IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

In the matter between: **Case Number: 29378/14**

13/10/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

6/10/2014 .....
DATE SIGNATURE

LUKAS MARTHINUS DE WET **FIRST APPLICANT**

ALTA DE WET **SECOND APPLICANT**

and

THE SHERIFF, HIGH COURT, CULLINAN **FIRST ESPONDENT**

STANDARD BANK OF SA LIMITED **SECONDRESPONDENT**

BOOYSEN OOSTHUIZEN **THIRD RESPONDENT**

JUDGMENT

PRELLER J:

The applicants apply for an order setting aside the sale of their immovable property on 30 January 2014 by the sheriff of Cullinan, who is the first

respondent. In the alternative they apply for an order reviewing and setting aside the decision of the sheriff to continue with the sale in the face of an instruction by the second respondent (who was the execution creditor) to cancel the sale. The first and second respondents gave notice that they abide the decision of the court, although the latter has filed an affidavit confirming the relevant facts as set out by the applicants. The application is opposed by the third respondent (the purchaser of the property at the execution sale), who filed a notice in terms of Rule 6(5)(d)(ii) that he is taking a point of law.

The facts are undisputed and relatively straightforward: The second respondent, through the first respondent, arranged a sale execution of the applicants' immovable property after they had failed to pay the agreed instalments on their bond. The amount of the arrears was approximately R35 000 and the outstanding balance just less than R460 000.

In order to avoid the sale of their property in execution the applicants found a purchaser for the property for an amount of R1 450 000. The sale was subject to the suspensive condition that the purchaser be granted a loan of R1 375 000. The application for a loan was turned down and on the day of the sale the applicants signed an addendum to the deed of sale in terms of which the purchase price was reduced by R105 000. The purchaser succeeded in obtaining a loan that enabled him to finance the transaction at the reduced price and the applicants satisfied the second respondent that their purchaser would be able to pay the purchase price, including the amount due in terms of the bond.

The sale was advertised to be held at 10h00. Before the commencement of the auction the sheriff was informed that the property had been sold and that the first respondent's instruction to cancel the sale was imminent. At 10h00 the sheriff started proceedings by reading out the conditions of sale and at 10h06

the second respondent instructed its attorneys to cancel the sale. This instruction was conveyed to the second respondent's representative at the auction, who jumped up and informed the sheriff that the sale is to be stopped, while the latter was still busy reading out the conditions of sale. In reaction the sheriff informed his audience that the sale had been cancelled, but the third respondent objected, threatening legal action if the auction did not proceed. The sheriff thereupon left the auction hall, presumably to take legal advice. He returned after a while and proceeded with the auction, which resulted in the third respondent purchasing the property for R730 000. The applicants were understandably upset by their loss of more than R600 000 on the transaction, hence the present application. The second respondent filed affidavits by its attorney of record and the representative at the sale, confirming the version of the applicants.

The legal point taken by the third respondent is formulated as follows:

> **"In conducting a sale in execution the [sheriff] is acting as '*an executive of the law*' and not as an agent of the [execution creditor]. Once a written instruction to proceed with a sale in execution has been furnished by an execution creditor to the relevant sheriff as provided for in Rule 46(4) then such sheriff cannot, absent a contrary written instruction, terminate or call off such a sale. The first respondent's contention quoted in paragraph 11.3.3 of the founding affidavit was therefore correct in law and the applicants are not entitled to the relief sought."**

The contention of the sheriff referred to in the founding affidavit is that the execution sale of the property was the only one scheduled for that day, that he had already commenced reading the conditions, that he was by law not allowed

to stop the sale and that there were purchasers who insisted that the auction be held.

The crisp point for decision is therefore whether the sheriff was legally entitled to cancel the sale in execution once he had started it, absent a written instruction by the execution creditor.

In his practice note Mr Davis SC for the third respondent formulated the question for decision as being whether the applicants are entitled to an order setting aside the sale in execution on the basis that the sheriff had been obliged to call off the sale on the oral instruction of the execution creditor. I am not sure whether this was intended to raise the question whether there is any provision in law for the setting aside of an execution sale, akin to the provisions for the rescission of a default judgment in terms of the Rules or the common law, but that question was not argued before me - counsel having concentrated exclusively on the legal consequences of an instruction to the sheriff to hold an execution sale and whether that instruction can be countermanded orally. Although the alternative prayer in the Notice of Motion makes provision for all the formalities that go with a review application, they were simply ignored. The application was approached on the assumption that an execution sale can be set aside and I shall assume without deciding that it can.

Mr van Rooyen for the applicants devoted no fewer than three pages in his short heads of argument to quote extensively from the wording of Rule 46, the only relevant parts of which for present purposes are sub-rules (4)(b) and (8). Of more assistance was his reference to section 45 of the Consumer Protection Act, 68 of 2008 and the Regulations promulgated in terms of section 45(6).

The following are the main enactments that are relevant for this case:

- Uniform Rule 46 regulates execution sales of immovable property. In terms of sub-rule (8) the execution creditor must prepare conditions of sale "corresponding substantially with Form 21 of the First Schedule." How much deviation will be permissible before the conditions will no longer correspond substantially may be a problem. It is, however, obvious that some scope must be allowed for deviations. See for example the provision in the second proposed provision that bids may only be for one rand or more. In the present economic environment, conditions of sale almost invariably require a minimum of R1 000. Likewise the requirement in condition 7 that bids will be considered only from persons who are acceptable in terms of the now repealed Group Areas Act, has fallen by the wayside. Both these deviations from the strict wording are substantial, but in my view acceptable and in fact essential. The proposed conditions as contained in Form 21 would fill no more than about two typewritten pages, but the conditions drawn up by the sheriff for the current sale were 12 pages long. There was no attack on the validity of any of the other conditions, nor was it argued that the far longer conditions did not "correspond substantially" with the conditions proposed in Form 21.

- After three sub-rules dealing with the attachment in execution, sub-rule (4) is the first of several dealing with the procedure prior to and during the sale. Rule 46(4)(b) requires the sheriff, upon written instruction from the execution creditor to proceed with the sale, to identify any bonds and other encumbrances registered against the title deed of the property in question. The word that I have underlined is relevant for an important part of the submissions made by Mr Davis.

- The Consumer Protection Act brought about some important changes to the working of Rule 46. Section 45(1) provides that a sale in execution is an "auction" as contemplated in the Act and the provisions in the relevant chapter of the Act must amend the provisions of Rule 46 *pro tanto.* In terms of Rule 46(15) the sheriff may not buy anything at his own execution sale and in terms of sub-rule (12) the sale must be without reserve, but subject to sub-rule (5). The only qualification in this regard contained in sub-rule (5) is that the local authority and a preferent creditor may stipulate a reasonable reserve price. The need for this qualification is obvious - the parties concerned should have the right to ensure that at least the outstanding municipal rates and the amount owing in terms of a bond are covered by the proceeds of the sale.

- That position has been changed by sub-sections (4) and (5) of section 45. The sale may now be subject to a reasonable reserve price (no longer limited as in Rule 46(5)) and the sheriff may bid at the sale, provided in both cases that prior notice thereof is given.

- Of interest is the definition of "**auction without reserve**" in the regulations framed in terms of the Consumer Protection Act. The relevant part reads:

> **"auction without reserve"** means an auction at which -
>
> (a) Goods are sold to the highest bidder without reserve;
>
> .....;
>
> .....; and
>
> (d) the seller of the goods cannot withdraw the goods from the auction after the auction is opened and there is public

solicitation or calling for bids;"

It is clear enough to me that if the goods are sold without reserve to the highest bidder at an auction, that auction will be regarded as having been one without reserve. What is not clear is whether, if at an auction that was advertised as one without reserve some of the goods are indeed withdrawn from the auction, that withdrawal will be invalid or whether the auction in respect of the rest will simply no longer be labelled as one without reserve.

- Regulation 18(4) once again makes it clear that the regulations are applicable to sales in execution.

- In terms of Regulation 19(3) any goods may be withdrawn at any time prior to the commencement of the auction. I could find no definition of what is to be regarded as the commencement of the auction.

- Both the Act and the Rules are silent on the question whether an execution sale can be cancelled after its completion or be stopped during the course thereof.

Mr Davis referred me to the provisions of section 8 of the Sheriff's Act, the code of conduct for sheriffs as provided for in section 16 of that Act, and certain comments in LAWSA vol. 25, part 1, paragraph 28. All of these have to do with the duty of the sheriff to act with integrity and in an impartial and fair manner to all parties and not to bring the office of the sheriff and the administration of justice into disrepute. If I understood his argument correctly, it was to the effect that the sheriff would act in contravention of these provisions if he cancelled the sale. The requirement of integrity etc. apply with

equal force whether the sheriff agrees to cancel the sale or not, and has nothing to do with the present inquiry.

I do not propose to deal in any detail with the Conditions of Sale, save for referring to the following relevant clauses:

Condition 1.1 states that the sale is conducted in accordance with the provisions of Rule 46 of the Uniform Rules as well as the Consumer Protection Act and its regulations.

Condition 1.3 states somewhat vaguely: "The property shall be sold by the sheriff to the highest bidder subject to such reserve price, if any, as may be stipulated by a preferent creditor or local authority in terms of Court Rule 46(5)(a)." I could not find any express statement anywhere in the record that the sale would be without reserve but I shall assume that, as required by Rule 46(12), it was one without reserve.

Condition 2.2 reserves the right of the execution creditor to cancel the sale "at any stage before the auction has commenced" and to bid at the auction.

I was referred to several judgments in which it had been held that in conducting a sale in execution the sheriff is not acting as an agent for any party, but "as an executive of the law". The main argument advanced by Mr Davis was based on the premise that the sheriff is not under the control of the execution creditor or for that matter of anybody in conducting a sale. As a general proposition that cannot be true, because "the law" does not set the wheels in motion for an attachment and a sale and is not going to pay the sheriff's costs if the same cannot be recovered from the proceeds of the sale.

The first authority quoted in this regard was the judgment in the case **Ivoral Properties v. Sheriff Cape Town, 2005(6(SA 96 (C).** If I read the judgment correctly, it goes no further than a finding that the sheriff has the necessary *locus standi* to enforce the conditions of sale in his own name. Not one of the judgments to which I have been referred is authority for the proposition that the sheriff is as unstoppable as a runaway train once the sale has commenced. Mr Davis did in fact concede during the helpful debate that I had with him that if the judgment debtor arrives with a bag full of bank notes in the middle of the auction and pays the judgment debt and costs, the sale cannot proceed. The justification that he advanced for this concession was that the *causa* of the sale would in that case have lapsed and that it cannot proceed. I fail to see why the same would not apply if the judgment debt is extinguished in some other way, e.g. by compromise or if the judgment creditor decides to give the judgment debtor time to pay.

I was also referred to the judgment in **Absa Bank v. Universal Pulse Trading, 2011(5) SA 80 (WCC)** in which Olivier AJ held that once the bidding at an auction has started (underlining added) the auction cannot be stopped. The learned acting judge noted the difference in this regard between auctions with and without reserve, pointing out that in the case of the latter it is the sheriff, in putting the article up for sale, who makes the offer and that every bid that is made is in reality a conditional acceptance of that offer, subject to the condition that the acceptance will fall away if a higher bid is made. That distinction is of importance in this case, in view of the stage at which the instruction to stop the sale was given by the representative of the execution creditor.

Mr Davis submitted that since Form 21 does not contain any clause authorising the cancellation of the sale, condition 2.2 referred to above is contrary to the rules and *ultra vires* and should have been and indeed was rightly ignored by

the sheriff. In my view the absence of a similar provision in the Form does not render the inclusion of such a provision *ultra vires*, more in particular in view of the many other deviations that were accepted without demur. The inclusion of that provision is furthermore expressly allowed in terms of Regulation 19(3). He also submitted that the circumstances under which an auctioneer is entitled to withdraw goods from a sale as discussed in paragraphs [12] and [13] of the judgment in **Absa v. Universal Pulse** (supra) are not applicable in the present case, because they deal with the right of an auctioneer in sales in general and not where the sheriff acts as an "executive of the law". As appears from paragraph [11] of the said judgment, however, the learned acting judge was expressly considering "the position of the sheriff where bidding has already commenced and he is instructed to terminate the auction". It is clear from the judgment and the authorities relied upon that the sheriff cannot stop a sale in execution once the bidding has started, and by necessary implication that he can do so before the commencement of the bidding. I also wish to emphasise that all the judgments concerned consider the position after the bidding has started, as distinct from the stage when the conditions of sale are read out, at which stage there is no suggestion that the sale cannot be stopped. In the present case it was common cause that the instruction to stop was given while the sheriff was reading out the conditions of sale.

The final point made by Mr Davis was that in view of the requirement in Rule 46(4)(b) that the sheriff be instructed in writing to proceed with the sale in execution, that instruction can only be countermanded in writing. It will be recalled that the requirement of writing in the said sub-rule was only with reference to the instruction to the sheriff to set the wheels in motion. He then has to identify bonds and other encumbrances registered against the title deed and inform the relevant interested parties. That will probably be weeks before the date of the sale and I find it hard to see a direct connection between the

setting in motion of the wheels and the stopping of the sale. Counsel could not refer me to any authority for the proposition of Mr Davis and I invited them to submit further heads in this regard and also perhaps on the requirement of writing for the cancellation of a written agreement for the purchase of immovable property. I heard nothing from them and assume that they could not find anything of assistance.

The instruction to stop the sale was clearly given during the reading out of the conditions of sale and before bidding had commenced. In my view the sheriff was wrong in refusing to stop the sale when instructed to do so and the question posed to me must be answered in the favour of the applicants. The application was postponed on a previous occasion at the request of the third respondent, who then tendered the costs of the postponement on the scale as between attorney and client. It is not clear to me whether such an order was made at the time and as far as may be necessary I shall make that order now.

Order:

1. **The sale on 30 January 2014 by the first respondent of the applicants' property, being portion76 of the farm Kaalfontein 513 Registration Division JR, is set aside;**
2. **The third respondent is ordered to pay the costs of the application, which shall include the wasted costs on the scale as between attorney and client of the previous postponement of the application.**

F G PRELLER

JUDGE OF THE HIGH COURT