IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No.

DELTE WHICHEVER IS NOT APPLICABLE

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

DATE: **SIGNATURE:**

In the matter between:

KALISA, ALFRED GAKUBA	Applicant
And	
FIRSTRAND BANK LTD	First Respondent
ACTING SHERIFF, SANDTON SOUTH	Second Respondent
TSENG YU CHIU	Third Respondent
BEZUIDENHOUT VAN ZYL INC.	Fourth Respondent
REGISTRAR OF DEEDS	Fifth Respondent

JUDGMENT

VAN DER LINDE, AJ:

1 In this matter the applicant seeks an order setting aside a sale in execution of immovable property which took place on 16 September 2014. He was a debtor of the first respondent, a bank, who as security

for the indebtedness took a mortgage bond over the property that was sold in execution. The second respondent is the acting sheriff who sold the property; the third respondent is the purchaser; the fourth respondent is the first respondent's attorney and the fifth respondent is the Registrar of Deeds.

2 Ancillary relief is also claimed. This includes the setting aside of the writ of execution which led to the sale in execution; and an order declaring as valid and binding an agreement of sale concluded on the day before, being 15 September 2014, in terms of which the applicant sold the property concerned to Mr JL Rutayangilana.

3 Although the papers filed were comprehensive, the issue on which the case can be decided is very narrow. It is simply whether the applicant complied with the terms of an agreement to defer the sale reached between him, represented by his then attorney, and the fourth respondent, the attorney of the judgment debtor, the first respondent, in the course of correspondence exchanged between them.

4 More particularly, the first respondent's case is that it had, through its attorney, demanded that a certain fixed amount of the judgment debt be paid to the fourth respondent no later than the day before the sale in execution, and that this was not paid. The applicant's case is that, although he concedes that he was obliged to pay an amount no later

than the day before the sale in execution, that amount had in fact not been fixed in the agreement, and that he was free to fix the amount payable. He fixed an amount, he says, and paid it in time.

5 Against this introduction it is appropriate that the background facts first be set out. It all starts when the applicant borrowed money from the first respondent on 5 August 2003. In the years after that there were amendments to the loan agreement but those amendments do not bear on the issues. The applicant fell in arrears in time and eventually, on 26 January 2010, default judgment was granted against him. He never applied to have it rescinded.

6 The default judgment gave rise to a series of offers to settle the arrears. The first relevant one which was accepted was on 24 July 2013 when the first respondent recorded in an email to the applicant that they had agreed that the applicant would pay the arrears of R250 000 by the 26th of July 2013. The first respondent would also assist the applicant in marketing the property so that the applicant could dispose of the property to pay his debt to the bank.

7 Two days later, on 26 July 2013 a new agreement was concluded after the applicant and the first respondent had held discussions on the 24th of July 2013. That agreement provided for the payment of certain instalments, again to make up the arrears. It was no part of that

agreement that the first respondent would assist the applicant with the marketing of the property; reference to the first respondent's letter of 26 July 2013 bears this out.

8 This agreement was not adhered to by the applicant and this failure led to the first respondent instructing the fourth respondent, to sell the bonded property in execution.

9 The sale in execution was arranged for 16 September 2014. The pending sale resulted in the applicant making fresh offers to the first respondent. It starts on the 4th of September 2014 when the applicants then attorneys, Hew Inc. Attorneys, wrote to the fourth respondent, proposing to settle the outstanding arrears on the terms set out in paragraph 5 of the letter.

10 These included an initial payment of R200 000 within seven days of acceptance of the offer, and the balance of the arrears to be paid within 30 days after payment of the initial R200 000. It was a term of that offer that the first respondent would instruct the sheriff to suspend the sale in execution. The offer also provided that if the applicant were to fail to adhere to this arrangement, then the first respondent would be at liberty to proceed with the sale in execution.

11 The fourth respondent reverted on 4 September 2014 saying that it would take instructions; but having taken the instructions, the fourth

respondent wrote back on 8 September 2014 in a letter marked "Without Prejudice", saying that the first respondent was not prepared to accept the offer. In fact, the first respondent demanded payment of the full amount due and payable in terms of the facility, failing which it would proceed with the sale in execution.

12 The letter however contained a counter-offer in the following terms:

> *"3. In the event that your client is not a position to perform as per paragraph 2 supra, our client is willing, entirely without prejudice to any of its rights which remain strictly reserved, to afford your client 3 (three) months within which to liquidate the full amount due and payable, the first instalment to be made within 7 days from date hereof, and all subsequent payments to be made on the 1st day of each and every successive month in liquidation of the amount due and payable."*

13 On the next day, 9 September 2014, the fourth respondent wrote to the applicant's attorneys advising that the total amount due and payable was R3 023 042.19 as of 9 September 2014.

14 The response of the applicant's attorneys came on 10 September 2014. In that letter they wrote amongst other things as follows:

> *"3. We further confirm that our client has agreed to liquidate the total amount of R3 023 042,19 within 3 months as counter-proposed by your client.*
>
> *4. Our client further advises us that he will pay the first instalment within 7 (seven) days from the 9th September 2014 directly into the account of your client and we will forward you proof of that payment (SWIFT copy) as soon as our client furnishes us with the same.*

> 5. *The balance of the remaining debt will be settled within the stipulated time frame.*
>
> 6. *With regard to the foregoing and our client's commitment to liquidate the debt, it is our client's instruction to request confirmation, in writing, from you that the proposed sale by auction scheduled for the 16th September 2014 will be postponed/suspended until the expiry of the 3 months period."*

15 The first respondent argues that this letter did not constitute an unqualified acceptance of the first respondent's offer, because the letter proposes that the applicant would pay the first instalment within seven days from the 9th of September 2014, whereas the first respondent had demanded that it be paid within seven days of the 8th of September 2014.

16 Further, the first respondent's offer of 8 September 2014 did not say anything about the account into which the first instalment had to be paid, and the applicant's attorney's letter of 10 September 2014 proposed that the first instalment would be paid directly into the account of the first respondent.

17 Next, on 11 September 2014, two letters were written by the fourth respondent to the applicant's attorneys. One of them dealt with the substance of the applicant's letter of 10 September 2014. Two paragraphs of that response are important:

> *"2. Entirely without prejudice to any of our client's rights, which remain strictly reserved, kindly be advised that the sale in execution of the immobile (sic) property in*

question, better known as Erf 3…. S…… Ext 2… Township, scheduled to take place on 16 September 2014 will be cancelled on payment of the first instalment on or before the 15th of September 2014. The aforesaid must be read in conjunction with our letter dated 8 September 2014, the terms and conditions of which are to be incorporated herein mutatis mutandis. It must furthermore be borne in mind that the amount due and payable bears interest and, as such, the amount of the final instalment will be communicated to you in due course.

3. *Further to the aforesaid, all payments are to be made directly into our trust account, the details of which are as follows:*

Bank: First Rand Bank Ltd
Branch No.: 2……..
Account No. 6……..
Payment ref: M……"

18 The second letter of 11 September 2014 by the fourth respondent to the applicant's attorneys reads as follows:

"1. The telephonic conversation between our Mr Van der Merwe and your Mr Mhango this afternoon refers.

2. *Kindly be advised that the "SWIFT" code of First Rand Bank Ltd is FIRNZAJJXXX."*

19 The fourth respondent (Mr van der Merwe) says nothing about the contents of the telephone conversation referred to in this letter. Mr Mhango, the then attorney for the applicant, did not depose to an affidavit. No one knows what was said during that conversation, but the reference to *"SWIFT"* harks back to the applicant's attorney's letter of 10 September 2014 in which in paragraph 4 it was said, *"… we will forward you proof of that payment (SWIFT copy) as soon as our client*

furnishes us with the same." That undertaking was in the context of the offer to pay the amount directly into the account of the first respondent; on the 11th of September the fourth respondent's letter explicitly required that the payments, all of them, be made directly into the fourth respondent's trust account.

20 There was no recorded response to the fourth respondent's substantive letter of 11 September 2014. However, two days letter there came an email on Saturday, 13 September 2014 at 18h46 from the applicant's attorney to the fourth respondent. It reads as follows:

> *"Find attached hereto SWIFT copies evidencing proof of payment of the first instalment. Kindly contact your bank and instruct them to the release of the money from the bank's suspense account into your trust account, accordingly.*
>
> *We further advise you that our client has finalised the deal to sale (sic) the property through private treat at a high price than the amount owing to the bank (sic). Our client will be in the country on the 15th of September 2014 to sign the sale agreement.*
>
> *We have instructions to make an undertaking that the balance of the amount owing to the bank will be paid directly from the proceeds of the sale to your trust account before the balance thereof is paid to our client.*
>
> *From the foregoing and the first instalment having been paid directly to your account, we seek your confirmation that the auction for our client's property, scheduled for the 16th September 2014, be cancelled and/or suspended as per your letter of the 11th September 2014."*

21 Some comments are apposite in relation to this email. First, the first instalment was not paid to the fourth respondent but to the first

respondent; and the fourth respondent was requested to instruct the first respondent to release that instalment into the fourth respondent's trust account.

22 Second, an undertaking was given that the balance of the amount owing would be paid direct to the fourth respondent's trust account, and therefore not to the first respondent, as was the case with the first instalment.

23 It follows that if the applicant must be considered as having accepted the fourth respondent's substantive letter of 11 September 2014, and if an agreement thus came into existence on those terms, then on the face of it there was non-compliance with the requirement that the first instalment be paid into the fourth respondent's trust account. There may also have been non-compliance concerning the amount of the first instalment, and this is an issue to which I return below.

24 In my view an agreement did came into existence on those terms. This is evidenced by the fact that the first instalment was being paid by the applicant without him having rejected the substantive content of the fourth respondent's letter of 11 September 2014. The conduct of payment is consistent only with an acceptance of the terms of the offer last conveyed. Mr Makgato for the applicant did not contend otherwise.

25 The fourth respondent responded on Monday 15 September 2014 at 09h20 in an email in which the following was said:

> *"From a perusal of the attachment we are unable to ascertain the exact amount that will be paid into our trust account, kindly advise. It must furthermore be borne in mind that the transfer of the money, as per the "SWIFT" transaction takes 2 to 3 working days. … We await to hear from you as to the amount transferred."*

26 This enquiry probably arises from the fact that the documents that were attached to the 13 September 2014 email appeared to indicate that the amount that was being paid was US$10 000. That roughly represented R100 000.

27 The applicant's attorneys responded to this email, saying that US$20 000 *"was transferred to your trust account on Friday".* Further, *"… in terms of our understanding, the transfer takes effect immediately and reflects into the bank's suspense account a few minutes after it has been transferred. It is up to the recipient or beneficiary of the amount transferred to request their bank to release the money transferred into the relevant account. The transferred money does not go directly into the beneficiary's account because of anti-money laundering laws."*

28 The letter went on to say:

> *"From the foregoing it is our prayer that the scheduled auction of the tomorrow (sic) be suspended as all steps have*

> *been taken to ensure that the amount owing to your client is paid within the three months agreed period."*

29 This email elicited a response from the fourth respondent dated 15 September 2014 which was sent by fax. The relevant portion of this letter read as follows:

> *"2. It was a specific requirement that the first instalment of R1 007 680,73 be made on or before the 15th September 2014 (in order to liquidate the full amount due and payable in terms of the facility over three months). Your client's "SWIFT" payment of US$20 000 does not equate to R1 007 680,73, taking into consideration the current exchange rate between the Rand and the Dollar. It must therefore be borne in mind that the payment of US$20 000 does not reflect in our trust account we presume due to exchange control regulations."*

30 The letter concluded by saying, *"… we hold instructions to proceed with the sale in execution of the immovable property scheduled to take place tomorrow morning at 11h00."*

31 This fax elicited an email response from the applicant's attorneys dated 15 September 2014 at 15h06. The email said amongst other things:

> *"We recall that your letter of 8th September 2014 did not specify any particular amount to be paid within seven days. Your letter indicated that your client is ready to afford our client three months and on that basis, our client paid the amount he had in good faith."*

32 The letter went on to say that the applicant had concluded a sale agreement which if performed, would guarantee payment to the first respondent of the full balance within the three month period afforded.

33 At 15h51 on the 15th of September 2014 the fourth respondent replied by email. The relevant part for present purposes of the email read as follows:

> *"At the outset we wish to place on record that our letter addressed to you dated 8 September 2014 is clear with reference to the re-payment terms, to wit that our client would cancel the sale in execution on payment of the total amount due and payable in terms of the facility in 'instalments', the first instalment to be paid on before the 15th of September 2014, and all subsequent instalments to be paid on or before the 1st day of each and every successive month in liquidation of the debt, over a period of 3 (three) months. It follows that your client had to effect equal monthly instalments in order to liquidate the debt over a three month period – your client was never afforded a moratorium of three months within which to settle the debt. The Oxford Dictionary defines instalment as follows: 'a sum of money due as one of several equal payments for something, spread over an agreed period of time.'"*

34 Further letters were exchanged on that day, but they rendered no result. The letter the sale in execution proceeded on 16 September 2014.

35 I now come back to the two respects in which, at least prima facie, the applicant had failed to comply with the agreement contained in the substantive letter of the fourth respondent off 11 September 2014. It is necessary to consider those aspects closer so as to come to a firm conclusion on them.

36 The first issue relates to the manner of payment of the first instalment. It is trite that a creditor may direct the debtor that the former requires

discharge of the obligation in a particular way at a particular time. In the said letter, the fourth respondent explicitly stated that all payments were to be made *"directly into our trust account"*.

37 The applicant's attorney's email of 13 September 2014 conveyed that a payment had been made by or on behalf of the applicant into the account of the first respondent. That payment, standing on its own, therefore did not serve to discharge the obligation. However, the obligation could conceivably only be considered to have been discharged if the applicant's attorney's instruction to the fourth respondent to instruct the first respondent to pay the money over to the trust account of the fourth respondent, was permissible in a contractual sense. By that I mean to convey that ordinarily a creditor is obliged to cooperate with the debtor for the debtor to discharge its obligations to the creditor.

38 I doubt however whether that principle would extend to include entitling a debtor to expect of a creditor to assist the debtor in discharging an obligation which the debtor would have been able itself to have discharged, without the assistance of the creditor. Put differently, the principle that the creditor is obliged to cooperate would extend, in my view, only to those respects in which the debtor is unable itself to discharge its obligation without the creditor's assistance.

39 The payment of 13 September 2014 therefore did not discharge the applicant's obligation to pay the first instalment, whether by the 13th of September 2014 or by the 15th of September 2014. On this basis alone, in my view, the applicant had failed to comply with the agreement between him and the first respondent, and the first respondent was entitled to have proceeded with the sale in execution on the 16th of September 2014.

40 The second issue concerns the size of the first and subsequent instalments. I have quoted above the contents of paragraph 3 of the fourth respondent's letter of 8 September 2014, repeated here for ease of reference:

> *"3. In the event that your client is not a position to perform as per paragraph 2 supra, our client is willing, entirely without prejudice to any of its rights which remain strictly reserved, to afford your client 3 (three) months within which to liquidate the full amount due and payable, the first instalment to be made within 7 days from date hereof, and all subsequent payments to be made on the 1st day of each and every successive month in liquidation of the amount due and payable."*

41 The first question to ask is whether the reference to *"3 (three) months"* is a reference to calendar months or to 30 day periods. In my view it is in fact a reference to calendar months, because the subsequent part of the sentence refers to the subsequent payments having to be made on the first day of *"each and every successive month"*. That would indicate that the months that follow upon the month in which the first

instalment is to be made, are calendar months. And since ordinarily the use of a word more than once in close proximity would suppose that the same meaning is to be attached to it in both instances, the first reference to *"months"* ought also to be considered as a reference to calendar months.

42 On this basis then there were three calendar months within which to have liquidated the full amount due and payable: September, October and November. Since the first instalment was required to be made within seven days of 8 September 2014 (therefore by the 15th of September 2014), that left two calendar months, being October and November, within which to pay the balance.

43 The next question is whether the three instalments were required to be equal. The answer to that question is in my view that the first two instalments were required to be equal, but that the third instalment, being the final instalment, would be adjusted to incorporate the interest that would have run up on the reducing balance of the capital amount in the meantime.

44 First, this follows from the contents of paragraph 2 of the fourth respondent's substantive letter of 11 September 2014, the last sentence of which reads as follows:

> *"It must furthermore be borne in mind that the amount due and payable bears interest and, as such, the amount of the final instalment will be communicated to you in due course."*

45 Clearly what was intended when paragraph 3 of the fourth respondent's letter of 8 September is read with paragraph 2 of the fourth respondent's letter of 11 September 2014, is that there would be, at the very least, payments on each of the 1st of October and the 1st of November.

46 Second, the final instalment, that of the 1st of November, could not be determined in advance, and would have to be calculated later, for a specific reason mentioned in the letter: namely that the reducing balance was bearing interest. In other words, the implication is that the author considered that were it not for the interest factor, it would not have been necessary to defer the determination of the amount of the final instalment. And the author must have reasoned that were it not for the interest issue, it would have been unnecessary to defer fixing the final instalment because it would have been the same as the previous two.

47 The result is therefore that on a proper interpretation of paragraph 3 of the 8 September 2014 letter of the fourth respondent, read with paragraph 2 of the 11 September 2014 letter of the fourth respondent, the agreement required that the outstanding amount of R3 023 042,19 be paid in three instalments, the first two of which would be equal, and

the third of which would be equal to each of the two instalments that preceded it, plus such interest as will have accrued on the outstanding balance, calculated as from the 10th of September 2014.

48 The first payment by the applicant of some R200 000 was therefore substantially less than R1 007 680,73, which represents a third of the capital amount as of 9 September 2014.

49 In this respect, too, the agreement was not complied with and the first respondent was therefore entitled to have proceeded with the sale in execution.

50 If the agreement was in fact not established on the first respondent's version, which is of course the procedurally preferred version, then at best for the applicant there was no binding agreement to defer the sale in execution. The does not spell relief in terms of the notice of motion.

51 In view of the conclusion to which I have come, it is not necessary to deal with the striking out application. As regards the costs reserved in respect of the rule 7 application, they should follow the event. I am not persuaded that a special order is warranted.

52 In the result I make the following order:

1. The application is dismissed with costs, including the reserved costs of the rule 7 application.

_____
WHG VAN DER LINDE
ACTING JUDGE OF THE HIGH COURT

For the Applicant:	Adv. MC Makgato
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For the First Respondent:	Adv. A Lamprecht
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Date argued:	3 September 2015
Judgment delivered:	11 September 2015