THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 22740/2013

DATE OF HEARING: 11 MAY 2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

……………………… DATE ………………………… SIGNATURE

In the matter between:

THE SHERIFF OF THE HIGH COURT

JOHANNESBURG SOUTH Applicant

and

MOTSOANA YVONNE KALALA Respondent

Passport Number [……..]

In Re:

THE STANDARD BANK OF SOUTH AFRICA LTD Plaintiff

CELOKUHLE PHUNELELE FORTUNATE NSELE First Defendant

Identity Number [……..]

XOLILE PORTIA NSELE Second Defendant

Identity Number [……..]

JOYCE THANDI MHONI

Identity Number [……..] Third Defendant

JOYCE THANDI MHONI

Identity Number [……..] Fourth Defendant

In her capacity as Executrix

in the estate late **JAMES CHIKOSA MHONI**

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION AND SUMMARY OF FACTS

1. The plaintiff obtained judgment against the defendants pursuant to non-payment of the monthly payments in respect of a mortgage bond resulting in the sale in execution of the property in issue, namely

Portion 1 of Erf […..] Township, Registration Division I. R., Province of Gauteng, also known as [……].

2. The sale in execution took place on 18 February 2014 and was sold by the applicant to the respondent. In terms of the conditions of sale the property would be sold to the highest bidder and the purchaser would pay a 10% deposit upon signature of the conditions of sale.

3. The respondent duly paid the 10% deposit but failed to furnish guarantees for the balance of the purchase price within 21 days of the date of sale. The conditions of sale do not contain a notice period within which the applicant would call upon the respondent to remedy a breach. The applicant however, upon the respondent's breach, despatched a letter of demand to the respondent, calling upon the respondent to provide the guarantees within 7 days. This letter of demand was not reacted to and the applicant despatched a further letter in which the respondent was advised that the sale would be terminated. Both letters were sent by registered post. The applicant was thus obliged to proceed in terms of the provisions of rule 46 (11).

4. The practice directive of this division provides that if an application in terms of rule 46 (11) is unopposed it will serve before a judge in chambers. If the application is opposed it is heard in open court. The applicant brought the application on affidavit, as required and the respondent opposed the application alleging therein, in limine, that the application was initiated by the plaintiff and not by the applicant

(whatever that may mean). Furthermore the respondent stated that she denies being in breach of the conditions of sale but did not expand hereon at all. There is no indication is the answering affidavit that guarantees were delivered and the affidavit does not set out anything whatsoever to indicate that the relief sought ought not to be granted.

5. Moreover the answering affidavit was signed by the respondent but not commissioned at all. The answering affidavit must therefore be disregarded for this reason alone. However, because of the apparent importance of the matter to the respondent and because the application involves immovable residential property I have deemed it fit to ensure that the applicant is well within its rights to be granted the relief sought, despite the absence of the answering affidavit and the non-appearance for the respondent.

6. Before the hearing I requested my registrar to telephone the respondent’s attorneys, as appears on the papers filed, to remind them of the date and time of the application. The telephone number listed on the papers filed is not that of the respondent’s attorneys. The application proceeded thus in open court.

7. Counsel for the applicant could not point out a clause in the conditions of sale entitling the applicant to retain the deposit paid by the respondent, ex facie the document. He submitted though that the conditions of sale provide for payment by the respondent of all losses incurred by the applicant upon a breach by the respondent. He referred me to the case of The Sheriff v Mashaba 1948 (4) SA 870 (T)

wherein it was held that the sheriff could not utilise the deposit to offset the wasted costs and losses. This case followed the case of Sheriff v Gillingham 1907 TS 190. I was also referred to the case of The Sheriff v Jaithoon 1955 (3) SA 416 (N) wherein Holmes J (as he then was) held the complete opposite that, insofar it pertained to the practice in then Natal, the deposit could be allocated towards the payment of costs.

8. In Sheriff of the High Court, Johannesburg South v Sithole and Three Similar Cases 2013 (3) SA 168 (GSJ), Spilg J held, with reference to the provisions of rule 46 (11) (b) that the sub section does not sanction forfeiture on breach. On the contrary the sub section expressly circumscribes the extent of liability pursuant to default and stipulates how it is to be determined. Spilg J further held that the sub section was complemented by rule 46 (8) (a) (i) which requires that the conditions of sale in execution of immovable property comply substantially with Form 21 of the First Schedule. Clause 6 of Form 21 provides for payment of 10% deposit on the date of sale, while clause 8, which is the operative provision dealing with the consequences of cancellation due to a breach by the purchaser, makes no reference to forfeiture (nor does any other clause), but provides:

> "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 the 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 of 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. Consequently a forfeiture provision is invalid. Neither rule 46 (11) (b) nor the standard conditions of sale contained in Form 21 permit forfeiture of the deposit. They however do not expressly provide for the retention of the deposit, pending the court's determination, under rule 46 (11) (b), of the losses for which the defaulting purchaser should be liable. Nonetheless the rule contemplates an expedited determination of losses which are readily ascertainable and therefore liquidated.

10. This brings me to the question of costs of this application. The respondent chose to oppose the application and filed a notice of intention to oppose and an affidavit purporting to be an answering affidavit, notwithstanding the absence of commissioning thereof. Under the circumstances the applicant could not have brought the application before a judge in chambers and was obliged to bring the application in open court. In my view and for this reason, the respondent ought to pay the costs of this application.

11. In the circumstances I make the following order:

    11.1 The sale in execution on 18 February 2014, of the immovable property described as Portion 1 of [……] Township, Registration Division I. R., Province of Gauteng, measuring 273 (two hundred and seventy three) square metres and held under Deed of Transfer No T3932/2009, subject to the conditions therein contained and also known as [.......] ("the property"), is hereby cancelled.

11.2 The property may again be put up for sale in execution in accordance with clause 10 of the conditions of sale.

11.3 The deposit shall be retained by the sheriff in trust until the quantification of loss sustained and judgment have been granted in respect thereof in terms of rule 46 (11) (b).

11.4 The written report required under rule 46 (11) (b) shall be laid before the presiding judge (Avvakoumides AJ) or any other judge in chambers by no later than 30 June 2015, failing which an affidavit explaining why such written report could not be so laid and indicating by when such report can be laid before the presiding judge.

11.5 The respondent is ordered to pay the costs of this application.

AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

Representation for the Applicant:

Counsel	Adv: C. G. V. O. Sevenster
Instructed by	Vezi De Beer Inc.

Representation for Respondent:

Counsel	No appearance
Instructed by:	No appearance