

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE CIRCUIT LOCAL DIVISION, EAST LONDON)**

Case No. 16/2021

In the matter between:

**INDUSTRIAL DEVELOPMENT
CORPORATION OF SOUTH
AFRICA LIMITED**

Applicant

and

**CALAB DEVELOPERS (PTY) LTD
SHERIFF, EAST LONDON**

First Respondent

HIGH COURT

Second Respondent

PURPLE SUNSHINE TRADING (PTY) LTD

Third Respondent

SOUTH AFRICAN BOARD FOR SHERIFFS

Fourth Respondent

SIPUNZI ATTORNEYS

Fifth Respondent

**REASONS IN RESPECT OF RULING IN
APPLICATION FOR INTERIM
INTERDICT PENDING PART B**

HARTLE J

[1] On 19 November 2021 the applicant issued out an application on an urgent basis (under the same case number as a prior action issued by the first respondent against the third respondent and First National Bank) claiming the following relief under PART A:

“1. That the Applicant’s non-compliance with Rule 6 of the uniform rules be condoned and the forms and service provided (for) in terms of the Rules be

dispensed with and the matter be disposed of as one of urgency in terms of Rule 6 (12)(a);

2. That the writ of execution issued on 18 November 2021, against the movable property, corporeal and incorporeal, against the third respondent be stayed pending the finalization and determination of Part B;

3. That the writ of execution against the third respondent dated 30 August 2021, in respect of the Double Cab Isuzu Bakkies, white in colour, with registration numbers JKK 828 EC/JFS 588 EC¹ and JFS 585 EC (“Motor Vehicles”); be stayed pending finalization of Part B to be instituted, duly supplemented, within 21 days from the date of this order by the applicant.

Alternatively, should the Motor vehicles have been sold at public auction:

4. That the respondents be interdicted from passing transfer of ownership and registration of the motor vehicles described in the notice of sale in execution dated 25 October 2021, more specifically Double Cab Isuzu Bakkie with registration number JFS 588 EC, held on 16 November 2021, under the above case number to any person, natural or juristic, pending the finalization of Part B to be instituted, duly supplemented, within 21 days from the date of this order by the applicant.

5. that the application be referred for complaint for the conduct of the second respondent to the South African Board of Sheriffs in terms of Section 44(1) of the Sheriffs Act 90/1986.

6. That the application be referred to the legal practice council for complaint against the conduct of the fifth respondent.

7. That the respondents, pay the costs of the application, on an attorney and client scale, jointly and severally, one paying the other to be absolved, if so opposed. (*sic*)

¹ There appeared to have been uncertainty on the part of the applicant regarding which vehicles were requested to be attached under the writ of execution dated 30 August 2021 and a suggestion that the vehicle with registration letters and numbers JKK 828 EC may have been confused with the motor vehicle ultimately sold in execution on 16 November 2021 (JFS 588 EC) in which the applicant claimed its interest by virtue of a special notarial covering bond in existence. According to the first and fifth respondents, however, they managed to attach a vehicle with registration letters and numbers JKK 828 EC which the third respondent purported to sell to Car Connections in Nahoon, East London. This in fact suggests that a third Isuzu motor vehicle was in the mix and that the motor vehicle with registration letters and numbers JFS 588 was probably attached under a different warrant of execution than the one relied upon by the applicant as Annexure “FA9”.

[2] The relief which it indicated would ultimately be pursued under PART B was for an order that “a writ of execution against the third respondent dated 30 August 2021, in respect of motor vehicles² be declared unlawful and set aside” (its interest in these motor vehicles was based on the fact that they had been notarially pledged to it by the third respondent as security pursuant to a loan extended to it), that the “sales in execution” (*sic*)³ dated 27 September and 28 October 2021 in respect of the two motor vehicles, held on 14 October 2021 and 16 November 2021 respectively, be declared unlawful and set aside, and that “the respondents” pay its costs on a punitive scale.

[3] The matter initially came before the duty judge on 23 November 2021 but was struck off the roll because the papers were not in order.⁴

[4] A directive was issued by my colleague permitting the applicant’s papers to be supplemented and updated. The matter was re-enrolled for hearing before me. The issue of urgency was reserved for determination by the court hearing the matter.

[5] In a certificate of urgency filed on behalf of the applicant dated 19 November 2021 it was recognized that the first of the two pledged motor vehicles had already been sold in execution “around” 21 October 2021 in consequence of which the applicant acknowledged that it had already “lost its real right in respect of the first motor vehicle”. The second motor vehicle was set to have been sold in execution on 16 November 2021. This sale too was acknowledged to have happened already as was intimated by the alternative relief prayed for under Part A set out above, but the applicant hoped to stave off its completion on the expectation that “transfer and

² See footnote 1 above. The vehicle which was sold in execution on 16 November 2021 (JFS 588 EC) and which the applicant’s interest is founded upon is not at all referred to in the writ of execution, the practical effect of which the applicant sought to stay.

³ The applicant was ostensibly referring to the notices advertising the sales in respect of each of the two motor vehicles. Annexure “FA 10” possibly applies although it merely refers to a “Double Cab, Isuzu Bakkie.” Annexure “FA 12” self evidently applies in respect of the intended sale of the second motor vehicle (JFS 588 EC) which was set to take place at 10h00 on 16 November 2021.

⁴ The papers were still not quite in order by the time the matter appeared before me. Pages were missing or the order in which they were arranged confused. Annexures referred to in emails were also missing. The most important document, which would have evidenced an accounting to the first respondent of the proceeds from the auction sale by the time this application was launched, Annexure NR3 to the applicant’s supplementary affidavit, was also not included in the papers provided to the court for the hearing. A further anomaly (although I did not ask the parties to address this aspect at the hearing) is that the application was issued as an interlocutory one under an original action between different parties than those in the present matter.

registration should not yet be complete”. Counsel on behalf of the applicant, Mr. Mathopo, lamented that the applicant had been unable to acquire a full set of the court papers in respect of the judgment debt that had foregone the attachment (in explaining the uncertainty regarding the status of the second sale in execution) but asserted that the anticipated urgent application warranted “extreme urgency consideration due to the immediate and permanent nature of the transfer of ownership, should it occur”.

[6] Mr. Mathopo filed a revised certificate of urgency after the matter was initially struck from the roll insisting that the urgency that had pertained at the outset when the application was launched remained and asserted that “the relief sought by the applicant and the immediate relief is alive and imminent”.

[7] The following brief background is relevant.

[8] Calab Developers (first respondent) had entered into a loan agreement with the third respondent (Purple Sunshine) in March 2018. As security for that obligation Purple Sunshine had pledged the two Double Cab Isuzu motor vehicles referred to in the applicant’s prayers above (“the vehicles”), to Calab Developers under two special notarial covering bonds that were duly registered with the Deeds Office in 2018 and 2019 respectively.

[9] In the first bond (BN 4360/2018) the two vehicles are vaguely described in an annexure to the loan agreement as two in quantity “Double Cabs Isuzu” with a unit price valuation of “R 398 248.2” (sic).⁵ In the second special notarial covering bond (BN 3748/2019) the vehicles are specifically described by their make, model, further asset description and more importantly by their registration letters and numbers. The earlier 2017 model was referenced in this regard as JFS 588 EC and the latter 2018 model as JFS 585 EC.

⁵ Section 1 (1) of the Security by Means of Movable Property Act, No 57 of 1993 requires the movable property notarially hypothecated under the Act’s provisions to be “specified and described in the bond in a manner that renders it *readily recognizable*” in order for it to be deemed to have been pledged to a mortgagee as effectually as if it had been pledged and delivered to the mortgagee.

[10] The first respondent obtained a judgment in this court against Purple Sunshine (the third respondent) in EL Case No. 16/2021⁶ on 17 June 2021. It consequently issued a warrant of execution against Purple Sunshine's property to satisfy its judgment debt pursuant to which the sheriff (second respondent) evidently attached the motor vehicles.⁷ The motor vehicle with registration letters and numbers JFS 585 EC was sold in execution at a public auction on 14 October 2021. The second vehicle with registration letters and numbers JFS 588 EC was sold in execution at a public auction on 16 November 2021.

[11] On 16 November 2021 the applicant's attorneys addressed a letter to the sheriff alluding to the sale of the last vehicle that had happened that day, asserting *inter alia* in this respect that:

"2.4 My instructions are further to advise you that the said motor vehicle sold in execution is owned and is the property of my client in terms of the Special Notarial Bond entered into between my client and Purple Sunshine Trading 70 (Pty) Ltd.

3. I have been instructed to demand from you that you do not pay over the proceeds of the sale in execution of the above motor vehicle to the attorneys of the execution creditor. (Identified earlier in the correspondence as the fifth respondent)

4. Counsel is currently finalizing an application to set aside the sale in execution and to interdict your offices from paying the proceeds of the sale in execution to the attorneys for creditor until finalization of our application by the High Court."

[12] Evidently (and in my view not unsurprisingly because of its confusing and vague content, and the lack of any firm intimation that the sheriff was being asked to embark upon a formal process in terms of Uniform Rule 58 or what basis existed to

⁶ As indicated elsewhere this is the case number of the action between Calab Developers and Purple Sunshine.

⁷ Although no warrant of execution is in evidence in respect of the motor vehicle with registration letters and numbers JFS 588 EC, it appeared to me to be totally implausible that the sheriff would have proceeded to sell it without a warrant or an attachment having been made under such a writ. There is a reference in the sale notice to a warrant of execution dated 19 July 2021 which suggests that there may be an additional writ in contention that did not surface in the papers before the court.

vitiate the sale or render the sheriff's conduct in respect thereof subject to judicial scrutiny) this letter evoked no response from the sheriff.

[13] It further emerged that the applicant's attorneys had on 12 November 2021, days before the 16 November 2021 sale in execution and in anticipation thereof, also placed the sheriff, fifth respondent (acting on behalf Calab Developers) and Purple Sunshine on terms as follows:

"Dear Sirs

We refer to the Notice of Sale in Execution dated 25 October 2021 attached herein for your attention.

Please be advised of the following:

1. The Sheriff East London, on the instructions of Sipunzi Attorneys, has attached and intends to sell in execution a movable asset, KB 2004 Isuzu Bakkie, as described in the Notice of Sale in Execution;
2. The asset belongs to the IDC⁸ and is registered under the IDC's Special Notarial Bond Number: 4360/2018,⁹ attached herein for ease of reference, and therefore cannot be sold in execution without the IDC's written consent;¹⁰
3. Please regard in this correspondence as notice advising your offices that the rightful title holder of the asset is the IDC;¹¹ and
4. Should your offices instruct the Sheriff to proceed with the sale of this motor vehicle on 16 November 2021, the IDC will take legal steps and seek an adverse cost order.¹²

⁸ Again, this information is confusing, misleading, or plainly wrong.

⁹ This too is incorrect and does not appear from the 2018 bond.

¹⁰ This is also not correct except *vis-à-vis* the applicant and Purple Sunshine. Calab Developers would by then as a judgment creditor have been vested with a real right under a judicial pledge conferring on it the right to have the motor vehicle sold by the sheriff and to be paid from the proceeds at least before other unsecured creditors were paid. See Silberberg and Schoeman's *The law of Property*, 6th Ed, at par 17.3 and the footnotes cited there.

¹¹ Strictly speaking this statement is incorrect.

¹² An after-the-fact legal process was threatened rather than requesting the sheriff to issue out an interpleader on the basis of a competing claim.

Kindly confirm receipt of this email and that the sale will not proceed.

We request this confirmation before or on 15 November 2021, 12h00.

Please note that the IDC's rights remain reserved."

[14] The sheriff replied within minutes and indicated that it would be referring the applicant's attorney's email to the instructing attorney (the fifth respondent) for their comment and reply.

[15] The applicant alleges however that the sheriff did not reply, yet it failed to take the threatened steps by 15 November 2021 which it had intimated that it would in order to protect its interests in the motor vehicle.¹³

[16] The first and fifth respondents, in reply to the applicant's allegation in its founding affidavit that it had amply warned the parties of the applicant's interest in the vehicle before the sale but that it had flat out ignored its entreaties, replied as follows:

"AD PARAGRAPH 17 THEREOF

8. The contents hereof are noted. The deponent assert that in its response thereto telephonically to the 4th Respondent (sic)¹⁴ it had advised the sheriff that it (was) not persuaded by the allegations claiming interest by correspondence but rather a proper court process should be instituted by

¹³ In *Bokomo v Standard Bank van Suid Afrika Bpk* 1996 (4) SA 450 (C) the court held that a notarial bondholder obtains real rights over bonded property as if such property had been mortgaged. In *Lief NO v Dettman* [1964] 2 All SA 448 (A) the court observed that the only real rights in favour of the mortgagee created by the registration of a bond are rights in respect of the mortgaged property, e.g., the right to restrain its alienation and the right to claim a preference in respect of its proceeds on insolvency of the mortgagor. These real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them. In this instance the applicant seemed to have invoked the right to take possession of the property on the basis of a bond breach by Purple Sunshine because of the attachment and alleged compromise or arrangement with its creditors, or on the basis of its belief that its interests under the bond were in any way imperilled by any act or omission on the part of Purple Sunshine. By the time the applicant learnt of the impending auction sale it should have asserted its rights under the bond (notably to retake possession of the motor vehicle *inter alia* and if necessary to have disposed of it) on the basis of the known attachment. Its misguided belief that the harm would only materialise once the bidder took possession and transfer of the motor vehicle pursuant to the sale or that that was the outer limit by when it had to take steps to protect its interest under the bond(s) was its own misfortune.

¹⁴ The deponent clearly meant the sheriff, i.e., the second respondent.

whomsoever claiming interest over the attached property, failing which the 4th Respondent may proceed with the sale in execution.”

[17] It is common cause that the applicant did not formally request the sheriff to launch interpleader proceedings. It is also worth mentioning that the special notarial bond referenced in the applicant’s correspondence would not necessarily and with the requisite specification required by the provisions of section 1 (1) of the Security by Means of Movable Property Act, no 57 of 1993, have identified the vehicle about to be sold in execution on 16 November 2021 as an especially hypothecated asset under the bond warranting the legal consequences contemplated by that section in respect thereof.¹⁵

[18] The applicant also picked up, from correspondence copied to it after the fact, that a director of Purple Sunshine had alerted the sheriff, on 13 September 2021 already, to the applicant’s interest in assets that had been “tagged”, I assume by the sheriff who had attached these at the request of the fifth respondent acting on the instructions of Calab Developers in the execution process. It is not clear from the correspondence relied upon by the applicant in the application before me what was sent as an email attachment to the sheriff in this respect, but the director wrote as follows concerning such attachment:

“On Monday, Sep 13, 2021 at 4.04 PM Pamela Bukashe-Nkukwana <pamela@pst70.co.za> wrote:

Afternoon,

As discussed please receive the attached. I will also be sending you the assets register which confirms all the tagged items belonging to IDC till our 40 million loan is paid up.

¹⁵ I mention this only to highlight what might have been in the sheriff’s mind at the time when he had to make the decision. A sheriff no doubt often finds himself in the position where he is subject to considerable risk in the discharge of his duties but if he is referred to a bond and on the face of it no risk is borne out by proceeding with the sale in execution of a motor vehicle bearing no obvious connection or hypothecation thereunder, he ought to have had no qualms in carrying out his duty prescribed by section 43 (1) of the Superior Court Act, no 10 of 2013 by executing on the warrant and proceeding with the sale.

With thanks

Pam, Bukashe”.

[19] It is evident that the sheriff responded to this communication, within minutes, to convey the fact that although the fifth respondent had been copied in on the email, the sheriff’s instructions were “to proceed in terms of the warrant of execution”.

[20] It is apparent that Purple Sunshine did not share its concerns with the applicant at all in this respect.

[21] The applicant relied on all of these interactions to suggest a collusion between the fifth respondent (acting on behalf of Calab Developers) and the sheriff and a willful disregard and compromise of its security rights in respect of the property of Purple Sunshine attached by Calab Developers in order to satisfy the judgment debt which it had obtained against it. Further, apart from vaguely asserting some sort of conspiracy between Calab Developers and Purple Sunshine by emphasizing that the order giving rise to the judgment debt had been obtained “by consent”, there was nothing on the papers to plausibly sustain the kind of “clandestine collusion” contended for by the applicant.¹⁶

[22] Not surprisingly - given the aspersion of misconduct on its part in lawfully executing against the motor vehicle in question, Sipunzi Attorneys who had carried forth the mandate of Calab Developers to sell the motor vehicle in the process of executing the judgment against Purple Sunshine (together with its client) opposed the application.¹⁷ Calab Developers denied that it had acted unlawfully in executing

¹⁶ It can hardly be suggested that Calab Developers, in exercising its real right to proceed with the sale in execution pursuant to the attachment, even if it was informed that the vehicle was hypothecated under a notarial pledge, acted fraudulently in instructing the sheriff to proceed, or expecting him to proceed to finality. By attaching the motor vehicle, it acquired a real right, known as *pignus judicale*, to the property. This entitled it, subject to the qualifications set forth in section 43 of the Superior Courts Act, to proceed with the sale in execution and to an entitlement to the proceeds of the sale of the property. *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) at [14],[18], [24] and [26].

¹⁷ The first and fifth respondents were also at risk of having punitive costs awards made against them if they did not oppose the relief sought by the applicant under Part A.

against the motor vehicles or that it had made itself guilty of any collusion with Purple Sunshine to defeat the applicant's security over either vehicle.

[23] Calab Developers further claimed to have been unaware of the applicant's interest in the vehicles at least until it was informed on 12 November 2021 thereof. But even having been so informed of the applicant's special notarial bond, it did not consider that it was not entitled to proceed with the sale in execution on 16 November 2021. Indeed, there was nothing lawfully precluding it from doing so.¹⁸

[24] Additionally, it rejected the notion that the matter was urgent, especially since the sale in execution had run its course by the time the application was launched, and delivery of the vehicle had been taken by the bidder at the auction sale. The applicant failed to attach Annexure "NR3" to its supplementary affidavit, but it is apparent from the averments made on its behalf in this respect that the Sheriff had produced a vendor's roll and an invoice on 16 November 2021 already, suggesting an accounting of the sale proceeds by that date. Evidently the horse had bolted by then, so to speak, leaving the applicant wanting only in respect of a copy of an agreement of sale and proof of transfer of the vehicle sold at the auction, neither which, as it turns out, would ultimately have availed themselves arising from the process, given the nature of sales by public auctions.

[25] Purple Sunshine, which had in fact caused all the fuss, offered no resistance to the application and the sheriff also kept his silence, leading the applicant to submit at the hearing that in the absence of any challenge from the sheriff to the very serious allegations against it of collusion with Sipunzi Attorneys and its client, and of purportedly serious flaws in the sale process, that it has established its pleaded case on the papers and was entitled to the relief sought against the sheriff at least.

[26] Co-incidentally the flaws relied upon did not impress upon me any suggestion that the sale in execution of 16 November 2021 was fatally flawed.¹⁹

¹⁸ Dream Properties, *Supra*, at par [18].

¹⁹ As indicated elsewhere the notice of the intended sale followed pursuant to an attachment of the motor vehicle (presumably predicated on a writ dated 19 July 2021). I have also noted that the description of the motor vehicle with registration letters and numbers JKK 828 EC was deliberate and possibly concerns a third Isuzu motor vehicle belonging to Purple Sunshine. The notice of sale dated

[27] Even assuming an awareness on the part of Calab Developers of an interest by the applicant in the second Isuzu Cab by the time of the sale by 12 November 2021, there was nothing precluding it from having made the attachment of the vehicle in the first place and instructing the sheriff to proceed with its sale by public auction on 16 November 2021.²⁰

[28] It is not uncommon for the sheriff to “take instructions” from a judgment creditor concerning whether the sale is to proceed or not, but once the sheriff proceeds with the sale he acts as an officer of the law and is required to complete the process to finality.²¹

[29] The sheriff would have been obliged to carry on with the sale of the movable property attached subject only to a formal interpleader application interposing.

[30] Uniform Rule 45 (7)(a) provides as follows in this regard:

“(7) (a) Where any movable property is attached as aforesaid the sheriff shall where practicable *and subject to rule 58* sell it by public auction to the highest bidder after due advertisement by the execution creditor in a newspaper circulating in the district in which the property has been attached and after expiration of not less than 15 days from the time of seizure thereof.”

(Emphasis added)

7 October 2021 was correctly criticized for being vague in respect of the description of that motor vehicle but does not appear to be necessarily fatal. The suggestion that the sheriff sold the same vehicle twice seems entirely implausible. Finally, the submission, not raised on the papers but during argument, that the sale was vitiated by the absence of the sheriff serving a notice of attachment on the applicant in terms of Rule 45 (8) (b) is entirely misplaced. The provisions of Rule 45 (8) (b) apply to the situation where the property sought to be attached is the *interest of the execution debtor* (not creditor) in the property pledged, leased, or sold under a suspensive condition to or by a third person, as the case may be. (For this reason, par [30] of the Labour Court judgement relied upon by Mr Mathopo in *Griekwaland Wes Korporatief and others v Sheriff Hartswater Warren and others* (Case no J 2404/05) cannot be correct neither could it have provided a basis in my view for the applicant to successfully argue later that the sale *in casu* fell to be set aside for want of service of the notice of attachment on the applicant.)

²⁰ Dream Properties, *Supra*, at paras [14] and [18].

²¹ Sedibe v United Building Society 1993 (3) SA 671 (T); Schoerie NO v Syfrets Bank Ltd 1997 (1) SA 764 (D) 773; Mpakathi v Kghotso Development CC 2003 (3) SA 429 (W) par 8. See also section 43 (1) of the Superior Courts Act, read with Rule 45 applicable in this case.

[31] Uniform Rule 58 in turn provides as follows:

“58 Interpleader

(1) Where any person, in this rule called 'the applicant', alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims, in this rule referred to as 'the claimants', in respect thereto, the applicant may deliver a notice, in terms of this rule called an 'interpleader notice', to the claimants. In regard to conflicting claims with respect to property attached in execution, the sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.²²

(2) (a) Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in subrule (1) hereof, to pay the money to the registrar who shall hold it until the conflicting claims have been decided.

(b) Where the claims relate to a thing capable of delivery the applicant shall tender the subject-matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the registrar may direct.

(c)

(3) The interpleader notice shall-

(a) state the nature of the liability, property or claim which is the subject matter of the dispute; (b) call upon the claimants within the time stated in the notice, not being less than 15 days from the date of service thereof, to deliver particulars of their claims; and

(c) state that upon a further date, not being less than 15 days from the date specified in the notice for the delivery of claims, the applicant will apply to court for its decision as to his liability or the validity of the respective claims.

²² The jurisdictional fact for the application of the rule is the existence of adverse claims. Since the sheriff would have been obliged to carry on with the execution, the intimation that competing claims existed with respect to the property attached in execution which required him to deviate from the normal procedure would have to have been clearly outlined for him so as to persuade him that he was faced with two *prima facie* valid and enforceable claims, or the threat of such claims, in respect of the motor vehicle.

(4) There shall be delivered together with the interpleader notice an affidavit by the applicant stating that-

- (a) he claims no interest in the subject-matter in dispute other than for charges and costs;
- (b) he does not collude with any of the claimants;
- (c) he is willing to deal with or act in regard to the subject-matter of the dispute as the court may direct.

(5) If a claimant to whom an interpleader notice and affidavit have been duly delivered fails to deliver particulars of his claim within the time stated or, having delivered such particulars, fails to appear in court in support of his claim, the court may make an order declaring him and all persons claiming under him barred as against the applicant from making any claim on the subject-matter of the dispute.

(6) If a claimant delivers particulars of his claim and appears before it, the court may-

- (a) then and there adjudicate upon such claim after hearing such evidence as it deems fit;
- (b) order that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant;
- (c) order that any issue between the claimants be stated by way of a special case or otherwise and tried, and for that purpose order which claimant shall be plaintiff and which shall be defendant;
- (d) if it considers that the matter is not a proper matter for relief by way of interpleader notice dismiss the application;
- (e) make such order as to costs, and the expenses (if any) incurred by the applicant under paragraph (b) of subrule (2), as to it may seem meet.

(7) If an interpleader notice is issued by a defendant in an action, proceedings in that action shall be stayed pending a decision upon the interpleader, unless the court upon an application made by any other party to the action otherwise orders."

[32] In this instance and despite the communications addressed to the sheriff in respect of the applicant's interest in the motor vehicle firstly by the director of Purple Sunshine on 13 September 2021 and secondly by the applicant's attorneys on 12 November 2021, there is nothing in such correspondence which beckoned him to have commenced such proceedings, which process in itself would have suspended the sale from going ahead, and/or the proceeds from being paid to Calab Developers.

[33] Despite the provisions of rule 45 (10) which dictate that where property subject to a real right of any third person is sold in execution such sale shall be subject to the rights of such third person unless he otherwise agrees, it is ostensibly through the medium of the interpleader process that the competing claims of Calab Developers (as execution creditor in respect of its judicial pledge) and the applicant (as secured creditor with its established rights in terms of section 1 of the Security by Means of Movable Property Act, No. 57. of 1993 to the motor vehicle) was required to have been determined. In other words, the execution sale, without any interpleader process interposing, would not *per se* be rendered invalid simply because of the competing interests of a third person contemplated by the provisions of rule 45 (10).

[34] Mr. Mathopo conceded that it had only occurred to the applicant that such a formal interpleader process was necessary (and desirable) when the matter was argued before me. It was further suggested that I might order the sheriff to conduct such a process, but not only was there no clarity of such a claim suggested to the sheriff by the correspondence in itself, but the horse had clearly bolted by then, so to speak, and in my view the urgency had been lost to the applicant by the time the matter was argued before me.

[35] More especially, the purchaser who bid for the vehicle at the auction would have taken delivery of the vehicle at the sale. This much is evident from the

processes for auction prescribed under the Consumer Protection Act, No. 68 of 2008 and the regulations promulgated thereunder in respect of sales in execution.²³

[36] It occurred to me by the further warrant of execution dated 18 November 2021, the execution of which the applicant also sought to restrain, that the execution sale of 16 November 2021 had still not yielded sufficient monies to defray the costs of execution and the judgment debt, hence Calab Developer's attempt at this point (after the 16 November 2021 auction sale) to attach Purple Sunshine's right, title and interest under a Nedbank account for a balance of R89 765.45, together with interest and costs.

[37] Since no correlation between that attachment (if an attachment was made by the sheriff pursuant to the issue of the writ) and the applicant's real right or interest in the movables of Purple Sunshine generally was established, I saw no compunction to stay execution of this last writ. Again, the forward trajectory after an attachment (if made by the sheriff), could have been staved off by formal interpleader proceedings which would have had the same effect as an interdict assuming the applicant had made out a proper case for it, which in my view it did not.

[38] In the result after hearing the parties' submissions, I issued the following order:

“[1] The applicant has failed to make out a case for the relief sought in prayers 1 to 7 of its notice of motion under caption Part A.

[2] The applicant is to pay the first and fifth respondent's costs of opposing the applicant's claim under Part A.

[3] Part B of the applicant's claim remains extant for the applicant to pursue, if so advised, on the ordinary opposed motion court roll.”²⁴

²³ See section 45 of the Consumer Protection Act, No. 68 of 2008 read together with the regulations promulgated thereunder in terms of section 120 (1) of the CPA. Consumer Protection Act Regulations, *Government Gazette* 34180 GN R293, 1 April 2011. (Regulation 32 deals with the disposal of motor vehicles by public auction).

²⁴ In issuing the order under paragraph [3] above, I recognized that the perceived anomalies in the legal process underscoring the sale might be real, or the sheriff's conduct possibly subject to review, or the last writ of 18 November 2021 somehow justifying an interpleader going forward, hence this avenue was left open to the applicant to still pursue, if so advised.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 7 December 2021

DATE OF REASONS: 31 May 2022*

*Reasons delivered electronically on this date by email to the parties.

APPEARANCES:

For the applicant: Mr. T Mathopo instructed by Mngadi Attorneys c/o Bax Kaplan Russel Inc., East London (ref. Mrs. Beetge Magnus).

For the first and fifth respondents: Mr. Kalimashe instructed by Sipunzi Attorneys, East London (ref. Mr. Sipunzi).

For the second, third and fourth respondents: No appearance.