

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2009/31887

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

THE SHERIFF OF THE HIGH COURT ROODEPOORT

Applicant

and

AMIEN, NAZLEE

Respondent

In re:

FIRST RAND BANK LIMITED

Judgment Creditor

and

MAJEKE, A N

First Judgment Creditor

MAJEKE, C

Second Judgment Creditor

SUMMARY

Execution – public auction of immovable property – Sheriff of High Court applying to court for cancellation of sale in terms of Uniform Rule 46(11) on basis that purchaser breached conditions of sale – purchaser counterclaiming for specific performance – counter-application not competent since purchaser failed to perform reciprocal obligations in terms of sale conditions.

J U D G M E N T

MOSHIDI, J:

[1] This is an application brought by the Sheriff of the High Court, Roodepoort (*“the applicant”*) in terms of Uniform Rule 46(11) for the cancellation of a sale in execution of immovable property described below.

THE RELIEF CLAIMED

[2] In the notice of motion the applicant claimed that the sale in execution of Erf 3528 Weltevreden Park Ext 29 Township Registration Division IQ in the Province of Gauteng (*“the property”*), which sale was held on 10 May 2013, be cancelled in order that the property may be resold by the applicant. The applicant also claimed that the deposit paid by Nazlee Amien (*“the respondent”*), at the public auction sale be retained by the applicant in trust until the damages have been quantified after completion of any subsequent

sale envisaged in Uniform Rule 46(11). The applicant also sought that the respondent be ordered to pay the costs of the present application.

THE RESPONDENT'S OPPOSITION

[3] The respondent filed an answering affidavit opposing the application. The respondent also filed a counterclaim, the contents of which I shall deal with later herein below.

COMMON CAUSE FACTS

[4] The following were common cause facts. On or about 27 October 2009, First Rand Bank Limited (*"the judgment creditor"*), obtained judgment against the judgment debtors, together with an order declaring the property executable. The property was subsequently attached. In August 2012 the applicant received instructions from the judgment creditor's attorneys of record to sell in execution the property. On 10 May 2013 the sale in execution took place. The property was purchased by the respondent at the sale in terms of a deed of sale (*"the Conditions of Sale"*), attached to the founding papers. At the same time, the respondent signed the Conditions of Sale. The respondent also paid to the applicant a deposit in the sum of R11 006,70 as well as the applicant's commission in the sum of R76 000,00.

THE CONDITIONS OF SALE

[5] The relevant provisions of the Conditions of Sale for present purposes are clauses 4.4, 4.5, 4.6, 4.7, 4.8.1, 6.4, 6.5 and 8, which dealt with the breach of the agreement. Clauses 4.4 to 4.8.1 provided as follows:

- “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 execution creditor’s attorney, which shall be furnished to the Sheriff within 21 days after the day of sale. Should the purchaser fail to furnish the sheriff with a bank guarantee within 21 days after the date of sale, the sheriff may in his/her sole discretion grant the purchaser a 5 day extension within which to provide the required bank guarantee. Should the purchaser fail to furnish the sheriff with a bank guarantee, which is approved by the execution creditor’s attorney, within the required time, the sale may be cancelled.*
- 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 *If the transfer of the property is not registered within 1 (one) month after the date of the sale, the Purchaser shall be liable for payment of interest at the rate of 9.75% Nominal Annual Compounded Daily to the execution creditor, 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 (one) month after the sale to date of transfer.*
- 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 any Deeds Registration Office levies. The purchaser shall further be responsible for payment, within 7 days after been requested to do so by the appointed conveyancer:*
 - 4.7.1 *of all amounts required by the Municipality for the issue of a clearance certificate in terms of section 118(1) of the Local Government Municipal Systems Act, No. 32 of 2000, to the effect that all amounts due in connection with immovable property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding*

the date of application for the certificate have been fully paid;

4.7.2 of all levies due to a Body Corporate in terms of Section 37 of the Sectional Title Act, No. 95 of 1986 or Home Owners Association.

4.8 The purchaser is hereby informed of the following charges:

4.8.1 Arrear rates and taxes, estimated at R19 521.00 & R95 830.00."

Clauses 6.1 to 6.4 of the Conditions of Sale provided as follows:

- "6.1 The property shall be at the risk and profit of the purchaser after the fall of the hammer and the signing of the conditions of sale and payment of the initial deposit.*
- 6.2 The Purchaser shall be liable to keep insured and all buildings standing on the property sold for the full value of same from the fall of the hammer and the signing of the conditions of sale and payment of the initial deposit to the date of transfer. Failing which the sheriff may effect the insurance at the purchasers expense.*
- 6.3 The execution creditor and the Sheriff give no warranty that the Purchaser shall be able to obtain personal and/or vacant occupation of the property or that the property is unoccupied and any proceedings to evict the occupier(s) shall be undertaken by the Purchaser at his/her/its own cost and expense.*
- 6.4 The property is sold as represented by the Title Deeds and diagram and the sheriff is not liable for any deficiency that may be found to exist. The property is sold as it stands ('voetstoots') and without warranty or representation and also subject to all servitudes and conditions specified in the Deed of Transfer, including any right reserved in favour of a developer or body corporate in terms of Section 25 of the Sectional Titles Act, No. 95 of 1986. Notwithstanding anything to the contrary hereinbefore contained, the property is sold free from any title conditions pertaining to the reservation of personal servitudes in favour of third parties and in respect of which servitudes preference has been waived by the holder thereof in favour of the execution creditor."*

UNIFORM RULE 46(11)

[6] Uniform Rule 46(11) on which the instant application is based provides as follows:

- “(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 said sheriff’s distribution account, be recovered from him or her under judgment of the judge 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.*
- (c) If such purchaser is already in possession of the property, the said sheriff may, on 10 days notice apply to a judge for an order ejecting him or her or any person claiming to hold under him or her therefrom.”*

For the sake of completion, and possible relevance to this matter, Uniform Rule 46(13) provides that the Sheriff shall give transfer to the purchaser against payment of the purchase money and upon performance of the Conditions of Sale and for that purpose do anything necessary to effect registration of transfer (underlining added).

[7] From the papers, the present application was not to be decided summarily in chambers, but was argued in open court (*cf The Sheriff v Jaithoon*¹ and see *The Sheriff v Mashaba*²).

[8] It was the applicant's case that the respondent has breached clause 4 of the Conditions of Sale in that the respondent failed to provide the applicant with a bank guarantee in respect of the balance of the purchase price. On 4 June 2013, some three years after the sale in execution, the judgment creditor's attorneys of record addressed a letter to the respondent in the following terms:

"We refer to the above matter and confirm that we act in this matter on behalf of the seller, the Sheriff of the High Court, Roodepoort. Our instructions are that you are in breach of your obligations arising out of the Conditions of Sale entered into between yourself and the Sheriff of the High Court, Roodepoort, in that –

1. *You have failed to furnish us with payment of a guarantee for the purchase price. Your failure to fulfil your commitments in terms of the above constitutes a breach of your obligations in terms of the Conditions of Sale and accordingly give you notice that you are in breach of your obligations. We hereby give you notice that should you not remedy your breach within 7 (seven) days from the date of this letter, our client intends taking action to cancel the sale."*³

There was no response from the respondent until the present application was served on her attorneys of record, Y Johnson Inc (*"Attorneys Y Johnson"*). On 22 August 2013, the respondent filed a notice to oppose through her present attorneys, Mangera and Associates, and later opposing papers and a

¹ 1955 (3) SA 416 (NPD).

² 1948 (4) SA 870 (T).

³ See bundle p 17, annexure "C".

counterclaim. The answering affidavit was filed out of time, and for which the respondent sought condonation.

THE ANSWERING AFFIDAVIT

[9] The answering papers were rather lengthy, comprising of a counterclaim, a point *in limine*, confirmatory affidavits and various annexures as well as an application to strike out certain portions of the applicant's papers in the counter-application and replying affidavit. These papers dealt at length with the delay on the part of the respondent to furnish the required bank guarantee. I must at the outset state that the point *in limine* which raised the matter that the applicant's founding affidavit was not properly commissioned and signed, had no merit at all and called to be rejected. The same applied to the application to strike out.

[10] It is significant that in the answering papers, the respondent described herself as follows:

*"I pause to point out that my business consists of purchasing properties, sold by way of sale in execution, and then either immediately finding a purchaser for the property and on selling it, alternatively renovating the property and selling it at a later stage."*⁴

What is equally significant was that the respondent, in sketching the delay in fulfilling her obligations in terms of the Conditions of Sale, admitted in her counterclaim that she provided the guarantee to the judgment creditor's

⁴ See para 11 of answering affidavit (*sic*).

attorneys of record, Lowndes Dlamini (“*Lowndes Dlamini*”) out of time i.e. on 19 August 2013 as opposed to within 21 days after the date of the sale, as provided for in clause 4.4 of the Conditions of Sale. There were various reasons advanced for the delay as mirrored in the extensive exchange of correspondence between the parties.

[11] The guarantee delivered by the respondent on 19 August 2013 only, was, however, unacceptable to Lowndes Dlamini, for reasons set out later in this judgment. The chronological events revealed the following: On 26 June 2013 and while the respondent was in breach of the Conditions of Sale, Lowndes Dlamini forwarded the necessary guarantee required to the respondent by way of a *pro forma* account, as shown in annexure “NA4” attached to the respondent’s counter-application. The significance of the *pro forma* account showed that at that stage (26 June 2013) the respondent was already in breach of the Sale Conditions; that Lowndes Dlamini already had instructions from the applicant to proceed with the cancellation of the sale in execution since a Rule 46(11) fee was included therein; transfer duty in the amount of R10 489,65 was also included; and clearance figures (i.e. the rates payable) in the sum of R189 654,89 were listed).

[12] As stated earlier, the guarantee subsequently delivered by the respondent was not acceptable to the judgment creditor’s attorneys. The guarantee did not contain the correct property description of the property. The respondent was required to rectify the guarantee. Later, on 17 September 2013, more than three years after the sale, the respondent delivered a proper

guarantee. This was confirmed by the respondent in her affidavit in support of the counter-application.⁵

[13] It was the applicant's case that in spite of the delivery of the correct guarantee later, the respondent had, in any event, not performed in full all her reciprocal obligations in terms of the Conditions of Sale. In this regard, reliance was placed on certain events. These included a letter from Lowndes Dlamini addressed to the respondent's former attorneys (*"Van Eeden Attorneys"*) on 12 December 2013 in the form of annexure "E".⁶ Annexure "E" contained certain settlement proposals with prejudice. The contents of the annexure were significant and it was necessary to quote therefrom somewhat *in extensio*.

[14] Paragraphs 6 to 10, respectively, stated that:

"Your client, in the counter-application, seeks that our client does all things necessary to give effect to the transfer of the immovable property (as purchased by your client on 10 May 2013) (in terms of prayer 2 of the notice of motion) together with a punitive costs order. Your client essentially seeks specific performance in terms of the signed conditions of sale. We record that your client has delivered the required guarantee (as required in terms of clause 4.4 of the conditions of sale) and has paid our costs. We however place on record that your client to date not, paid the required clearance figures; and/or paid the transfer duty (in respect of the immovable property). Your client has accordingly not performed in full in terms of the conditions of sale."

In as far as the clearance figures, and transfer duty were concerned, paras 11 to 16 provided as follows:

⁵ See para 38 of the respondent's affidavit in counter-application.

⁶ See p 127 bundle, as well as the respondent's response thereto.

“In order to facilitate the expeditious finalisation of the matter we advise that at paragraph 30 of your client’s affidavit in support of her counter-application, your client alleges that on 12 September 2013 she was in possession of revised City of Johannesburg clearance figures. We place on record that we have not had sight of these revised City of Johannesburg clearance figures, and we are as a result thereof not in a position to comment on your allegation contained within paragraph 31 of your client’s affidavit in support of her counter-application. We hereby request (in order to facilitate the transfer process and amicable settlement) a copy of the revised clearance figures to be provided to our offices within five (5) days from the date of this letter. We need to ensure that the revised clearance figures are still valid for clearance purposes. Once we are in possession of the valid revised clearance figures, our offices will be in a position to calculate the transfer duty payable by your client. We confirm that once we are in possession of the valid revised clearance figures, we will provide you with the transfer duty payable within two (2) days. Following payment by your client of the revised clearance figures and transfer duty, transfer and registration of the immovable property into your client’s name can commence.”

With regard to the lapsed revised clearance figures, annexure “E” in paras 17 to 19 provided that:

“Should the revised clearance figures have lapsed (and no longer valid), your client is well aware of the fact that transfer cannot proceed (as the clearance figures have not been paid, and as a consequence thereof transfer duty could not be calculated nor paid). This will require our offices to obtain new clearance figures in terms of section 118 of the Municipal Systems Act, which will be tendered to your client for payment. Although we note the relief your client seeks in her counter-application, your client has not paid the revised clearance figures or the required transfer duty.”

[15] The respondent reacted to the above letter by way of a letter from her attorneys, Van Eeden, dated 28 January 2014, annexure “F”.⁷ The latter annexure read, *inter alia*, that:

⁷ See bundle p 130.

“We have had an opportunity to now consult with our client regarding the contents of your letter. We take notice of the time periods contained therein and notice that these have expired. Accordingly, it is first necessary ascertain whether your client is amenable to extend these time periods. If your client is amenable to such an extension then we propose the following in an attempt to finalise this matter (this proposal is similar to the proposal contained in your letter);

- 2.1 the pending applications are stayed for a period of 30 days, from the date of your acceptance of this proposal, for our respective clients to comply with proposal below;*
- 2.2 our client, within a week from the date of your acceptance of this proposal, shall apply for current clearance figures from the City of Johannesburg in respect of the property. As you are aware our client is in a position to negotiate reduced clearance figures with the City of Johannesburg and your client is in a position to confirm these clearance figures with the Council;*
- 2.3 once in receipt of the aforesaid clearance figures your office will be in a position to finalise the transfer duty and present our client with the necessary transfer duty figures for payment;*
- 2.4 once our client is in possession of the clearance and transfer duty figures as set out above, our client will make payment of those amounts within 10 days from the date of receipt of these figures;*
- 2.5 once payment of the aforesaid amounts has been paid all requirements for the transfer of this property have been satisfied and your client agrees to affect transfer of the property immediately.”*

In the end, all the settlement proposals were fruitless. The respondent remained in breach in regard to the clearance certificate.

THE RESPONDENT’S COUNTERCLAIM

[16] In her counterclaim, the respondent sought an order compelling the applicant to do all things necessary, including the signing of all necessary documents, to give effect to the transfer of the property into the name of the

respondent. In the alternative, the respondent asked for an order that an independent attorney, nominated by the respondent, be authorised to do all things necessary to give effect to the transfer of the property in the place of the applicant. This relief claimed by the respondent is in essence in the form of specific performance. It was based on the respondent's assertions that all the requirements were in place for Lowndes Dlamini to proceed with the transfer of the property into her name. Significantly, the respondent contended that these requirements have been in place since at least 12 September 2013 (more than three years after the Conditions of Sale were accepted and signed by the respondent). The respondent further challenged the motive of Lowndes Dlamini in not wanting to proceed with the transfer of the property. If the sale was cancelled now, as opposed to when the respondent first defaulted earlier, the applicant will have to resell the property, which will result in further unnecessary costs together with more interest that will accrue in respect of the property. In addition, the respondent alleged that the outstanding rates and taxes, water, and electricity account in respect of the property would increase from the amount of R189 654,89 at the time of the sale agreement in May 2010. This, so argued the respondent, would hinder potential buyers from bidding for the property, and would also result in a lower purchase price on resale. The respondent also raised the issues that the buildings erected on the property were done without the necessary plans in place.

[17] In the heads of argument, it was submitted on behalf of the respondent that she had on numerous occasions tendered performance and continued to

do so. It was also argued that the amount owing to the City of Johannesburg in respect of arrear rates, taxes, water and electricity charges was substantial, and that the property is defective insofar as the building erections thereon were illegal, and that if the deed of sale agreement is cancelled, it is the bank, not the respondent, that will lose a substantial amount of money. Based on the lengthy delays since the sale in execution (10 May 2010), the respondent's main ground upon which she opposed the present application was articulated as being the applicant's attorneys of record's conduct which implied that the applicant has waived his right to cancel the deed of sale agreement. The applicant by seeking to now cancel the sale, was attempting to approbate and reprobate the sale agreement, which he could not do.

[18] The applicant opposed the counter-application of specific performance through an affidavit of Ms P C Lagarto ("*Lagarto*"), a Director of the applicant's attorneys of record, Lowndes Dlamini. Lagarto dealt with the matter on behalf of the applicant. The applicant himself, declined to make an answering affidavit to the respondent's counterclaim. This was based on the fact that he could not confirm the facts and/or the legal submissions which were not within his personal knowledge. The applicant, however, persisted with the relief to cancel the sale in execution as contained in his confirmatory affidavit attached to Lagarto's affidavit.⁸ The applicant also sought condonation for the late filing of the answering affidavit opposing the respondent's counter-application. In my view, such condonation ought to be allowed.

⁸ See annexure "D" bundle p 124.

[19] In essence, the applicant opposed the relief sought in the counterclaim on the basis, namely, that the respondent had not performed her reciprocal obligations towards the applicant. Such failure on the part of the respondent disentitled her claim to specific performance. This, on the basis *exceptio non adimpleti contractus*. I deal with the latter later herein below.

ISSUES FOR DETERMINATION

[20] The first issue to determine, based on the facts of this matter, especially the common cause ones, was whether the respondent breached the Conditions of the Sale Agreement. If so, whether the applicant was entitled to cancel the sale. It is trite that a breach of contract occurs generally when a party to the contract, without good cause fails to honour his/her obligations under the contract. See *Singh v McCarthy Retail Ltd t/a McIntosh Motors*.⁹ In Christie's *Law of Contract in South Africa*¹⁰, it is stated that:

"The obligation imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be in mora, and, in the last case, to be guilty of positive malperformance."

Reference was also made to *Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd*.¹¹ See also *Lillicrap, Wassenaar and Partners v Pilkington Brothers*.¹²

⁹ [2000] 4 All SA 487 (A), also reported at 2000 (4) SA 795 (SCA).

¹⁰ 6ed para 13, p 515.

¹¹ 1996 (3) SA 134 (N) 149F-150H.

¹² 1985 (1) SA 475 (A) at 499.

[21] In *The Sheriff v Jaithoon (supra)*, the Court had to decide whether the Sheriff had the power to cancel the sale, and resell the property without having obtained leave from the Court to do so. In that case, the purchaser was in breach of the conditions of sale by failing to pay the balance of the purchase price after paying a deposit only in respect of the sale. Cancellation of the sale was granted as claimed by the Sheriff. See also *Ex Parte Sheriff of Pinetown: In Re Ithala Development Finance Corporation Ltd v Buthelezi*.¹³

[22] In the context of the present matter, clauses 4.4 and 4.7.1 of the Conditions of Sale, quoted above, were crucial. The sale was held on 10 May 2010. In terms of clause 4.4 of the Conditions of Sale the respondent had to provide a bank guarantee, to be approved by the execution creditor's attorneys within 21 days after the date of sale. The respondent also had to, within 7 days after being requested to do so by the appointed conveyancer, pay all amounts required by the City of Johannesburg for the issue of a clearance certificate in terms of sec 118(1) of the Local Municipal Systems Act 32 of 2000. This, the respondent did not do. Instead, after the sale the respondent chose to negotiate with a bank to obtain a bond in favour of her own new purchaser. It was only on 17 September 2013 (some 40 months after the sale) did the respondent deliver an acceptable guarantee to Lowndes Dlamini. This was common cause since the respondent herself in her counter-application said:

¹³ 2008 (1) SA 456 (D&CLD).

“On 17 September 2013 I forwarded the amended guarantee to Legarto. Annexure ‘AN13’ is a copy of this mail.”¹⁴

However, in spite of the fact that the late delivery of the guarantee was accepted by Lowndes Dlamini, a large portion of the respondent’s counter-application made it plain that the applicant remained entitled to an order cancelling the sale concluded on 10 May 2010.

[23] With regard to the clearance figures as required by clause 4.7.1 of the Conditions of Sale, it was only on 12 September 2013 that the respondent, on her own version, was allegedly in possession of revised figures. This was clearly not within the seven days period as stipulated in the admitted Conditions of Sale. In addition, the respondent, on her own version, in the founding affidavit in support of the counter-application (commissioned on 15 November 2013) stated that:

“... I am in receipt of the revised City of Johannesburg clearance figures and enquired whether I can make payment thereof. The reason I enquired whether I could make payment of these figures was because I did not want to effect payment to the City if this matter was going to be cancelled because I would not get a refund.”

This, in my view, was a clear manifestation of a breach of the Conditions of Sale. The payment of clearance figures was essential for the transfer of the property from the execution debtors to the respondent. In this regard sec 92 of the Deeds Registries Act 47 of 1937 provides that no transfer of land shall be registered unless accompanied by a receipt or certificate of a competent public revenue officer that the taxes, duties, fees and quitrent payable to any

¹⁴ See para 38 p 11 of counterclaim.

provincial administration on the property to be granted or transferred have been paid. As at the hearing of this matter the clearance figures amount had still not been paid by the respondent. This fact was admitted by the respondent in the replying papers in the counter-application.¹⁵ In para 22.3 of the said affidavit, the respondent went on to state that:

“Any person who has had the experience with the City of Johannesburg will confirm the very slim chances of recovering monies paid over to them, especially in a situation like this.”

The respondent therefore remained in breach of the Conditions of Sale, which entitled the applicant to cancel the sale in execution.

[24] From the above, it was readily plain that the respondent, on her own version, failed to comply with the Conditions of Sale, and remained in default thereof to date. The applicant's election to cancel the sale in execution was accordingly manifest. This was borne out by the credible evidence. There was no question of the applicant approbating and reprobating, as contended for on behalf of the respondent. The applicant made genuine attempts to first resolve the matter amicably. It could not be now argued that the applicant had lost the right to cancel the sale agreement. The right to cancel was exercised within a reasonable time in the circumstances of this matter. See for example *Mahabeer v Sharma NO and Another*.¹⁶

¹⁵ See paras 22.1 to 22.3 of the replying affidavit, p 155.

¹⁶ 1985 (3) SA 729 (A).

THE DETERMINATION OF THE COUNTER-APPLICATION

[25] The respondent's counter-application, in the light of the above finding, required brief discussion only. The counter-application had no merit and must fail, for a number of reasons. The contract on which the Conditions of Sale was based plainly imposed reciprocal obligations on the parties thereto. The applicant had complied with his part of the agreement. On the other hand, the respondent failed demonstrably to perform her part under the Conditions of Sale. The guarantee for payment of the balance of the purchase price was furnished late by the respondent. Guarantees and transactions such as in the present matter are important. See for example in this regard *Rosen v Ekon*.¹⁷ The respondent failed to pay the amount of the clearance figures to date. Her tender to do so at the hearing of the matter, was unhelpful and insufficient, and clearly belated. The applicant's grounds for opposing the counterclaim based on the respondent's failure to perform her obligations in terms of the Conditions of Sale, were well-founded. In the circumstances, it will be unjust and inequitable to both the judgment creditor, the judgment debtors and the applicant to allow the respondent's counterclaim whilst she remained in default.

THE BUILDING PLANS

[26] The argument of the respondent that there were no building plans for the property and the cottages built thereon, had no merit at all. It too, ought to

¹⁷ [2000] 3 All SA 24 (W).

be dismissed out of hand. As argued by the applicant, and quite correctly so in my view, the respondent accepted the risk of purchasing the property, with all its improvements when she signed the conditions of sale on 10 May 2010. In terms of clause 6.1 of the Conditions of Sale, the property was at the risk and profit of the purchaser after the fall of the hammer and the signing of the Conditions of Sale and payment of the initial deposit. Clause 6.4 of the Conditions of Sale provided, *inter alia*, that the property is sold as represented by the Title Deeds and diagram, and that the Sheriff was not liable for any deficiency that may be found to exist. The sale in execution was not subject to any known suspensive conditions. The sale was not expected to influence, in any way the respondent's duty and obligations to perform in terms of the admitted conditions of sale. There was in any event, no credible evidence to support the respondent's contention about the absence of, or unlawful building plans. It also appeared to me that the argument was somewhat self-destructive of the respondent's cause. This was so since that, on the one hand the respondent made the allegation about the absent plans, whilst on the other hand, she insisted on taking transfer of the property. What was, however, clear was that the respondent was not entitled to an order for specific performance based on the *exceptio non adimpleti contractus*. The applicant made out a case for the cancellation of the sale in execution. In closing argument the applicant undertook to refund to the respondent the transfer duty and/or fees, in the event of the sale being cancelled. It will be proper to do so without a court order to that effect, in my view.

COSTS

[27] I deal briefly with the question of costs. It is a discretionary matter. There was no reason advanced by the costs should not follow the result. These kind of applications are normally dealt with in chambers by a judge. The present application was heavily opposed by the respondent. The respondent also filed a counter-application which had no merit at all. She must pay the costs.

ORDER

[28] In the result the following order is made:

1. Condonation is granted to both parties to the extent that affidavits were filed out of time.
2. An order is granted in terms of prayers 1, 2 and 3 of the notice of motion dated 31 July 2013.
3. The respondent's counter-application is dismissed with costs.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT	L VAN TONDER
INSTRUCTED BY	LOWNDES DLAMINI
COUNSEL FOR THE RESPONDENT	M G GIOIA
INSTRUCTED BY	Y JOHNSON ATTORNEYS INC
DATE OF HEARING	7 OCTOBER 2014
DATE OF JUDGMENT	5 FEBRUARY 2015