid substantial sums of money in respect of transfer costs to ensure that transfer took place pursuant to the sale.

32 I therefore conclude that the late service of the notice of attachment in the circumstances described did not go to the root of the matter as contemplated in *Todd* and that it does not constitute a ground for setting the sale aside.

33 The final question to be decided in this part of the case arises from clause 4.3 of the Conditions. Condition 4, under the heading CONDITIONS OF PAYMENT, reads as follows:

- 4.2¹⁰ Payment shall be made in cash, by bank guaranteed cheque or by way of an electronic transfer, provided that satisfactory proof of payment be furnished immediately on demand to the Sheriff.
- 4.3 Should the Purchaser fail to pay the deposit on completion of the sale, then the sale shall be null and void and the Sheriff shall immediately put the property up for auction again.
- 4.4 The balance of the purchase price shall be paid to the Sheriff against transfer and shall be secured by a bank guarantee, to be approved by the Plaintiff's Attorney, which shall be furnished to the Sheriff within 21 days after the date of sale.
- 4.5 The deposit will be deposited immediately by the Sheriff into a trust account held in terms of Section 22 of the Sheriff's Act 90 of 1986.
- 4.6 The purchaser shall be liable for payment of interest at the rate of 15.5% nominal annual compounded daily to the Plaintiff and to any other bondholder at the rate due to them on the respective amounts of the award in the plan of distribution, as from the expiration of 1 month after the date of payment.
- 4.7 The Purchaser shall be responsible for 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. The Purchaser shall further be responsible for payment of all outstanding rates, taxes and other amounts due to the Municipality in respect of the property or levies due to a Body Corporate in terms of the Sectional Titles Act No 95 of 1986 or Home Owners Association, within 7

days after being requested to do so by the Plaintiff's attorney.

4.8 The Purchaser shall, immediately on demand by the Sheriff, pay the Sheriff's commission as follows:

4.8.1 6% on the first R30 000,00 of the proceeds of the sale; and

4.8.2 3.5% on the balance thereof.

Subject to a maximum commission of R9 655,00 plus VAT and a minimum of R485,00 plus VAT.

4.9 The Purchaser may obtain transfer forthwith if the Purchaser pays the whole purchase price and complies with conditions 4.7 and 4.8 within one month from the date of sale in which case any claim for interest shall lapse, otherwise transfer shall be passed only after the Purchaser has complied with the provisions of conditions 4.1, 4.7 and 4.8 thereof.

4.10 The Purchaser must furnish the transferring attorneys with all documents and information required by them to effect transfer into the name of the Purchaser, within 7 (SEVEN) days after having been requested to do so by the transferring attorneys.

34 The interpretation of condition 4.3 was the subject of considerable debate during argument and counsel for the execution creditor and the execution purchaser submitted additional written argument on the point.

35 I must first determine at the level of language, properly interpreted, what condition 4.3 means. Counsel submitted that condition 4.3 should be read together with condition 2.5, which provides:

If the Sheriff suspects that a bidder is unable to pay either the deposit or the balance of the purchase price, he may refuse to accept the bid of such bidder, or accept it provisionally until the bidder satisfies him that he is in a position to pay both such amounts. On the refusal of a bid under such circumstances, the property may immediately again be put up for auction.

- 36 To my mind, however, conditions 4.3 and 2.5 deal with somewhat different situations. Condition 2.5 deals with a situation which may arise during the process of bidding and therefore before the "completion of the sale". In the condition 2.5 situation, the sheriff may halt the bidding process or accept a bid provisionally until the bidder satisfies the sheriff that the bidder is able to pay both the deposit and the balance of the purchase price. If the sheriff refuses the bid under these circumstances, the bidding process may be started again ("... may immediately again be put up for auction.") If the sheriff accepts the bid provisionally, then the sale remains uncompleted until the bidder satisfies the sheriff that the bidder can pay the execution purchase price.

- 37 There is however no suggestion in the present case that the sheriff acted under condition 2.5. On the contrary, the sheriff has set out facts which demonstrate his state of mind at the relevant time. I quote from his affidavit:¹¹

... [I]n terms of rule 46, read with Form 21, I have discretion to accept or reject a bid or accept it provisionally until the bidder has satisfied me that he is in a position to pay the amounts due in terms of the sale.

... I accepted the 2nd respondent's bid of R1,800,000.00 on behalf of the [execution purchaser] and ... the sale was completed on the fall of the hammer.

[T]he 2nd respondent, on behalf of the [execution purchaser] and I are well acquainted with one another as he purchases properties at auctions conducted by me, on a regular basis.

- 38 The discretions conferred by condition 2.5 arise for exercise *if the Sheriff suspects that a bidder is unable to pay*. Manifestly, the sheriff had no such suspicion. He did not suspect that the second respondent or the execution purchaser might be unable to pay the purchase price; on the contrary, the sheriff's evidence shows that he had confidence in its creditworthiness. The sheriff did not purport to act under condition 2.5.

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Record pp275-6; paragraph numbers omitted.

- 39 Counsel correctly submit that the interpretation of a contract, indeed any document having legal effect, is a unitary process involving a consideration of the text, its context and its purpose. In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,¹² the court held in relation to the interpretation of a provision in a contract:

Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

- 40 The context of condition 4.3 is that it is a provision in a scheme where judicial power is employed to redress an imbalance which arose because the execution debtor had been ordered by a court to pay a sum of money to the execution creditor but had failed to do so. In such a situation and at the instance of the creditor, the court, through its officer the sheriff, lays its hand on the property of the execution

¹²

2014 2 SA 494 SCA para 12

debtor and, against the will of the debtor but in accordance with a process prescribed by law, realises such property by public auction. The proceeds of the property when realised are then applied to meet the duly proven claims not only of the execution creditor but also of other persons with interests in the property.¹³ These include persons who hold securities over the property in the broad sense of an entitlement to preferent payment from the proceeds of its sale such as bondholders, the municipal authority into whose area of jurisdiction the property falls and even bodies corporate and home owners' associations, as well as other creditors of the execution debtor who have lodged writs of execution with the sheriff in due time.

- 41 For sound reasons of public policy, such sales have always been attended by a considerable degree of public notice. This transparency is consistent with the values of openness and good administration which lie at the core of the Constitution. Not only must the process be open for the good of the public; it must also have regard to the interests of the execution debtor which is to be deprived of its property against its will and must thus be attended by a measure of deliberateness. Time periods are prescribed for each step in the process to enable members of the public and the debtor to consider their positions and raise finance. This is because the public interest

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Stakeholders, in the modern idiom.

recognises as the best outcome of the execution process that the process should not reach completion; that the debtor should discharge his obligation to or reach an accommodation with the creditor so that the debtor be not deprived of his property. But where the process does reach completion, the policy of the law is that the best price the process can achieve should be realised.

42 Where the debtor's immovable property is identified for execution, rule 46 prescribes an elaborate process. Notices must be served on or sent to identified stakeholders and the fact of the process must be made known to the general public. The identities of those with preferent rights over the property must be identified.

43 While the policy of the law does not require that conclusion of the contract arising from the public auction process be dependent upon the execution of a written contract, the law nevertheless requires that the bidding for the immovable property which is up for auction be conducted subject to a set of written conditions. This is set out in rule 46(8):

(a)(i) The conditions of sale shall, not less than 20 days prior to the date of the sale, be prepared by the execution creditor corresponding substantially with Form 21 of the First Schedule, and the said

conditions of sale shall be submitted to the sheriff conducting the sale to settle them.

- (ii) The execution creditor shall thereafter supply the said sheriff with two copies of the conditions of sale, one of which shall lie for inspection by interested parties at his or her office and the sheriff conducting the sale shall forthwith furnish a copy of the conditions of sale to all other sheriffs appointed in that district.
- (b) Any interested party may, not less than 10 days prior to the date of the sale, upon twenty-four hours' notice to the execution creditor and the bondholders apply to the magistrate of the district in which the property is to be sold for any modification of the conditions of sale and the magistrate may make such order thereon, including an order as to costs, as to him may seem meet.

44 The body of form 21 reads as follows:

- 1 The property shall be sold by the sheriff of at to the highest bidder without reserve/with a reserve price of
- 2 The sale shall be for rands, and no bid for less than one rand shall be accepted.
- 3 If any dispute arises about any bid the property may be again put up to auction.
- 4 If the auctioneer makes any mistake in selling, such mistake shall not be binding on any of the parties, but may be rectified. If the auctioneer suspects that a bidder is unable to pay either the deposit referred to in condition 6 or the balance of the purchase price he may refuse to accept the bid of such bidder, or

accept it provisionally until the bidder shall have satisfied him that he is in a position to pay both such amounts. On the refusal of a bid under such circumstances, the property may immediately be again put up to auction.

- 5 The purchaser shall, as soon as possible after the sale, and immediately on being requested by the , sign these conditions, and if he has bought *qua qualitate*, state the name of his principal.
- 6(a) The purchaser shall pay a deposit of ten per cent of the purchase price in cash on the day of sale, the balance against transfer to be secured by a bank or building society guarantee, to be approved by plaintiff's attorney, to be furnished to the sheriff within days after the date of sale.
- (b) If transfer of the property is not registered within one month after the sale, the purchaser shall be liable for payment of interest to the plaintiff at the rate of per cent p.a. and to the bondholder at the rate of per cent p.a. on the respective amounts of the award to the plaintiff and the bondholder in the plan of distribution as from the expiration of one month after the sale to date of transfer.
- 7 Inasmuch as the defendant is a member of the Group, no bids will be accepted by or on behalf of a person who is not a member of such Group, unless such person exhibits to the auctioneer at the sale a permit from the Minister of the Interior authorizing him to acquire such property.
- 8 If the purchaser fails to carry out any of his obligations under the 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, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purpose; and if he is already in possession of the property, the sheriff may, on seven days' notice, apply to a judge for an order ejecting him or any person claiming to hold under him therefrom.

- 9 The purchaser shall pay auctioneer's charges on the day of sale and in addition, transfer dues, costs of transfer, and arrear rates, taxes and other charges necessary to effect transfer, upon request by the attorney for the execution creditor.
- 10 The property may be taken possession of immediately after payment of the initial deposit, and shall after such deposit be at the risk and profit of the purchaser.
- 11 The purchaser may obtain transfer forthwith if he pays the whole price and complies with condition 9, in which case any claim for interest shall lapse, otherwise transfer shall be passed only after the purchaser has complied with the provisions of conditions 6 and 9 hereof.
- 12 The sheriff may demand that any buildings standing on the property sold shall be immediately insured by the purchaser for the full value of the same, and the insurance policy handed to him and kept in force as long as the whole price has not been paid: and if he

does not do so, the sheriff may effect the insurance at the purchaser's expense.

13 The property is sold as represented by the title deeds and diagram, the sheriff not holding himself liable for any deficiency that may be found to exist and renouncing all excess. The property is also sold, subject to all servitudes and conditions specified in the deed of transfer.

14 The execution creditor shall be entitled to appoint an attorney to attend to transfer.

45 I turn to consider the meaning of the phrase "on completion of the sale" in condition 4.3. In my view the phrase means on the fall of the hammer. It is at that moment that a sale by auction is concluded. Counsel submitted that the effect of the condition was to make the sale subject to a resolutive condition. I agree.

46 A condition is an uncertain future event. A resolutive condition does not suspend the coming into effect of the contract in which it is embodied; but on fulfilment of a resolutive condition, the contract will be terminated. In the realm of contract a suspensive condition suspends the full operation of the obligation and renders it dependent on the occurrence of an uncertain future event; whereas in the case of a resolutive condition the normal consequences flow from the

contract, but on the happening of an uncertain future event these consequences are annulled.¹⁴

- 47 I see no absurdity if the phrase is given its literal meaning. A public auction makes it possible for commercial chancers, speculators who lack the financial means to make good on their bids, to bid for a property in the hope that after a successful bid they can raise finance which they do not have at the fall of the hammer. Both Form 21 and the Conditions include provisions which are meant to reduce or eliminate the risks to the sheriff, and therefore those who are financially interested in the outcome of the sale, that a bidder might not be good for the purchase price at the fall of the hammer. There would be no commercial absurdity at the level of interpretation if the phrase were to require the purchaser immediately on the fall of the hammer to make payment of the deposit to the sheriff. Under condition 4.2, payment might be made by means which include cash and electronic transfer; so the provision does not give rise to a commercial absurdity. But even if that interpretation is wrong, I do not think that the condition can contemplate a delay in paying the deposit any longer than the actual business day of the sale.

48 From that it follows, as I see it, that if the execution purchaser fails to pay the deposit as required by condition 4.3, the condition visits the failure so to pay with the nullity of the sale itself. In such a case, the condition contemplates that the sheriff must immediately put the property up for auction again. As the sale then fails by operation of law, the sheriff is not required to approach a court under rule 46(11)(a) for cancellation of the sale. Form 21 recognises other situations in which the property may again be put up for auction without the intervention of the court.

49 Can the sale and subsequent transfer survive the fulfilment of the suspensive condition in condition 4.3? Counsel addressed this issue in their supplementary argument. It was submitted that the Conditions did not correspond substantially with Form 21. In this regard counsel referred to rule 46(12)¹⁵ and rule 46(8)(a)(i).¹⁶ In support of the argument, counsel referred to *Shoprite Checkers Ltd t/a Megasave v Khan and Another*.¹⁷ In that case a sale in execution was subject to

¹⁵ "Subject to the provisions of subrule (5), the sale shall be without reserve and upon the conditions stipulated under subrule (8), and the property shall be sold to the highest bidder."

¹⁶ "The conditions of sale shall, not less than 20 days prior to the date of the sale, be prepared by the execution creditor corresponding substantially with Form 21 of the First Schedule, and the said conditions of sale shall be submitted to the sheriff conducting the sale to settle them."

¹⁷ Unreported; a judgment of a full bench of the Eastern Cape Division, delivered on 8 July 2004 under case no. CA520/2003.

the consent of the judgment creditor which refused consent. The majority held that the condition providing for the consent of the judgment creditor was invalid and thus could not validly have been relied upon by the judgment creditor to avoid the sale which had been concluded. The minority held that the condition was valid but that if the clause were invalid, it could not be severed from the remainder of the contract which arose from the fact that the bid of the execution purchaser was successful.

- 50 Both the majority and the minority dealt with the first question, ie whether the condition offended against the scheme contemplated by rule 46. The majority did not deal with the second question, that of severability. The minority judgment dealt with severability at length. On the first question, the majority held that the test for compliance with the requirement in rule 46(8)(1)(a)(i) that the conditions as framed correspond substantially with Form 21 was whether the conditions as so framed included "inappropriate, unfair or invalid conditions" or "were in conflict with the rules or another law".¹⁸ The minority held that the test was whether any of the conditions imposed were contrary to the *boni mores* or public policy.¹⁹ Assuming, without deciding, that the

¹⁸ Para 24

¹⁹ Para 14

more stringent test of the majority is applicable, I consider that the resolute condition in Condition 4.3 does not offend against that test.

51 Form 21 caters for the problem inherent in sales in execution that the purchaser may not have the means to pay the purchase price by providing for the situation where the sheriff suspects during the bidding that the purchaser may not be able to pay. Condition 4.3 as framed caters for the situation which arises at the conclusion of the bidding process (on completion of the sale or at the fall of the hammer) when it appears that the purchaser is not immediately able to pay the deposit. There is to my mind nothing about condition 4,3 that is inappropriate, unfair, in conflict with the rules or another law or otherwise invalid.

52 In the present case, I similarly consider that the resolute condition in clause 4.3 of the Conditions is not severable. To excise it would be to create a new contract for the parties. In the language of *Sasfin v Beukes*,²⁰ the resolute condition goes to the principal purpose of the contract and is not merely subsidiary or collateral to that purpose. The purpose is to achieve a sale of the property to a purchaser who if financially in a position to comply with its obligations.

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1989 1 SA 1 A para 11

53 If this is correct, then it follows that either the sale in execution failed because the resolutive condition in condition 4.3 was fulfilled or because the agreement of sale contained an illegal term which was not severable from the remainder of the agreement. On either basis, the sale in execution could form no valid basis for the subsequent juristic act of the sheriff in transferring the property to the execution purchaser.

54 Counsel nevertheless submit that the invalidity of the sale in execution cannot effect the validity of the real agreement (saaklike ooreenkoms) of transfer of the property to the execution purchaser. The argument is based on the principle expressed in *Legator Mckenna Inc v Shea*.²¹

Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement ...

55 In *Legator*, the SCA found that the agreement of sale was invalid but that, nevertheless, the ensuing real agreement of transfer was valid. In that case, while the person who sold the property (a curator appointed by the court) lacked authority to conclude the sale, by the time the curator came to transfer the property, that defect in authority

²¹

2010 1 SA 35 SCA para 22

had been cured. The curator thus had the necessary authority to transfer. The fact that the curator lacked authority to sell had, in accordance with the abstract theory of acquisition of ownership, no impact on the capacity of the curator to transfer and therefore no impact on the validity of the real agreement.

- 56 But the present case is different. The capacity of a sheriff to transfer a property in execution away from its owner, the execution debtor, arises only if a valid sale in execution has taken place. Absent such a valid sale, the sheriff has no greater power to transfer the property than any other person. As I have found that the sale failed because the resolutive condition was fulfilled, the sheriff had no power to transfer. The Conditions provided for what the sheriff had to do when the resolutive condition was fulfilled: he had immediately to put the property up for auction again.
- 57 I therefore conclude that the transfer of the property by the sheriff to the execution purchaser was invalid and must be cancelled.
- 58 Counsel for the execution purchaser submitted that the execution debtor was estopped from asserting his right of ownership to the property or that it had waived its right to vindicate it. These submissions were based only on the facts that the execution

purchaser took active steps to facilitate the sale in execution and did not take steps to vindicate before transfer was passed even though the execution purchaser called upon it to do so. In my view, this delay cannot constitute either an estoppel or a waiver of a right to rely on the invalidity of the transfer.

59 Finally, the execution purchaser argued that the execution debtor lacked standing to pursue the relief sought in the application. When one appreciates, as I think one must, that the relief sought is in essence vindicatory, it must follow that this contention is without merit. The owner of a thing is preeminently the party vested by law with standing to vindicate.

60 It follows that some of the relief sought in the main application must issue. I turn to the counter-application brought by the execution purchaser.

61 The ground on which the counter-application is brought is unjust enrichment. The execution purchaser submits that if the sale and transfer of the property are set aside, it will be impoverished. It correctly abandoned its prayer for relief in this regard against the execution creditor. This is because the execution creditor was not enriched at the expense of the execution purchaser. Before the

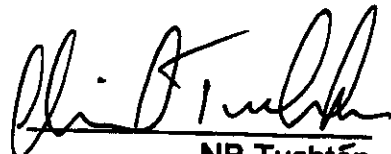
distribution by the sheriff of the proceeds of the sale, the execution creditor had a claim against the execution debtor. Commercially, this claim was equivalent to its nominal face value because the execution debtor had assets sufficient satisfy the claim. The effect of the distribution to the execution creditor was to discharge the execution creditor's claim, *pro tanto*, against the execution debtor. The execution creditor was therefore not enriched by the distribution. Its asset position before and after the distribution was the same.²²

- 62 The position in this regard as between the execution purchaser and the execution debtor is different. Effectively, and through the intermediation of the sheriff, the execution purchaser discharged debts owed by the execution debtor *sine causa*. These debts included the amounts paid to the execution creditor (R1 915 694,65 less R180 000 provided by the execution debtor) and the rates due to the local authority (R79 060,20). But I do not think that the execution debtor was enriched by the payments by the execution purchaser of the sheriff's fees in relation to sale and transfer which I have held to be abortive. The award to the execution purchaser must carry interest from date of registration of transfer into the name of the execution purchaser, ie 22 June 2015.

- 63 I heard no argument as to costs but it seems to me that all parties who contested the matter have enjoyed a measure of success. I consider that the fairest would be to make no order as to costs.
- 64 The execution creditor asked that I give directions regarding the attachment of the money held in the trust account of the execution debtor's former attorney. But there is no relief sought in that regard. In the absence of any agreement between the parties, the law must simply take its course. The effect of my judgment is that the attachment of the property was valid. I am not called upon to pronounce on the validity of the attachment of the money in the trust account. I think the parties would be wise to agree how that matter should be finally resolved. But it is a matter for them, not the court.
- 65 I make the following order:
- 1 The prayer for a declaration of invalidity in relation to the writ of execution against the immovable property of the KK Trust (the execution debtor), being Holding 89 Laezonia Agricultural Holdings (the property), is dismissed.
 - 2 The sale in execution of the property is declared to have become null and void by reason of the fulfilment of the

resolutive condition in condition 4.3 of the Conditions of Sale (pp35-44 of the papers).

- 3 The transfer of the property into the name of the Mthimunye Trust (the execution purchaser) is hereby set aside.
- 4 The six respondent is hereby authorised and directed to
 - 4.1 cancel the registration of the property in the name of the execution purchaser;
 - 4.2 cancel all bonds registered over the property by the execution purchaser; and
 - 4.3 re-register the property in the name of the execution debtor.
- 5 The execution debtor is ordered to pay the execution purchaser the sum of R1 814 754,85, together with interest on that sum at 9% per annum from 22 June 2015 to date of payment.
- 6 There will be no order as to costs.


NB Tuchten
Judge of the High Court
13 March 2017

For the first applicant:
In person

For the first respondent:
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For the second to fourth respondents:
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