REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 14656/2021

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

……..
SIGNATURE **DATE: 14 December 2022**

In the matter between:

ASTFIN GAUTENG (PTY) LIMITED trading as ASSETFIN (formerly ABD Financial Services (Pty) Ltd trading as Assetfin)	Applicant
and	
THE STANDARD BANK OF SOUTH AFRICA LTD	First respondent
THE SHERIFF, PRETORIA SOUTH WEST	Second respondent
ISHAD OMAR	Third respondent
FARHANA OMAR	Fourth respondent
ABRAHAM JACOBUS MOUTON	Fifth respondent

JACOBUS GERHARDUS KRUGER	Sixth respondent
MARIUS LOUIS ADAMS	Seventh respondent
BASILEIA FIRE AND SAFETY SOLUTIONS (PTY) LTD	Eighth respondent

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JUDGMENT

SWANEPOEL, AJ

Introduction

[1] On Thursday, 14 November 2019, the immovable property situated at 155 Baird Avenue, Andeon Agricultural Holdings, was sold in execution. The immovable property's full description is: Holding 83, Andeon A.H., Registration Division J.R., Province of Gauteng, in extent 2.0234 hectares, held under Deed of Transfer No T91138/2012 (in this judgment I will refer to it as "the immovable property").

[2] Mr Abraham Jacobus Mouton, the fifth respondent, was at all relevant times the registered owner of the immovable property. The third and fourth respondents purchased the immovable property at the sale in execution.

[3] The applicant seeks an order declaring the sale in execution to be invalid and that it be set aside.

[4] Only the first respondent, The Standard Bank of South Africa Ltd, ("first respondent" or "Standard Bank") opposed the application.

Relevant common cause facts

[5] Regard had to the parties' affidavits of record and a joint practice note by the parties' counsel (undated, but uploaded onto Caselines on 30 September 2022), the following material facts are common cause:

[5.1] Standard Bank was the holder of a first mortgage bond registered over the immovable property as security for the fifth respondent's indebtedness to Standard Bank.

[5.2] The applicant is the holder of a second mortgage bond registered over the immovable property as security for the fifth respondent's indebtedness to the applicant, Mr Mouton being a co-surety for the eighth respondent's indebtedness to the applicant.

[5.3] On 09 September 2016 (prior to the registration of the second mortgage bond) Standard Bank consented to the registration of the second mortgage bond.

[5.4] Standard Bank's consent was accompanied by a document titled "Conditions Governing the Passing of a Subsequent Bond in favour of a Third Party", to which reference is made later in this judgment.

[5.5] The second mortgage bond was registered on 10 November 2016.

[5.6] Standard Bank and the applicant therefore each held a limited real right in respect of the immovable property.

[5.7] On 20 November 2018 the applicant obtained judgment against *inter alia* Mr Mouton, as surety for the indebtedness of the eighth respondent, Basileia Fire and Safety Solutions (Pty) Ltd.

[5.8] On 28 January 2019 the Sheriff, Pretoria South West (cited as the second respondent) executed the writ of execution obtained by the applicant but was unable to attach sufficient movable assets to satisfy the judgment debt owing to the applicant.

[5.9] On 23 October 2019 the applicant obtained an order declaring the immovable property specially executable. Standard Bank was a party to the application by the applicant to declare the immovable property executable.

[5.10] On 14 November 2019 the applicant caused a writ of attachment to be issued that was lodged with the Sheriff on 26 November 2019.

[5.11] On 27 November 2019 the Sheriff informed the applicant that the immovable property was sold in execution, on 14 November 2019, at the instance of Standard Bank.

[5.12] At no point in time did the applicant receive notice of any kind of the sale in execution of the immovable property.

[5.13] The immovable property was sold to the Omars for R1 000 000 (One Million Rand).

The issues in dispute

[6] Counsel for the applicant and first respondent agreed that the issues for determination are whether:

[6.1] There existed an obligation on Standard Bank to notify the applicant of the sale in execution.

[6.2] There existed an obligation on the Sheriff to notify the applicant of the sale in execution.

[6.3] The sale in execution (absent any notification given in respect thereof by either Standard Bank or the Sheriff) was invalid, and thus whether same should be set aside.

Comprehensive factual and legal consideration

[7] On or about 26 August 2016 the applicant concluded a master rental agreement with the eighth respondent in terms whereof the applicant rented goods to the eighth respondent for which the latter agreed to pay rental to the applicant. As security for any indebtedness by the eighth respondent in terms of the master rental agreement, the fifth, sixth and seventh respondents respectively executed a guarantee in favour of the applicant.

[8] In addition to the guarantee, the fifth respondent caused the second mortgage bond in the sum of R1,5 million to be registered over the immovable property in favour of the applicant. At that time Standard Bank already held a first mortgage bond over the immovable property.

[9] The eighth respondent defaulted in terms of the master rental agreement and on 18 November 2018 this Court granted judgment against the fifth to eighth respondents, jointly and severally, for payment in the sum of R2 396 675 plus interest and costs, to be made to the applicant.

[10] On 23 October 2019 this Court granted an order in favour of the applicant wherein it was declared that the immovable property be specially executable (this was the matter in respect of which Standard Bank, was a party).

[11] After becoming aware of the sale in execution which occurred on 14 November 2019, the applicant's attorney of record directed enquiries to Standard Bank's attorneys. Thereafter multiple correspondences were exchanged between the parties' attorneys of record. Standard Bank's attorneys conveyed the view that there existed no obligation on their client to notify the applicant about the sale in execution and that the applicant must make an offer to the Omars to purchase the immovable property in the absence of which they will proceed with the transfer of the immovable property to the Omars. Transfer of the immovable property to the third and fourth respondents was registered on 12 November 2020.

[12] The applicant relied on three bases in support of the relief sought by it:

[12.1] That the Sheriff had a duty to notify the applicant of Standard Bank's sale in execution of the immovable property, by virtue of the provisions of Uniform Rule 46(7)(b).

[12.2] That Standard Bank had a duty in terms of Uniform Rule 46(5) to notify the applicant of the sale in execution.

[12.3] That Standard Bank had a contractual obligation to notify the applicant of the attachment of the immovable property and the sale in execution, by virtue of the provisions of clause 3 of the consent conditions.

[13] At all relevant times, Uniform Rule 46 (4)(c), (5) and (7)(d) provided as follows:

> ***"46 Execution - Immovable property***
> ***(4)(c) & (5)***
> *(c) Upon receipt of written instructions from the execution creditor to proceed with such sale, the sheriff shall ascertain and record the bonds or other encumbrances which are registered against the attached immovable property together with the names and addresses of the persons in whose favour such bonds and encumbrances are so registered and shall thereupon notify the execution creditor accordingly."*
>
> *(5) Subject to rule 46A and any order made by the court, no immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless —*
>
> *(a) the execution creditor has caused notice of the intended sale to be served upon —*
>
> *(i) preferent creditors;*
>
> *(ii) the local authority, if the property is rated; and*
>
> *(iii) the body corporate, if the property is a sectional title unit,*
>
> *calling upon the aforesaid entities to stipulate within 10 days of a date to be stated, a reasonable reserve price or to agree in writing to a sale without reserve, and has provided proof to the sheriff that such entities have so stipulated or agreed, or*
>
> *(b) the sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this rule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in paragraph (a) within the time stated in such notice."…*
>
> *(**46 (7)(d))***
> *(d) Not less than 10 days prior to the date of the sale, the sheriff conducting the sale shall forward a copy of the notice of sale referred to in paragraph (b) to every execution creditor who had caused the said immovable property to be attached and to every mortgagee thereof whose address is known and shall simultaneously furnish a copy of the notice of sale to all other sheriffs appointed in that district." (own underlining)*

[14] It is not in dispute that neither Standard Bank nor the Sheriff notified the applicant (in any manner whatsoever) of the sale in execution of the immovable property and that the applicant was unaware of the sale in execution at the time when it occurred.

[15] In the context of the duty imposed upon the Sheriff pursuant to the provisions of Uniform Rule 46(7)(d) it was held by the Full Court in *Le Roux v Nedbank Bpk en andere* 1980 (4) SA 386 (O) (on appeal against the setting aside of a sale in execution of a farm in the district of Harrismith pursuant to no notice being given to the first respondent in that matter of the sale in execution) that Uniform Rule 46(7)(d) must be complied with – in that notice of the intended sale must be sent to every mortgagee whose addresses are easily ascertainable by the Sheriff. In that matter, because such notice was not provided, the Court *a quo* set aside the sale in execution.

[16] In the present matter the Sheriff did not oppose any of the relief sought by the applicants. It was not suggested on behalf of Standard Bank that the Sheriff was not able to ascertain that the applicant was a mortgagee in respect of the immovable property and/or that the applicant's address was not known to the Sheriff or could not reasonably be obtained by the Sheriff, who conducted the sale in execution. It was also not suggested on behalf of Standard Bank that the Sheriff could for any reason whatsoever not forward a copy of the notice of sale to the applicant, as contemplated in Uniform Rule 46(7)(d).

[17] The provisions of Uniform Rule 46(7)(d), in terms whereof the Sheriff is obligated to forward a copy of the notice of sale to every execution creditor who had caused the said immovable property to be attached and to every mortgagee thereof whose address is known, is cast in peremptory terms. It is not disputed that at the time of the sale in execution the applicant had already caused the immovable property to be attached and that it was a mortgagee thereof. No explanation has been offered for the failure by the Sheriff to provide the requisite notice in accordance with the provisions of Uniform Rule 46(7)(d).

[18] In my view the Sheriff's failure to give notice to the applicant gives rise to the invalidity of the sale in execution. It cannot be (and it was not factually) gainsaid that the applicant's rights (as mortgagee and execution creditor) were negatively affected because it received no notice of the sale in execution.

[19] Significantly, Standard Bank's answering affidavit did not address the failure by the Sheriff to give notice to the applicant of the sale in execution. The factual allegation by the applicant that the Sheriff did not give such notice is not disputed on behalf of Standard Bank. In addition, the legal requirement that such notice be given, by the Sheriff to the applicant in terms of Uniform Rule 46(7)(d), was not addressed in the answering affidavit. A careful consideration of the answering affidavit reveals that Standard Bank's responses were only focused on its own obligations and its denial that there existed any obligation on it to give notice to the applicant of the sale in execution.

[20] In paragraphs 34 and 35 of the applicant's founding affidavit it expressly referred to the provisions of Uniform Rule 46 (4)(c) and (7)(d) which relate to the notice obligations of the Sheriff. The Sheriff is required to give notice to Standard Bank as execution creditor of the names and addresses of persons in whose favour bonds and encumbrances over the immovable property is registered (Uniform Rule 46 (4)(c)). It is not disputed that the Sheriff failed to do so. In addition, the Sheriff is required to give notice to the applicant (in its capacity either as execution creditor or that of mortgagee) of the sale in execution. It is not disputed that the Sheriff failed to do so.

[21] It is clear from a reading of Uniform Rule 46(7)(b) that the Sheriff and the execution creditor (Standard Bank) was required to consult before the sale for purposes of enabling the creditor to prepare the notice of the sale in execution. Because Standard Bank knew the identity of the applicant and that it was also a mortgagee in respect of the immovable property, its failure to deal with the allegations in the applicant's founding affidavit in relation to the Sheriff's notice obligations becomes rather curious.

[22] In considering the effect of the Sheriff's failure to give the requisite notice to the applicant in terms of Uniform Rule 46(7)(d), it is important to recognise that the applicant does not attack the validity of Standard Bank's underlying judgment and order in terms whereof the immovable property was declared executable. It is only the sale in execution that is under attack.

[22.1] In terms of Uniform Rule 46 it is the Sheriff that conducts the sale.

[22.2] In the circumstances (despite the fact that the sale in execution had been perfected in that registration of transfer of the immovable property to the third and fourth respondents had occurred) this is not a case where the owner of the immovable property claims recovery of the property in question. The applicant also did not seek relief (in the present application) whereby the transfer of the immovable property pursuant to the sale in execution be affected.

[22.3] Significantly, the third and fourth respondents (in whose names registration of the transfer of the immovable property occurred) elected not to oppose the application.

[22.4] The Omar's version was not placed before this Court and the extent of their knowledge as regards the applicant's status as mortgagee of the immovable property and whether they had knowledge of the order obtained by the applicant in terms whereof the immovable property was declared specially executable, is unknown.

[22.5] I do not regard it necessary to consider the abstract theory for the passing of ownership (as was done in *Knox N.O. v Mofokeng and others* 2013 (4) SA 46 (GSJ)). The principal consideration in the present matter is whether the sale in execution as effected by the Sheriff was unlawful as a consequence of the Sheriff's failure to give notice in terms of Uniform Rule 46(7)(d).

[22.6] I find that the sale in execution by the Sheriff was invalid as a consequence of his failure to give notice in terms of Uniform Rule 46(7)(d). Even if I am wrong in this regard, the particular injunction (and its effect) contained in Uniform Rule 46(5)(b)

must be considered. In terms of the subrule it is provided that no immovable property which is subject to any claim preferent to that of the execution creditor (in the present instance Standard Bank) shall be sold in execution unless (first) the execution creditor has caused notice of the intended sale to be served upon the listed entities provided in Uniform Rule 46(5)(a)(i) to (iii) or unless:

"[t]he Sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this Rule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in paragraph (a) within the time stated in such notice" (own underlining).

[22.7] I agree with counsel for Standard Bank's suggested interpretation of Uniform Rule 46(5)(a) – to the effect that the subrule only finds application in relation to any claim preferent to that of the execution creditor (Standard Bank), However, I am of the view that subrule (5)(b) of Uniform Rule 46 must be interpreted such that the Sheriff must be satisfied that it is impossible to notify *"any preferent creditor"* and that the subrule is not (also, as would be the case under subrule (a)) intended to find application in respect of *"any claim preferent to that of the execution creditor"* as contemplated in the wording of subrule (5). This interpretation is fortified by the use of the word "or" at the end of subparagraph (a) and before commencement of subparagraph (b) of subrule (5) of Uniform Rule 46. Thus, despite the fact that the applicant never held a claim preferent to that of Standard Bank in respect of the immovable property and that there existed no notification obligation on Standard Bank in terms of Uniform Rule 46(5)(a), the requirement remained that the Sheriff had to be satisfied that it was impossible to notify "any preferent creditor, in terms of this Rule", which, in my view, must be regarded as a reference to the provisions of Uniform Rule 46 as a whole, and not as a reference to subrule (5) of Uniform Rule 46 only.

[23] For the sake of comprehensiveness I mention that the consent conditions governing the passing of a subsequent bond in favour of a third party, as agreed

between the applicant and Standard Bank, in particular clause 3(d) thereof, cannot be interpreted to mean that a general obligation was contractually agreed between the parties in terms whereof Standard Bank was obligated to give notice of the sale in execution to the applicant. The clause clearly provides for conditions that will apply *"for the purpose of service of any notice, process or other document which may be required to be given to the Mortgagee in connection with any attachment and/or sale in execution of the mortgaged property under any prior ranking mortgage bond(s) or for any other purposes the Mortgagor's address shall be …"* (own underlining). In my view the content of the clause as agreed between the parties cannot be interpreted to apply in relation to an obligation to give notice which rests on a third party, such as the Sheriff. However, the finding that the sale in execution was invalid as a consequence of the Sheriff's failure to abide the prescriptive notice provisions contained in Uniform Rule 46(7)(d) and, to the extent required in terms of Uniform Rule 46(5)(b), renders it unnecessary to further examine the contractual consent conditions and whether same placed any notification obligation on Standard Bank.

[24] Uniform Rules 45, 46 and 46A deal with execution in High Court procedure. Whereas Uniform Rule 45 makes provision for execution in general and against movable property, Uniform Rule 46 deals with execution against immovable property and Uniform Rule 46A with execution against residential immovable property. It is generally accepted that Uniform Rules 45, 46 and 46A should, where necessary, be read in conjunction with one another. I was not referred to particular case law by counsel on behalf of the parties dealing with the question whether a sale in execution may be impugned in circumstances exactly such as the present. Counsel for the applicant referred in heads of argument to the decision by this Court in *Van der Walt v Kolektor (Edms) Bpk en andere* 1989 (4) SA 690 (T) (without specifying a particular part of the judgment on which reliance was placed) as part of a general submission to the effect that the sale was invalid and must be set aside. I am of the view that considerations regarding *restitutio in integrum* and whether an owner of immovable property had opportunity to intervene prior to or

after a sale in execution find no application in the consideration of the present matter. The adjudication of the present matter is limited to the question whether there occurred a valid sale in execution. In *Knox* (referred to above) the principle was however recognised that a sale in execution can be regarded as invalid and a nullity *inter alia* absent the requisite authority of the Sheriff to cause transfer to take place. Similarly, in *Joosub v JI Case SA (Pty) Ltd (now known as Construction and Special Equipment Co (Pty) Ltd and Others* 1992 (2) SA 665 (N) it was recognised that (in the context of the *rei vindicatio* pursuant to an invalid sale and transfer which had already occurred) the registration of transfer of ownership of immovable property is no bar to the setting aside of a sale in execution that was a nullity as a consequence of amongst others non-compliance by a Sheriff with notice requirements in terms of Uniform Rule 45(3) (at pp 672G to 673D). The issue of non-compliance with the provisions of Uniform Rule 46(7)(b) attracted the attention of the Court in *Kaleni v Transkei Development Corporation and Others* 1997 (4) SA 789 (Tks) where it was held that non-compliance with the requisite description requirements of the immovable property as well as the requirement of notice to be given of the sale to the registered owner thereof, merited the setting aside of the sale.

[24.1] Evidently the requirement of notice contained in Uniform Rule 46(7)(b) is to afford an execution creditor (other than the one causing the relevant sale in execution to take place) as well as a mortgagee sufficient opportunity to take steps to protect their legitimate interests. That opportunity was not afforded to the applicant, through no fault of its own.

[25] Insofar as it concerns the submissions made by Standard Bank's counsel to the effect that the provisions of Uniform Rule 46(7)(d) constitute an *"internal contradiction in rule 46"*, I find as follows:

[25.1] The submission is based on the contention that the duty of the first ranking preferent creditor to notify the lower ranking preferent creditor is affected or uplifted in Uniform Rule 46(7)(d). That contention is manifestly incorrect.

[25.2] The injunction contained in Uniform Rule 46(7)(d) is directed at the Sheriff and not at Standard Bank (in its capacity as highest ranking preferent creditor).

[25.3] In addition the finding that the Sheriff must be satisfied that it is impossible to notify *"any preferent creditor, in terms of this rule"*, is contained in Uniform Rule 46(5)(b). Clearly, in my view, the Legislature contemplated a reference to *"any preferent creditor"* and not only a preferent creditor with a claim preferent to that of the particular execution creditor (as contemplated in Uniform Rule 46(5)(a)). The subrule provides for a notification to any preferent creditor *"in terms of this rule"* and not only a limited reference to the provisions of Rule 46(5) – to the extent that the provisions of subparagraph (b) would apply only to a creditor with a claim preferent to that of the execution creditor.

[26] In the circumstances the submission made on behalf of Standard Bank that this Court is tasked to reconcile the suggested *"internal contradiction"* contained in the Rule, is mistaken.

[27] There is no reason why costs should not follow the result of this application, and why Standard Bank should not be ordered to pay the applicant's costs of the application. This is particularly so in circumstances where Standard Bank failed to, in its answering affidavit, deal with the failure by the Sheriff to give the requisite notice to the applicant, whilst the Bank knew of (at least) the mortgagee status of the applicant.

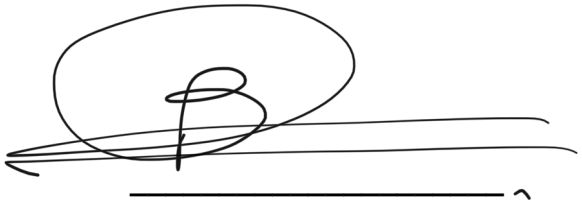
Order

[28] In the circumstances I grant an order in the following terms:

1. It is declared that the sale in execution which occurred on 14 November 2019 in respect of the immovable property described as Holding 83, Andeon A.H., Registration Division J.R., Province of Gauteng, in extent 2.0234 hectares, held under Deed of Transfer No T91138/2012 (in terms whereof the second respondent caused the immovable property to be sold to the third and fourth respondents) is invalid;

2. The sale in execution referred to in paragraph 1 of this order is set aside;

3. The first respondent is ordered to pay the applicant's costs of the application.



PA SWANEPOEL

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing : 13 October 2022

Date of judgment : 14 December 2022

Appearances:

Counsel for applicant:	Adv. L Acker
Attorneys for applicant:	Ross Munro Attorneys
Counsel for first respondent:	J van der Merwe (attorney)
Attorneys for first respondent:	Haasbroek & Boezaart Attorneys