REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA 30/9/16

CASE NO.: 66559/2011

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

29/9/2016
DATE

SIGNATURE

In the matter between:

PETRUS JACOBUS MARYN VAN STADEN N.O.	First Applicant
MOHERANE WILLIAM HARRY MATHIBEDI N.O.	Second Applicant
HENDRIE STEPHANUS GREEFF	Third Applicant

and

CONSOLIDATED AUCTIONEERS PRETORIA CC	First Respondent
HERMAN VORSTER	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent
THE MASTER OF THE NORGH CAUTENG HIGH COURT	Fourth Respondent
ABSA BANK LTD	Fifth Respondent
THE SHERIFF WONDERBOOM	Sixth Respondent

Date heard: 27 July 2016
Date delivered: 30 September 2016

J U D G E M E N T

DE VOS J:

[1] This is an application by the applicants for the setting aside of a default judgement granted by this court on 16 January 2012 under case no. 66559/2011. In terms of this order the pre-liquidation sale of a property known as Portion 141 (a portion of Portion 94) of the Farm De Onderstepoort 300, Registration Division JR, Gauteng Province, in extent of 8.5653 hectares (hereinafter referred to as 'the property') was ratified and ABSA Bank Ltd (the fifth respondent in the present application) was granted leave to proceed with the transfer of the property to Consolidated Auctioneers Pretoria CC (the first respondent), the purchaser of the

farm at a sale in execution.

[2] The background to this application is as follows. It is common cause that the first and second applicants are the joint and final liquidators of a company known as Mannus Homes (Pty) Ltd (hereinafter referred to as 'the company'). The company was winded-up by virtue of a special resolution registered on 26 April 2011. Prior to the liquidation of the company the property was – and is still – registered in the name of the insolvent company. The property was sold in execution on 15 April 2011, prior to the liquidation of the company, at the instance of the fifth respondent, who held a bond over the said property. The property was sold to the first respondent for the amount of R710 000. The first respondent paid the full purchase price as well as VAT in the amount of R99400 over to the sixth respondent (the Sheriff, Wonderboom). In addition thereto, the first respondent also paid an amount of R269 835,87 to the City of Tshwane Metropolitan Municipality, due for outstanding rates and taxes, in order to effect transfer of the property onto the name of the first respondent. The first and second applicants confirm that the first respondent paid an amount to the local authority and should not be out of pocket in this regard but will have to be reimbursed; they furnish an undertaking that the first respondent would be repaid the said amount; this meaning, as I understand it, the amount of R269 835,87 which was made to the City of Tshwane Local Municipality.

[3] Upon liquidation of the company, the first and second applicants were appointed as the provisional liquidators of the insolvent company, before the property could be transferred to the first respondent. Their refusal to transfer the property to the purchaser caused the first respondent to apply to this court for an order which was granted on 16 January 2012 by Van der Byl AJ, declaring that the first respondent is entitled to proceed with the transfer of the property to himself as the purchaser thereof. The order granted by Van der Byl AJ was granted on an unopposed basis as set out hereunder. In turn, this led the first and second applicants to bring an urgent application as set out in para [4] *infra*.

[4] In this application before me the first and second applicants apply for the following relief in their notice of motion:

4.1 On an urgent basis, pending finalisation of the relief sought in the normal cause, that the transfer of the property be stayed;

4.2 In the normal cause:

4.2.1 that the order granted against the liquidators on 16th January 2012 be rescinded;

4.2.2 that the first respondent (Consolidated Auctioneers Pretoria CC) pay the cost of the application including the urgent part thereof.

The application by the first respondent in which an order was granted against the liquidators by default on 16 January 2012 will, for purposes of this judgement, be referred to as 'the main application'. The urgent relief sought in 4.1 has already been granted by this court. Only the question of costs of the urgent application remains to be decided.

[5] I am called to decide on para [4.2] above. It is common cause that the urgent application was brought by the first and second applicants after default judgement was granted. The declaratory order was granted as the first and second applicants were in default to oppose the matter. The applicants' failure to oppose the matter was caused by a misunderstanding on the side of the first and second applicants' attorney regarding the rules of this court. I will deal with this aspect at a later stage as the first and second applicants also seek condonation for their failure to file an opposing affidavit within the prescribed time period as provided for in the Uniform Rules of Court. It is common cause that the main application was brought after the first respondent became aware that all execution steps against the company became suspended upon winding-up of the company, as provided for in s 359(1) of the Companies Act 61 of 1973, as amended. At that stage there was a dispute between the parties. The first respondent contended that the first and second applicants, in their capacity as provisional liquidators, have ratified the sale in execution in terms of extended powers granted to them by the Master of the High Court. The first and second applicants contend that they declined to ratify the sale. On the 16th January 2012 the default judgement was granted, declaring that the property can be transferred. It is this order that the applicants now seek to set aside.

[6] Subsequent to the granting of the default judgement, the first and second applicants brought the urgent application referred to above. The first and second applicants based their application thereon that they did not ratify the sale in execution, neither as provisional nor final liquidators. Both liquidators confirm that the reason for their refusal was that the property was sold far below its market value and in such an event the final liquidators have the right to sell the property afresh. They say that as a result of the winding-up of the company the execution sale was suspended in terms of the provisions of s 359(1)*(a)* of the Companies Act. They confirm that they were originally appointed as the provisional liquidators. As the provisional liquidators of the company they had no authority to dispose of

immovable or movable property of the company, and therefore they could not sell the property. In order to sell the property, the provisional liquidators had to obtain the authority of the Master in terms of s 386 (2A) and (2B) of the Companies Act.

[7] The dispute between the parties relates to the time period between the appointment of the first two applicants as provisional liquidators until their appointment as final liquidators. It is common cause that the Master appointed the first and second applicants provisional liquidators on 21 July 2011 and that they were appointed as final liquidators on 05 October 2011. Before the joint liquidators were appointed as final liquidators they applied to the Master of the North Gauteng High Court, Pretoria to extend their powers in terms of the provisions of s 386 of the Companies Act to sell the property referred to above. On 24 August 2011 the Master granted such extended powers in terms of the provisions of s 386(2A) and (2B) of the Companies Act.

[8] Hendrie Stefanus Greeff, the intervening applicant, and herein cited as the third applicant, has joined the present proceedings and was granted leave to intervene and be joined as the third applicant in the rescission application on 10 November 2015.

[9] The third applicant also applies for an order to set aside the default judgement and to join him as eighth respondent in the main application, in the event that the rescission of the default judgement is granted. The third applicant also prays for an order that the first respondent be ordered to pay the costs of Part A and Part B of the intervening application and, in the event that any of the other respondents to the intervening application oppose the leave sought in Part B of the application, that a cost order be granted against such opposing respondents. In Part C of his intervening application the third applicant applies for the dismissal of the main application instituted by the first respondent under case no. 66559/2011, with costs. There will be referred to the third applicant's application to intervene and be joined as a party, as reflected in Part A of the notice of motion, and further seeking the rescission of the default judgement in Part B of such a notice of motion, and ultimately seeking the dismissal of the main application in Part C of the notice of motion, as the third applicant's intervening application.

[10] The third applicant's intervening application is based on the provisions of Uniform Rule 42, ie that the default judgement was wrongly granted. The third applicant also supports the

application brought by the first and second applicants although on a slightly different basis.

[11] Apart from the first respondent, none of the other parties or entities cited as parties to the main application, the rescission application, and/or the third applicant's intervening application, opposed any of the applications.

[12] It is common cause that the third applicant was the only member and former director of the insolvent company before its liquidation and that he is also a creditor of the insolvent company. It is common cause that when the third applicant liquidated the insolvent company by way of special resolution the outstanding bond owing to ABSA Bank Ltd was approximately R2.2 million. Four years prior to the sale in execution the immovable property was bought by the liquidated company for the amount of R5.4 million. The special resolution liquidating the insolvent company was registered on 26 April 2011, eleven days after the sale in execution. The third applicant stood surety for the liabilities of the insolvent company towards the fifth respondent.

[13] It is not in dispute that the third applicant has the necessary and required *locus standi* to apply for the rescission of the default judgement as well as to be joined as a respondent to the main application. Leave was accordingly granted to the intervening applicant to be joined as the third applicant in the application for the rescission of the default judgement and in the event of granting the rescission application to be joined as the eighth respondent in the main application.

[14] It is common cause that after the first and second applicants were appointed as provisional liquidators of the insolvent company, and after applying for the extension of their powers to sell the property, the first and second applicants received offers from third parties wanting to purchase the said property from the insolvent estate in the amount of R1,1 million and R1,8 million respectively.

[15] On 27 November 2011 the first respondents instituted the main application seeking a declaratory order that the sale in execution of the immovable property which was sold to the first respondent is not null and void and that transfer of the immovable property should be effected in the name of the first respondent. The first respondent contended that the first and second applicants have ratified the sale in execution and upon that version the default

judgement was granted. At the time when default judgement was granted, only the first respondent's version was before the court.

[16] It is the third applicant's case in the present application that unless ratification can be proved the relief sought by the first respondent and granted to it in terms of the default judgement is and was not legally competent and barred by the provisions of inter alia s 386 of the Companies Act. Section 386(4) deals explicitly with the powers of the provisional liquidator. It is common cause that the function of a provisional liquidator whose powers the Master may restrict under s 386(6) is for all intents and purposes that of a receiver *pendente lite*. A provisional liquidator acts as a steward and assumes control of the property and affairs of the company pending the appointment of a final liquidator. A provisional liquidator stands for all intents and purposes in a caretaker function. See *Ex Parte* ***Klopper NO: In re Sogervim SA (Pty) Ltd (In Liquidation)*** **1971 (3) SA 791 (T) at 797**. It is not the function of the provisional liquidator to liquidate the company as no meeting of creditors has taken place and the *concursus* cannot take steps to enforce its rights. The Master for this reason does not accord unto a provisional liquidator any of the powers under s 386(4) except in some cases as mentioned under s 386(4)*(f)*. In the present matter it is common cause that on 04 August 2011 when the alleged ratification occurred, the powers of the provisional liquidators had not been extended under either ss 386(2A) and (2B) or 386(4) of the Companies Act. It is contended that the first respondent failed to deal with this allegation in his answering affidavit and in fact admits same. The inevitable conclusion is, therefore, that the first and second applicants had no authority under the circumstances of this case and as the provisional liquidators of the company to dispose of either its immovable or movable property until they were appointed as final liquidators on 05 October 2011. However, after application to the Master, their powers were extended and they were granted the authority to dispose of the property of the company in terms of s 386(2A) and (2B). This authority was granted by the Master on 24 August 2011. Any alleged ratification of the sale in execution before the 24th August 2011 by the first and second applicants would be null and void and would amount to a clear violation of the principles of *nemo plus iuris ad alium transferre potest quam ipse habet.* It follows from the aforegoing that any reliance placed by the first respondent on letters or events that occurred before 24 August 2011 to prove that ratification has in effect been given by the first and second applicants, are null and void. The first and second applicants had, in the circumstances, no authority as the provisional liquidators of company to dispose of either its immovable or movable property. It must further be borne in mind that no sale took place

at the instance of the provisional liquidators. The sale in question was the sale in execution by the sixth respondent.

[17] The third applicant contends that the crux of this dispute is whether the provisional liquidators were empowered to ratify the sale conducted by the Sheriff, and, if so, whether they did indeed ratify the pre-liquidation sale in execution. The first respondent, in his application for default judgement and in opposition of this application, relies on correspondence from Leonie Vorster on 02 August 2011 and from the first applicant on 04 August 2011, recording that the first and second applicants have ratified the sale. The letter dated the 04 August 2011 comes from the first applicant in his capacity as joint liquidator and reads as follows:

> *'Kindly take notice that the fixed property situated at, Portion 141 of the Farm De Onderstepoort, 300 was sold at a Sale in Execution and the liquidators ratified the sale in the amount of R710 000.00'*

Both these instances of correspondence are dated before occurred before 24 August 2011, the date on which the first and second applicants' received authorisation from the Master in terms of s 386(2A) and (2B) to sell the property. Before the 24th August 2011, first and second applicants could not have been vested with extended powers under s 386 and could not have ratified the sale. The third applicant contends that before the first and second applicants' powers were extended they were only provisional liquidators, simply carrying out caretaker functions and had no authority to liquidate the estate of the company. The first and second applicants appreciated their lack of authority to ratify the sale, prompting the application for permission to the Master of this court. It follows from the aforesaid that the facts relied on by the first respondent in the main application before Van der Byl AJ are flawed and that default judgement could not have been granted in the circumstances. If the correct facts were brought to the attention of Van der Byl AJ he would no doubt not have granted the order.

[18] At this stage of the judgement, and to explain the sequence of events and subsequent delays, I deem it necessary to place the following on record. After default judgement was granted on 16 January 2012 the first and second applicants brought an urgent application, in combination with the rescission application, seeking an interim interdict to stay the execution of the order granted by Van der Byl AJ, pending the finalisation of the rescission application. The interim interdict was granted and the rescission application was subsequently argued before Webster J on 12 May 2012. Judgement was reserved. To date hereof, Webster J has not handed down judgment in the rescission application. The partaking parties to the rescission application have subsequently been informed by the Judge President of this Division that no judgement

would be forthcoming due to the retirement of Webster J. Thereafter, on 03 July 2015, there was a new turn of events. The third applicant became aware thereof that the first respondent was going to sell the immovable property per public auction. This was in direct conflict with the provisions of the existing interim order prohibiting transfer of the immovable property pending the finalisation of the rescission application. After several enquiries by the third applicant through his attorney of record, it was confirmed that discussions took place in terms whereof the first applicant had allegedly confirmed the sale to the first respondent. Accordingly a public auction was held on 10 July 2015 and notwithstanding objections by Mr Brand on behalf of the third applicant, the immovable property was again sold per public auction for R4,1 million. It is the third applicant's case that at present the immovable property has not been transferred and still vests in the insolvent estate of the insolvent company. The third applicant contends that the alleged settlement was never finalised, neither was it reduced to writing and creditors never sanctioned such an agreement. Accordingly the rescission application is still pending and the existing interim order prohibiting transfer is still in force. Following discussions between the parties and the discussion in the chambers of the Deputy Judge President Ledwaba on 10 September 2015 it was subsequently agreed that the rescission application will be argued *de novo*. As a result thereof the third applicant filed his application for intervention and the order in terms of Part A of such an application was granted on 10 November 2015.

[19] I now turn to deal with the first and second applicants' version. The uncontested version of the first and second applicants is that they were the joint liquidators of the insolvent company. They were subsequently appointed as the final liquidators on the dates set out above. The third applicant was the only director and shareholder of the insolvent company before its liquidation and the said applicant also bound himself as surety and co-principle debtor for the obligations of the liquidated company's debts to the fifth respondent. They confirm the facts set out by the third applicant.

[20] Both the first and second applicants confirm that the sale in execution was a direct result of the company falling into arrears with its bond payments to the fifth respondent. Consequently the property was sold in execution to the first respondent on 15 April 2011. They were then appointed as joint liquidators. The essence of their version is that they both deny that they ratified the sale in execution. They also seek a rescission of the default judgement granted by Van der Byl AJ.

[21] The principles applicable to a rescission of a judgement are clear. A party is entitled to the rescission of an order granted against it by default if good cause exists for the setting aside of the default judgement. *'Good cause'* means a reasonable explanation for the default and a *bona fide* defence. See in this regard rule 31(2)*(b)* of the Uniform Rules. Before the first and second applicant can succeed in their rescission application they must also be granted condonation for their late opposition of the default judgement. The court must first decide whether condonation should be granted to them.

[22] The first and second applicant filed an application for condonation. It is common cause that the first and second applicants filed a notice of opposition to the main application on 09 December 2011. The first and second applicants, however, failed to file an opposing affidavit timeously and the first respondent proceeded on the unopposed roll of 16 January 2012 to obtain the order sought for by default which was granted on that day. The applicants contend that the enrolment of the main application on the unopposed roll of 16 January 2012 was irregular and not in compliance with the provisions of Uniform Rule 6(5)*(f)* and/or the practice directive applicable in this division at that time in light of the notice to oppose filed by the first and second applicants. Therefore it is contended that the default order granted on 16 January 2012 was irregularly obtained and erroneously sought and granted. Mr Johan Loots acting on behalf of the first and second applicants filed an affidavit attached to the papers as annexure "MVS8" on behalf of the first and second applicants explaining the failure to file opposing affidavits as follows. On 08 December 2011 a notice to oppose the main application was telefaxed to the attorney acting on behalf of the first applicant and same was served on 09 December 2011. The reason for the failure to file an opposing affidavit is also explained. Mr Loots was on leave from 15 December 2011 to 15 January 2012. Mr Loots confirms that he was under the impression that the main application would only serve before court on 16 January 2012 <u>if no notice to oppose was given</u>, and should a notice of intention to oppose be given, the main application will find its course to the opposed roll in which case a notice of set down will be served. This impression was based on the last paragraph of the notice of motion of the main application which reads as follows:

> *'GELIEWE VERDER KENNIS TE NEEM DAT indien geen kennisgewing van opponering gemaak word nie die aansoek aangehoor sal word op 16 Januarie 2012 om 10h00 of so spoedig daarna as wat die Advokaat namens die Applikant aangehoor kan word'.*

Mr Loots further confirms that due to the festive season and his leave, as well as several other urgent matters he had to attend to, he could not see to the finalisation of the opposing affidavit in time. It is not contested by Mr Loots that, in terms of the practice directive applicable at

that time, an applicant is entitled to set down the application on the unopposed motion roll if an opposing affidavit was not filed timeously; but says he was under the impression that a notice of set down on the unopposed roll should also be served. It is common cause that such a notice of set down was not served. He was therefore under the impression that the opposing papers could be served at a later stage. Mr Loots says in his supporting affidavit that on 16 January 2012, the first day after he had returned from his vacation, he had a consultation with Mr Herman Vorster who acted on behalf of the third applicant. In order to finalise the opposing affidavit to the main application they discussed the merits of the main application. On the same day at approximately 11h00 Mr Loots telephonically contacted the first respondent's attorney of record, Mr Bester, who was not available at that time. Shortly thereafter and on the same day, Mr Bester telephoned Mr Loots while still in the company of Mr Vorster. Mr Loots further states in the affidavit that during this telephone conversation he was brought under the impression that the application was not set down for hearing on 16 January 2012.

The next day, 17 January 2012, Mr Loots was informed that the default judgement was granted, notwithstanding the telephonic conversation referred to above. Mr Bester's stand was that there was no obligation on him to inform Mr Loots that the matter was indeed set down for hearing on 16 January 2012. Mr Loots informed Mr Bester that the first and second applicants intend launching an application for rescission of the default judgement whereupon Mr Bester responded that it was his instruction to proceed with the transfer of the property.

[23] From the aforegoing it is clear that the applicants were not to blame for the fact that judgement was granted on 16 January 2012 and had intended to oppose the application for default judgement all along. The first and second applicants' intention to defend the application is corroborated by the fact that they subsequently launched an urgent application, in combination with the rescission application, seeking an interim interdict that the execution of the 16 January 2011 order be stayed pending the finalisation of the rescission application. The interim interdict was indeed granted on an urgent basis. The rescission application was subsequently argued before Webster J in May 2012 as referred to above and judgement was reserved.

[24] The third applicant subsequently filed his application for intervention and the order set out in Part A of such an application was granted on 10 November 2015.

[25] I am satisfied that the first and second applicants have a reasonable explanation for their default to file an affidavit in opposition to in the main application within the prescribed time limits. I accept the explanation given by Mr Loots and therefore conclude that the first and second applicants were not wilful in failing to file their answering affidavit and therefore their negligence cannot be regarded as gross negligence. Insofar as the third applicant is concerned it is clear that he was not cited as a party to the original proceedings and therefore no condonation is sought on his behalf for the late joining of the proceedings. In any event, the third applicant was entitled to rely on the expertise of the joint liquidators to protect the interest of all creditors including himself. Accordingly condonation must be granted to the first and second applicants.

[26] The next issue to be decided is whether there is good cause for the setting aside of the default judgement as required by Uniform Rule 31(2)*(b)*. In order to determine whether a *bona fide* defence exists it is clear in terms of s 386(2A) and (2B) of the Companies Act that the provisional liquidators could only sell the said property once the Master has granted authorisation to do so. Only thereafter were they entitled to ratify the sale in execution. Once they became entitled to ratify, it must be determined if and when thy exercised their extended powers.

[27] All three the applicants rely on the decision of ***Legh v Nungu Trading 353 (Pty) Ltd & Another*** **2008 (2) SA 1 (SCA)** where in effect exactly the same relief was sought by the purchaser of an immovable property prior to liquidation, as the relief sought by the first respondent in the main application. **At para 10-11**, Ponnan JA held that s 20(1)*(c)* of the Insolvency Act 24 of 1936, which reads as follows:

> *'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 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'*

cannot be viewed in isolation. Section 20(1)*(a)* divests the insolvent of his estate and vests it in the Master, and then, upon him in the trustee. Section 20(2)*(a)* provides that for the purpose of s 20(1), the estate shall include all the property of the insolvent at the date of sequestration including property or proceeds thereof which are in the hands of the sheriff or a messenger under a writ of attachment. The estate of a company in liquidation, on the other

hand, remains vested in the company. In terms of s 361(1) of the Companies Act all of the property of a company which has been winded-up is deemed to be in the custody and under control of the Master until a provisional liquidator has been appointed and has assumed office. The property of the company of whatever kind, although it is in his/her custody and under his/her control, does not vest in its liquidator unless the court so orders in terms of s 361(3). Sections 20(1)*(a)* and 20(2)*(a)* of the of the Insolvency Act, insofar as vesting the insolvent's property in the trustee, therefore plainly have no application to a company in winding-up. Both sections are therefore not rendered inapplicable to a company in winding-up by s 339 of the Companies Act. The court found that such relief is not competent in light of the provisions of s 361(1) of the Companies Act. In para 21 of the said judgement Heher JA confirmed the majority judgment but on a different ground and held that:

> *'Section 359(1)(a) suspends all civil proceedings (ie both those already commenced before a winding-up and those which would, but for the suspension, be commenced after the making of an order for winding-up) until the appointment of a liquidator, whereafter they may be commenced or continued only after compliance with the provisions of s 359(2). In this case the claim against the company for transfer of the property sold in execution had arisen before the commencement of the winding-up. After the provisional order the property remained that of the company and fell into the* concursus*'.*

[28] In the main application the first respondent said in para 13.1 of its founding affidavit:

> *'Die eerste en tweede respondent* [the first and second applicants in the present application – own insertions] *het nie in die skoene van die Sewende Respondent* [i.e. The Sheriff Wonderboom – the sixth respondent in the present application] *getree by likwidasie van Mannus Homes (Pty) Ltd nie. Slegs die beheer van die eiendom het op die Eerste en Tweede respondent oorgegaan. Sewende Respondent het egter reeds beslag gelê op die eiendom ingevolge 'n geldige eksekusie lasbrief en die eiendom verkoop op 15 April 2011 voor die likwidasie van Mannus Homes (Pty) Ltd. Die likwidasie het dus nie die eksuekusieproses opgeskort of ongedaan gemaak nie'.*

Van der Byl AJ accepted this statement of fact and law as correct and granted the said order.

[29] The case advanced on behalf of the first respondent and on which the order was granted by Van der Byl AJ completely ignores the meaning and effect of s 359(1) and (2) of the Companies Act. A sale in execution does not divest the first and second applicants as liquidators of the company of the import of these provisions. Section 359(1)*(b)* makes it clear that after a special resolution for the voluntary winding up of a company has been registered *'any attachment or execution put in force against the estate or assets of the company after the*

commencement of the winding up shall be void'. Although the sale in execution in terms whereof the first respondent purchased the property in question took place prior to the company being placed into liquidation, the said immovable property forming the subject matter of this application had not been transferred. Accordingly dominium in the immovable property still vests in the company. At present the property is still registered in the name of Mannus Homes (In Liquidation). As the dominium of the property has not been transferred to the first respondent the first and second applicants are duty-bound to take into their reckoning everything which falls into the estate of the company, which includes the said property.

[30] In effect the property remains the property of the judgement debtor (and hence the property of his curator in the event of an insolvency) right up to the moment of delivery. Kriegler J held in ***Simpson v Klein NO & Others* 1987 (1) SA 405 (W) at 412A** that:

> *'. . . it is the actual transfer of* dominium *in goods attached in execution pursuant to the sale which divest the estate of the judgment debtor of such goods'.*

See also in this regard ***Liquidator Mr Spares (Pty) Ltd v Goldies Motor Supplies (Pty) Ltd* 1982 (4) SA 607 (W) at 609** and ***Pols v R Pols – Bouers en Ingenieurs (Edms) Bpk* 1953 (3) SA 107 (T) at 112D-E.**

[31] In this application the first respondent has a different approach. The first respondent contends that the first and second applicants applied to the Master of the High Court for authority to ratify the auction sale on 04 August 2011 and in fact did ratify the sale in execution. The first respondent's contention is based on the contents of two letters. It appears that these two letters, dated 02 August 2011 and 04 August 2011 respectively, created the impression that the sale in execution was ratified by the liquidators. Leonie Vorster is an estate administrator at St. Adens International Insolvency Practitioners. On 02 August 2011, Ms Vorster – representing the applicants – indicated to the fifth respondent in an email that she received instructions from the liquidators to ratify the transaction and requested the fifth respondent's permission to ratify the sale. The fifth respondent thereupon informed her to ratify the sale. The first respondent contends that the first and second applicants then, on that very same day, did ratify the sale. Copies of the said correspondence are attached to the opposing papers as "CAP2" and "CAP3".

[32] The first and second applicants deny that they have ratified the sale in execution. The first applicant says in his founding affidavit that during the course of August 2011 himself and the second applicant received confirmation from the fifth respondent that they should ratify the

sale, meaning that they should as liquidators accept the pre-liquidation sale. As they were not entitled, as provisional liquidators, at that point in time to enter into any agreement to dispose of immovable property of the company, unless their powers have been extended in terms of the provisions of s 386(4) of the now partially repealed Companies Act 61 of 1973, they applied to the Master for the extension of their powers on 04 August 2011. It was only on 24 August 2011that their powers were ultimately extended by the Master as set out in annexure "MVS7". However, subsequent to the fifth respondent's instruction, the first and second applicants received far better offers for the sale of the immovable property. As a result of these offers the first and second applicants never signed any agreement, meaning a written agreement of sale, with the first respondent as the pre-liquidation purchaser, in terms whereof the liquidators intended or agreed to dispose of the immovable property to the first respondent. Thus, they never exercised the extended powers bestowed upon them.

[33] The liquidators' powers were only extended on 24 August 2011. It follows that any reference to ratification done by them on 04 August 2011 must be regarded as *pro non scripto*. Unfortunately the confusion generated by the said correspondence created the impression that ratification was effected and that the sale in execution was confirmed and that transfer could proceed in the normal way. *Ex facie* the documentation before me no such ratification could have occurred before the liquidators' powers were extended and any reliance on anything before that date appears to be *ultra vires* as the first and second applicants lacked the powers to ratify the sale in execution. The first and second applicants' denial to ratify the pre-liquidation sale is supported by the fact that at the time when the main application was brought no meeting of creditors had at any of the relevant times been convened. As no meeting of creditors has taken place the *concursus* cannot take steps to enforce its rights. I find it totally improbable that any diligent liquidator would ratify the sale of an immovable property not knowing what other claims have to be met.

[34] The first respondent contends further that s 386(2A) and (2B) is of no application to the present set of facts. Sections 386(2A) and (2B) provide that:

> *'(2A) At any time before a general meeting contemplated in subsection (1)*(d) *is convened for the first time the liquidator shall, if satisfied that any movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reason for such recommendation.*
>
> *(2B) The Master may thereupon authorise the sale of such property or any portion*

thereof on such conditions and in such manner as he may determine: Provided that if such property or portion thereof is subject to a preferential right, the Master shall not authorise the sale of such property or portion unless the person entitled to such preferential right has given his consent thereto in writing'.

[35] It is the first respondent's contention that this section is not applicable as the sale by the sheriff had already taken place before liquidation. Therefore, the supervening liquidation does not automatically terminate contracts entered into before liquidation. The liquidator must make an election to abide by or to terminate the contract. If he abides by the contract he steps into the shoes of the Sheriff (not the company) and is obliged to the other party to perform. See in this regard ***Bryant & Flanagan (Pty) Ltd v Muller & Another NNO* 1978 (2) SA 807 (A) at 812H-813A.** The first respondent also referred the court to the decision of Kotze JA in ***Liquidators Union & Rhodesia Wholesale Ltd v Brown & Company* 1922 AD 549 at 558-559.** Where the effect of a judicial attachment was discussed, Kotze JA said the following:

'The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court. They pass out of the estate of the judgment debtor, so that in the event of the debtor's insolvency the curator of the latter's estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent estate . . . But although the effect of a pignus judiciale *is that the control of the property arrested in execution passes from the judgment debtor, and therefore on his insolvency supervening does not come under the administration of the curator of the insolvent estate, the* dominium *remains in the debtor, who can, up to the last moment before actual sale, redeem his attached property: that is to say, the property subject to the* pignus judiciale, *for while the* pignus *lasts he remains the owner of the pledge".*

[36] The first respondent also relies on the following decisions in support of their argument:

36.1 In ***Syfrets Bank Ltd & Others v Sheriff of The Supreme Court Durban Central & Another: Schoerie NO v Syfrets Bank Ltd & Others* 1997 (1) SA 764 (D&CLD) at 774I-775A** the court concluded:

'Executory contracts entered into with the insolvent before the advent of liquidation or insolvency, as the case may be, are not automatically terminated by the insolvency . . . but the rights and obligations thereunder become suspended until the trustee or liquidator has had the opportunity to decide, in the light of the interests of the general body of creditors and the insolvent, whether to abide by or

abandon the contract'.

36.2 In ***Strydom NO v MGN Construction (Pty) Ltd & Another: In re Haljen (Pty) Ltd (In Liquidation)*** **1983 (1) SA 799 (D&CLD) at 803G** the court stated:

> *'The Legislature in my view sought in s 359(1)*(b) *to draw a distinction between, on the one hand, attachments and execution which had been put in force prior to the commencement of winding-up and, on the other hand, those which were only put in force thereafter.*
>
> *The last-mentioned class of executions and attachments were to be void and the first-mentioned not. This it did because it wished only those creditors who had taken steps to have execution put in force prior to the commencement of winding-up to have the advantage of s 391(2)* [sic] *ie of being able to continue with such execution upon notice to the liquidator'.*

36.3 The first respondent contends that the reasoning in ***Strydom NO*** is in accordance to what is said in ***Lindley*** **On Companies 6th ed vol 2 at 903**:

> *'The court is much more reluctant to stay executions than other proceedings (under the provisions of the Companies Act). To interfere with the creditor whose legal right is established and who is about to reap the fruit of a successful litigation, is a strong measure scarcely to be justified by considerations of hardship to the debtor, but possibly justifiable on the principle that equality is equity, and that it is unjust to other creditors that one shall obtain payment in full whilst little or nothing is left for them. Even as between creditors, however, some preference is fairly the reward of extra diligence; and where a creditor has actually issued execution against a company before a petition to wind up has been presented, and the Sheriff is in possession when it is presented, the court will not interfere and deprive the creditor of the fruits of his diligence, unless under very special circumstances, eg, of oppression or fraud. But, as a rule, if the Sheriff does not cease before the commencement of the winding up, the execution will be stayed'.*

I have considered the first respondent's submission. In ***Syfrets Bank Ltd*** the bank held a mortgage bond over certain property as security for a loan advanced to a close corporation. The bank obtained judgement and the sheriff attached and sold the property at a sale in execution. The property was bought in by the bank. After the sale was concluded, another party, with the bank, approached the sheriff to enquire whether it would be possible to allow them to purchase the property in place of the bank. After the sale in execution, but before transfer of the property could be completed, the corporation was placed in provisional liquidation. The first respondent's contention is therefore that in accordance with the decision

in ***Syfrets Bank Ltd*** it follows that in the instance execution was put into force against the property when the sheriff attached it pursuant to the writ of execution issued on behalf of the fifth respondent. That, and the resultant judicial sale of the property, preceded liquidation of the company. Consequently, transfer of the property to the purchaser, which would constitute the final step in the execution process in respect of the property, would not fall within the purview of and thus be invalidated by the provisions of s 359(1)*(b)*. The court adopted the view that if liquidation intervened after the immovable property had been sold in execution, but before transfer was completed, a sheriff was no longer entitled or obliged to give transfer to a purchaser. The decision then rested with a liquidator whether to abide by the contract or to repudiate it.

[37] I do not agree with the reasoning of the first respondent. It conflates the notion of a sale in execution performed by the sheriff (not the applicants) as the sale in execution within the true intention of s 386(2A) and (2B). In ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** **2012 (4) SA 593 (SCA)** Wallis JA held on behalf of the court **at 604B**:

> *'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 temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used'.*

Although this quotation refers to the interpretation of contracts there is no reason why the same logic should not apply in matters of insolvency. In ***Meskin*** **Insolvency Law Chapter 6** it is concluded that where prior to the commencement of the winding-up property has been sold in execution and after such commencement the property is delivered to the purchaser, the provisions of section 359(1)(*b*) of the Companies Act *per se* do not operate to invalidate the delivery. However, the delivery may be impeachable at the instance of the liquidator. But whereas at the commencement of the winding-up delivery has not occurred, it is precluded as a result of the institution of the *concursus creditorum* and the purchaser's personal right to obtain delivery as against the sheriff is enforceable only within the limits arising from such institution. While there is authority for the view that the liquidator has this right to decide whether to allow the sale to proceed or to abandon it, it is respectfully doubted that this is the case. The effect of the *concursus* is that control of the property vests in the liquidator, and the sheriff is therefore precluded by operation of law from passing transfer of the property to the execution purchaser. In ***Warricker NO and Another v Senekal*** **2009 (1) SA 509 (W) at para 22**, the court pointed out the differences between the two situations. An election by a liquidator not to abide by a pre-liquidation contract of the company amounts to a breach

which affords the other party an action for damages which he can prove as a creditor, whereas in the case of a sale in execution which does not proceed because of the liquidation of the company, there is no breach and the creditor does not have an action for damages, but must *'simply resort to the winding-up procedure to prove and obtain satisfaction (to whatever extent other creditors receive it) of its original debt which was the subject of the execution process. The one process is substituted with another one'*. I agree with this line of thought. Taking into consideration ss 342(1) and 391 of the Companies Act, the liquidation terminates the *pignus judiciale* over the property which, in turn, results in the transfer of the custody and control of the property from the sheriff to the Master and thereafter to the liquidator, thereby precluding the sheriff from passing transfer of the property to the execution purchaser. See ***Syfrets Bank Ltd* at 782–783; *Cf Shurrie v Sheriff for the Supreme Court, Wynberg and Others* 1995 (4) SA 709 (C)**, in which, it was respectfully submitted, it was incorrectly concluded that the purchaser could obtain delivery of the property from the execution officer notwithstanding the commencement of the winding-up.

[38] It is common cause that in the event of liquidation of a company the assets shall be applied in payment of the costs, charges and expenses incurred in the winding up and, subject to the provisions of s 435(1)*(b)* the claims of creditors as nearly as possible as they would be applied in payment of the costs of sequestration and the claims of creditors under the law relating to insolvency and, unless the memorandum or articles otherwise provide, shall be distributed among the members according to their rights and interest in the company. If the first respondent's contention is to be accepted it would mean that s 386(2A) and (2B) is of no application as the sale in execution has already taken place. In terms of the provisions of ss 343 and 398 of the 1973 Companies Act and the common law ownership of the dominium continues to vest in the company until transferred. There is no indication that the words *'sold'* in s 386(2A) and *'sale'* in (2B) refer to a sale in a physical sense of entering into a sale agreement. To give up dominium is the only business-like and sensible meaning that can be attributed to the words *'sold'* and *'sale'*. I find no reason why the words *'sold'* and *'sale'* should be read as references to the sale in execution. The applicants' application to the Master to amplify their powers was done in the context to perfect a sale to which the applicants had not been a party to. As the provisional liquidators merely acted as caretaker pending the appointment of the final liquidators they had no authority to liquidate the estate of the company. The applicants, appreciating their lack of authority, applied to the Master to have their powers extended to ratify the sale ie the transfer of the property sold in execution.

In my view and for purposes of this application I do not have to give a final decision on this point save to state that in my view the liquidation process stayed the execution proceedings and in the absence of proof that the sale in execution was ratified the applicants have shown that they do have a *bona fide* defence to the plaintiff's claim. The first and second applicants deny that the ratified the sale in execution. If it is to be accepted, it will create a complete defence against the first respondent's claim. The third applicant should also succeed in its defence based on the provisions of Rule 42. Firstly, ratification could not have taken place on or before the Master granted his consent to sell the property and therefore any reliance on the correspondence by Leonie Vorster must be regarded as *pro non scripto*; and secondly if the liquidators' version is to be accepted that they did not ratify the sale in execution, no sale agreement was concluded.

[39] As far as costs are concerned there can be no doubt that the third applicant is entitled to its costs as it was successful in this application. The position of the first and second applicants is somewhat different. Mr Pelser SC on behalf of the first respondent contended that no costs should be awarded to the first and second applicants due to the fact that the first and second applicants were partly responsible for creating the wrong impression that the sale in execution was ratified. The first and second applicants also delayed their application to have the order set aside and if it was not for the third applicant who joined in the application the first and second applicants should be held liable for the increased costs caused by their failure to act immediately in the interest of creditors. It was further contended that the first and second applicants never brought an application in terms of the provisions of Uniform Rule 42 and that in the absence of such an application, and without the assistance of the third applicant, the first and second applicants would not have succeeded in their application to have the order set aside as they failed to make a full disclosure of the facts to this court. It is further contended that the first and second applicants' application should be refused with costs.

[40] I have carefully considered the arguments raised by the first respondent's counsel, but in light of the fact that I have come to the conclusion that the application of both the first and second applicants as well as that of the third applicant, although brought on a different basis, should succeed I am of the opinion that the normal rule should apply namely that the successful parties are entitled to their costs, including the costs occasioned by the urgent application.

I THEREFORE MAKE THE FOLLOWING ORDER:

(1) The order granted by Van der Byl AJ on 16 January 2012 under case no. 66559/2011, and attached to the third applicant's founding affidavit deposed of on 30 September 2015 as "Annexure HSG4", and in terms whereof the pre-liquidation execution sale of the immovable property known as Portion 141 (a portion of Portion 94) of the Farm De Onderstepoort 300, Registration Division JR, Gauteng Province, in extent 8.5653 hectares, was ratified and in terms of the sixth respondent was granted leave to proceed with the transfer of the property be rescinded and set aside;

(2) The third applicant be and is hereby joined as the eight respondent in the main application under case no. 66559/2011, instituted in terms of the notice of motion dated 21 November 2011;

(3) The relief sought in Part C of the third applicant's intervening application is postponed to be adjudicated at the hearing of the main application;

(4) The first respondent be and is hereby ordered to pay the costs of Part A and Part B of the third applicant's application;

(5) Condonation is granted to the first and second applicants for their failure to oppose the main application within the time limits prescribed by the rules of this court;

(6) Leave is granted to the first and second applicants to file their opposing affidavits in the main application under case no. 66559/2011 within 14 (fourteen) days of this judgement;

(7) The first respondent is ordered to pay the costs of the first and second applicants in this application;

(8) The first respondent is ordered to pay the costs of the first and second applicants in the urgent application staying the order of 16 January 2012 that has now been rescinded and set aside.

DE VOS J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

For the first and second applicants:	Adv Konstantinides SC
For the third applicant:	Adv N C Hartman
For the respondent:	Adv Q Pelser SC
	Adv J Eastes