IN THE COURT OF SOUTH AFRICA

[REPUBLIC OF SOUTH AFRICA]

APPEAL CASE NUMBER: A5024/2018

G.J CASE NUMBER: A22478/2013

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

10 / JUNE / 2019
DATE

SIGNATURE

in the matter between:

NISHAL MOHANLAL RAMLOUTAN — APPELLANT

(First respondent in the Court a quo)

And

SHIRISHKUMAR JIVAN KALIANUJEE N. O. — FIRST RESPONDENT

MOHERANE WILLIAM HARRY MATHIBEDI N. O — SECOND RESPONDENT

JUDGMENT

Mavundla J.

[1] The respondents applied for, and obtained, an order setting aside registration of transfer to the appellant of an immovable property, Erf 195, Morningside Extension 14, known as 26 French Lane, Morningside Extension 14 ("the property"), together with relief ancillary thereto. The appellant is now appealing against this order.

[2] The relevant order was granted by Victor J on 1 August 2014, in the following circumstances, which are common cause:

2.1 During or about 2005, Nedbank lent and advanced monies to Pamela Samuel as security for a mortgage bond registration over the property;

2.2 Samuel defaulted on her loan obligations to Nedbank which resulted in Nedbank foreclosing on the property in terms of a judgment granted in this court on ;

2.3 On 23 October 2012, a sale in execution of the property was held where the appellant purchased the property for the sum of R2930 000. 00;

2.4 On 30 November 2012, a sequestration application was issued and a provisional order was granted on the 11 December 1012 under case number 69425/2012

2.5 On 29 January 2013, the Deputy Sheriff caused the registration of transfer of the ownership of the property to be effected into the appellant's name;

2.6 On 4 February 2013, a final order of sequestration was granted;

2.7 The respondents, who are the joint trustees of the insolvent, applied to have the transfer set aside;

2.8 The appellant, relying on the provisions of section 20(1)(c) of the Insolvency Act, Act 24 of 1936 ("the Act"), opposed the application on the basis that execution of the judgment against the insolvent was not suspended, due to the sheriff not having become aware of the sequestration of the insolvent, and that consequently the transfer is unassailable.

[3] The court *a quo* granted leave to appeal on the basis that there was a compelling reason for consideration as contemplated in section 17(1)(a)(ii) of the Supreme Court Act, Act No. 10 of 2013 ("The Supreme Court Act") in that the point was *res nova* and should be considered by an appeal court. The appeal is accordingly brought with the leave of the court *a quo*.

[4] The grounds of appeal are that:

4.1 the court *a quo* correctly found that the sheriff did not become aware of the insolvent's sequestration;

4.2 despite this absence of knowledge, the court a *quo* however concluded that execution was in any event stayed and that consequently the transfer of the property to the appellant was unlawful and had to be set aside.

[5] The question to be determined on appeal is therefore whether execution against the estate of an insolvent is automatically stayed despite the sheriff not gaining knowledge of the sequestration as contemplated in section 20(1)(c)[1] of the Insolvency Act 24 of 1930.("The Act")

[6] The appellant contended that the respondent at no time disputed that the sale in execution of the property was properly executed and that the appellant complied with all the terms of the agreement of sale. The respondent also did not contest the allegations that the appellant was a *bona fide* innocent third party purchaser, who had no knowledge of the preceding sequestration proceedings. It is further common cause that no caveat was registered against the transfer of the property, as contemplated in section 17 of the Act.

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[1] The section reads as follows:
"20 Effect of sequestration on insolvent's property
(1) The effect of the sequestration of the estate of an insolvent shall be-
(a) ...
(b) ...
(c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs;"

[7] The appellant further contended that the respondent's affidavit did not make out a case to the effect that the sheriff became aware of the sequestration of the insolvent's estate. Reliance on section 20(1)(c) of the Act was therefore never part of the respondents' cause of action. The respondents attempted to import in their replying affidavit facts which would justify reliance on section 20(1)(c) of the Act. The court *a quo* correctly found that the sheriff did not become aware of the sequestration, and this aspect does not form a subject matter of this appeal, so it was contended.

[8] It was further contended by the appellant that despite the above, the court *a quo* however concluded that the *concursus creditorum* and or section 20(1)(a) of the Act "trumps" non-compliance with section 20(1)(c) of the Act. The Court *a quo* on the aforesaid basis was of the view that the continuation of execution of the judgment against the insolvent was unlawful, consequently the court *a quo* concluded that that the registration of the transfer of the property in the name of the appellant had to be set aside.

[9] The appellant further contended that Shongwe JA in *Foure & Another v Edkins*[2] held that: "[15] The meaning and effect of s20(1)(c) read with subsec 2(a) of the Act is that as soon as the sheriff becomes aware of the sequestration of the debtor's estate he is duty-bound to or enjoined by operation of law to stay the execution, unless the court otherwise directs...."[3]

[10] The appellant further contended that the court *a quo's* finding that execution against a judgment is in any event stayed despite the relevant sheriff not becoming aware of the sequestration of the debtor, effectively renders section 20(1)(c) of the Act superfluous. If execution was automatically stayed, there would not have been any need to insert section 20(1)(c) of the Act.

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[2] 2013 (6) SA 576 (SCA) at [15].

[3] In para [15], the following was said: "The meaning and effect of s20(1)*(c)* read with subsec (2)*(a)* is that as soon as the sheriff becomes aware of the sequestration of the debtor's estate, he is duty bound or enjoined by operation of law to stay the execution, unless the court otherwise directs. Subsection *2(a)* deals with what constitutes the property of the insolvent at the date of the sequestration. The effect of subsec (1) is to confer the power or control (and not ownership) of the property on the Master and subsequently the trustee and to dispossess or remove control of the property from the sheriff unless the court otherwise directs. This simply means any interested party (including the execution purchaser) may approach the court to direct otherwise. Logically the interested party must place facts before the court to persuade it to direct otherwise."

[11] The appellant further contended that the process to be adopted by a court in interpreting a statute was comprehensively dealt with by the Supreme Court of Appeal in *Natal Joint Municipality Pension Fund v Endumeni Municipality*[4] as follows:

"[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.[5] It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.*[6] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all these factors.[7] The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the

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[4] 2012 (4) SA 593 (SCA) at [18].

[5] Spigelman CJ describes this as a shift from text to context. See 'From Text to Context: Contemporary Contractual Interpretation', an address to the Risky Business Conference in Sydney, 21 March 2007 published in J J Spigelman *Speeches of a Chief Justice 1998 – 2008* 239 at 240. The shift is apparent from a comparison between the first edition of Lewison *The Interpretation of Contracts* and the current fifth edition. So much has changed that the author, now a judge in the Court of Appeal in England, has introduced a new opening chapter summarising the background to and a summary of the modern approach to interpretation that has to a great extent been driven by Lord Hoffmann.

[6] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16 - 19. That there is little or no difference between contracts, statutes and other documents emerges from *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.

[7] Described by Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 as an iterative process. The expression has been approved by Lord Mance SCJ in the appeal *Re Sigma Finance Corp (in administrative receivership) Re the Insolvency Act 1986* [2010] 1 All ER 571 (SC) para 12 and by Lord Clarke SCJ in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2012] Lloyds Rep 34 (SC) para 28. See the article by Lord Grabiner QC 'The Iterative Process of Contractual Interpretation' (2012) 128 *LQR* 41.

temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',[8] read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[12] It was further submitted that:

12.1 it is a well-established rule of construction that a statutory provision should, if possible, be construed in such a way that effect is given to every word so that no word, clause or sentence, if it can be prevented, is construed to be superfluous, (relying on the authority of *NST Ferrochrome (Pty)Ltd v Commissioner o for Inland Revenue* 2000 (3) SA 1040 SCA at [12]);

12.2 The Court *a quo* should therefore have held that the sheriff's transfer of the property to the appellant did not occur contrary to the provisions of section 20(1)(c) of the Act and that the sheriff had the necessary authority to proceed with the transfer.

[13] It was further submitted that, as appears from the judgment of *Knox N.O. v Mofekeng and Others*[9] immovable property can be vindicated from a *bona fide* purchaser in the following circumstances:

13.1 if property is sold at a sale in execution in terms of a valid, existing judgment, same cannot be vindicated from a *bona fide* purchaser once the property has been transferred to the purchaser - provided the sale in execution was not a nullity;

[8] Per Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98. The importance of the words used was stressed by this court in *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25 to 30.
[9] 2013 (4) SA 46 (GSJ).

13.2 This implies that even where a valid judgment has for example been rescinded after the sale in execution had taken place, the property cannot be vindicated from a *bona fide* purchaser who has taken transfer of the properly merely on the grounds that the judgment has been rescinded;

13.3 However, this only applies where a valid judgment was in existence at the time of execution sale and where a valid sale in execution complying with the essential applicable rules of court and statutory measures had taken place. Where there was no judgment, or where the judgment was *void ab initio*, the immovable property in question can in principle be vindicated from the *bona fide* purchaser who had taken transfer of the property. The reason for the second rule is that where the sale in execution was invalid, the sheriff had no authority to transfer the property to the purchaser. The result is not only that the underlying sale agreement concluded at the sale in execution is invalid, but also that the real agreement is defective, since the sheriff does not have authority to transfer the property to a new purchaser.

[14] It was further submitted that, in applying the principles laid down in the *Knox* judgment to the facts in the current matter, it would mean that the application could only have been successful if the immovable property was transferred to the applicant despite the sheriff having had knowledge of the insolvent's sequestration. Had this been the case, the sheriff would no longer have had authority to proceed with the transfer, and the transfer would have been unlawful.

[15] It was further contended by the appellant that the above interpretation will not, as contended by the respondents, have the effect of rendering section 20(1)(a) of the Act nugatory. The reason for this is that trustees have the right, upon the *concursus creditorum* coming into effect, of electing whether or to terminate the sale agreement

in respect of the property - relying on the authority of *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd*[10];

[16] The applicant further referred to the authors in Messkin Insolvency Law and its Operation in Winding Up, Issue 31 p5-51:
"...The effect of the institution of *concursus* is to preclude any entitlement to specific performance against the trustee or the liquidator: the fate of the contract is dependent upon the exercise of the election which the trustee or liquidator has with reference thereto, subject to any right (other than one to specific performance) which in terms of the contract already has accrued to the other party thereto at the institution of the *concursus*."

[17] In the present case, so it is submitted, the respondents could therefore have terminated the sale agreement concluded with the appellant, or they could have interdicted the transfer. They elected not to do so, despite the petitioning creditor being the insolvent's brother and having knowledge of the sale.

[18] The appellant concludes by contending that the execution against the insolvent's estate was not stayed since the mandatory provisions of section 20(1)(c) of the Act were not complied with. The sheriff was therefore not deprived of the authority legally to transfer the property to the appellant. Consequently, the property was lawfully transferred to the appellant following a valid and binding judgment, sale in execution, and transfer and that accordingly, the order setting aside the sale by the court *a quo* should be replaced with an order dismissing the application with costs, which shall include the costs of two counsel.

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[10] *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd*1988 (2) SA 546 AD at 566H-5667A.

[19] It is trite that upon sequestration of the debtor's or insolvent's estate, a *concursus creditorum* automatically comes into existence[11], that is, the law places its hand on the assets of the insolvent, thus precluding any person from disposing of the said assets. The insolvent is divested of the property in the insolvent estate, which is then vested with the Master until a trustee is appointed; Vide *Van Zyl NNO v The Master.*[12]

[20] Section 20(1) (a) of the Act provides that:

"The effect of the sequestration of the estate of an insolvent shall be—

to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him."

[21] A *Concursus creditorum* comes into effect automatically once a provisional order is granted, *in casu* it came into effect on the 11 December 1012 under case number 69425/2012 (vide 2.4 supra). This meant that in terms of section 20(1)(b) of the Act any civil proceedings against the estate of the insolvent was stayed until the appointment of a trustee.

[22] Significantly, section 5 of the Insolvency Act proscribes the sale of the attached property of an insolvent under a writ of execution. Section 20(1)(b) of the Act stays any civil proceedings instituted by or against the insolvent until the appointment of a trustee. It stands to reason that once a trustee is appointed, the insolvent estate vests with the trustee. The stay of any proceedings against the insolvent upon the appointment of the trustee axiomatically is not uplifted, but remains.

[23] *In casu*, the sale in execution of the property was held on 23 October 2012. The property at that stage vested with the Sherriff by virtue of the attachment, pending transfer thereof to the purchaser. Thereafter, a *concursus creditorum* came into being

[11] Mondi Limited v Rhodes 1997 (3) ALL SA 291 (D).
[12] 2013 (5) SA 71 (WCC) at 77.

when a provisional order was granted on the 11 December 2012. The effect thereof, was that as from the last mentioned date the assets of the insolvent, including the property already sold but still vesting with the Sheriff, was divested from the insolvent and the sheriff to vest with the Master, until the appointment of trustees; vide s20(1)(a) of the Act.

[24] In *Willow Waters Homeowners v Koka*,[13] Maya JA held that: "[22] It is established that ownership comprises a bundle of rights or competencies which include the right to use or exclude others from using the property or to give others rights in thereof. One of these rights or competencies is the right to freely dispose of the property, the *ius disponendi*. If that 'right' is limited in the sense that the owner is precluded from obtaining the full fruits of disposition... [then] one of his rights of ownership is restricted. In this matter the embargo registered against the property's title deed 'carves out, or takes away' from the owner's dominium by restricting its *ius disponend*. Thus, it subtracts from the dominium of the land against which it is registered. It satisfies the second aspect and is, therefore, a real right."

[25] In the matter of *Simpson v Klein NO and Others*[14] the Court held that: "Where one is dealing with movables, ownership would pass upon delivery thereof, i.e. by the deputy-sheriff to the purchaser at the sale in execution. In the case of immovables, however, ownership in the attached property cannot pass during the sale in execution. It only passes subsequently upon formal transfer of the property by the deputy sheriff to the purchaser in execution."

[26] In Ex *Parte Flynn: In re United Investment Ltd*[15] the court, dealing with the provisions of section 183 of the Companies Act, held that: Execution includes attachment of the property and the sale of the property and it seems to me that to sell the seized property in execution is to put in force the execution. ...the sale of the seized property after the winding-up order has been made would be void in terms of the section. The obligation to transfer the property sold arises out of the sale and I think is also covered by the section. .... The transfer of the property is one of the steps in the execution proceedings. Those proceedings would fall within the term 'all civil proceedings' and as there is no

[13] 2015 (5) SA 304 (SCA) at 312 E-G.
[14] 1987 (1) SA 405 (WLD) at 411B-C.
[15] 1953 (3) SA 443 [E,D.L.D] at 445 A-B read with 445 G-H.

ground for narrowing that phrase to exclude a stay in such proceedings there must be a suspension of that step; that is the transfer."

[27] *In casu*, the sale in execution of the property was held on 23 October 2012. The property at that stage vested with the Sherriff by virtue of the attachment, pending transfer thereof to the purchaser. Thereafter, a *concursus creditorum* came into being when a provisional order was granted on the 11 December 2012. The effect thereof, was that as from the last mentioned date, the assets of the insolvent, including the property already sold (but with the *ius disponendi* not being completed pending transfer whilst the property still vested with the Sheriff, was divested from the latter and thereupon vested with the Master, until the appointment of the Trustees.

[28] In the matter of *Menqa and Another v Markom and Others,*[16] the Supreme Court of Appeal held that if a sale in execution was *null and void* because it violated the principle of legality, the sheriff had no authority to transfer ownership to the purchaser. In my view, once the sheriff was divested of any residual right, *in casu*, the right to complete the sale - the *ius disponendi* having been divested from him, the purported transfer on 29 January 2013, was devoid of any legality because the sheriff transferred what no longer vested with him; vide *Schoerie NO v Syfrets Bank Ltd and Others*[17].

[29] The Court *a quo* noted that there was no notice as envisaged in terms of s17(1) read with s17(3) of the Insolvency Act, 24 of 1936. Upon a sequestration order being issued, the registrar is obliged in terms of subsection 17(1) of the Supreme Court Act to send to the sheriff, one original of every provisional sequestration order or the final sequestration order. Subsection 17(3) of the Supreme Court Act obliges the sheriff upon receipt of such order, to enter a caveat against the transfer of the immovable property or cancellation of a bond pertaining to such immovable property. *In casu,* this was not done.

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[16] 2008 (2) SA 120 SCA.
[17] 1997 (1) SA 764 (D & CLD) at 778G-H et 781F-I.

[30] The court a *quo* took into account the fact that when the sale in execution took place on 23 October 2012, the property forming the subject matter of the application fell within the area of the Sheriff Sandton/Midrand and consequently the sale in question of the property was conducted by the Sheriff Sandton/Midrand. Thereafter, on 1 November 2012, there was a new structure introduced as to the sheriff's jurisdictions and the Sheriff of Randburg was divided into two sheriff's offices namely Sheriff Randburg-West and Sheriff Randburg South-West. The Sheriff Sandton was divided into two offices, namely, Sheriff Sandton-North and Sheriff Sandton-South.

[31] When the new order came into effect, the Department of Justice did not immediately appoint a Sheriff for Sandton-South, but appointed the Sheriff Halfway-House as the acting Sheriff for Sandton-South. So, quite clearly this property fell within the jurisdiction of the Sheriff Sandton-South. The papers for the sequestration which were purportedly served on 30 November 2012 and the return of service issued by the sheriff of Sandton-South were dealt with at that office.

[32] The sequestration application was served on the second respondent personally, and that return of service clearly reflects that the service of the provisional order on 7 January 2013 was issued by the Sheriff Halfway-House. The registration of the transfer papers on 29 January 2013 was clearly initiated at the instance of the Sheriff Halfway-House, Alexandra, which is where he was acting in his capacity as Sheriff Sandton-South. The registration of the transfer was prompted as the instance of his office.

[33] The Sheriff Sandton alleged that he had made a search in both the Sandton-South and Halfway House offices for the documents regarding the service of the provisional order of sequestration in December 2012, to no avail. The returns referred to herein above clearly demonstrate that it is unlikely that this particular sheriff could not have been aware of the sequestration of this insolvent. Accordingly, in my view, the provisions of s5 of the Act, which proscribes the sale of attached property belonging to an insolvent estate, finds application. Accordingly I find that the decision of the court *a quo* that the

concursus creditorum takes precedence, in the circumstances of this case, cannot be faulted.

[31] In the result the appeal is dismissed with costs.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

I agree

ZEENAT CARELSE
JUDGE OF THE HIGH COURT

I agree

AVRILLE MAIER-FRAWLEY
ACTING JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 19/ 06 / 2019

APPLELLANT'S ADV. : ADV M. MOSTERT

INSTRUCTED BY : JJFB INCORPORATED

1ST RESPONDENT'S ADV: ADV. B GRADIDGE

INSTRUCTED BY : KRAMER VILLION NORRIS ATTORNEYS

2ND RESPONDENT'S ADV: ADV. BH SWART SC

INSTRUCTED BY : JACO ROOS ATTORNEYS INC