Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 25776/2009

In the matter between:

KRISHNA NAIDOO	**First Applicant**
BERNADETTE MARY NAIDOO	**Second Applicant**

and

FIRSTRAND FINANCE COMPANY LIMITED	**First Respondent**
SAAMBOU BANK LIMITED	
(Under Curatorship in terms of section 69 of the Bank Act, No 94 of 1990)	**Second Respondent**
MARK ROY LIFTMAN	**Third Respondent**
THE REGISTRAR OF DEEDS	**Fourth Respondent**
I J HUGO N O (In his capacity as the Sherriff of the Magistrate's Court, Kuils River)	**Fifth Respondent**

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JUDGMENT DELIVERED : 2 FEBRUARY 2011

Heard on 14 October 2010

For Applicants	:	Adv A Aggenbach
Attorney(s)	:	NSW Attorneys (c/o Snitchers Inc)
For 1st & 2nd Respondents	:	Adv D van Reenen
Attorney(s)	:	Schevel Cohen & Fourie

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THE REGISTRAR OF DEEDS	**Fourth Respondent**
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MOOSA, J:

The Relief

1]This is an application in which the applicants seek an order that the purported sale in execution of Erf 4706, Erf 2816 and Erf 2817, Kraaifontein ("the properties") held on 6 November 2008, be set aside and, pending the setting aside of the sale, that the fourth respondent be interdicted from registering transfer of the properties into the name of the third respondent. Save for the first and second respondents, the other respondents are not opposing the application. On 8 December 2009 an order was

granted in terms of which, the transfer of the properties was interdicted pending the outcome of this application. On 11 December 2009 an order was taken by agreement, in terms of which the future conduct of the matter was agreed to and the matter was eventually set down on the semi-urgent roll for argument. The first and second respondents reserved the right to argue the question of urgency. The applicants are seeking final relief or, for that matter, a pronouncement on the validity of the execution process which will have the effect of final relief. The relief sought is for the sale in execution in this matter to be set aside for want of proper compliance with the rules of the court.

The Grounds of Challenge

2]The applicants attacked the sale of execution on a number of grounds; the majority of which comprised the failure, on the part of the first and/or the second respondents, to comply with the Magistrates' Rules of Court. Some of the grounds were not raised in the founding papers but were belatedly introduced in the replying papers or in applicants' heads of argument. The grounds of challenge included*, inter alia*, the failure to give proper notice of amendment with regard to the substitution of the name of the plaintiff in the pleadings and the warrant of execution (r 55A read with r 36(6)); the failure to have the warrant of execution re-issued by the clerk of the court (r 37(3) read with r 36(1)) and the failure to serve the warrant of execution and notice of attachment as required in terms of r 43(2)(a) read with r 9(3)(d) on the proper *domicilium citandi et executandi* address.

Matter not raised in the Founding Papers

3]Although the various alleged grounds of attack constitute serious non-compliance with the Rules of Court, it is not necessary to deal with all those grounds. It would be

sufficient to set aside the sale on one ground provided it goes to the heart of the matter of non-compliance. One of the grounds relied on by the applicants for the relief sought is the failure of the respondent to serve the warrant of execution and the notice of attachment on the chosen *domicilium* address as required by r 43(2)(a) read with r 9(3)(d). The first and second respondents contended that the applicants had not raised the failure to serve the notice of attachment in terms of r 43(2)(a) in their founding papers. This is incorrect. The issue was raised in the founding papers, although it may not have been articulated very clearly. However, all the facts that constitute the particular ground were set out in the founding papers and the annexure.

4]In para 49 of the founding affidavit, the first applicant states:

> *"I assume that during August 2008 a fresh warrant of execution against the properties was issued as the copy that my attorneys of record obtained from the court file does not bear the court's stamp or signature. We had no notice of the assumed issue of the warrant."*

Admitting the contents of para 49, first respondent, in para 40 of its answering affidavit, went on to explain:

> "*The fact of the matter is that the bank served the documents on the Applicants' chosen domicilium. At no stage had the Applicant's notified the Bank that they had vacated the premises and were effectively no longer in control thereof, despite being aware that this was the address where all legal process had been served in the past."*

First applicant continues in para 50 to state the following:

> "In terms of a copy a return of service by the Sherriff (sic), on 22 August 2008 a copy of the warrant and a Notice of Attachment was affixed to the outer or principle (sic) door. However, he also states that there

> were no doors. I also refer the court to the fact that the Sherriff (sic) also recorded that the buildings were damaged, that there were no windows and that the ceilings were broken. A copy of the return is attached hereto and marked as "KN31". In fact the buildings were completely abandoned and stripped of anything that could be removed and at approximately that same time the municipality demolished all the buildings on the second property."

5]In response thereto the first respondent in para 41 of the Answering Affidavit admits the contents, save to deny that there was no principle outer door on the property and states:

> *"It is clear that there was such a door as the sheriff attached the process to the door. The return interpreted as a whole states that there were no other doors on the premises."*

The undisputed fact is that the principal door to which the documents in question were affixed, was located on the second property and not on the first property which was the chosen *domicilium* address in terms of the Mortgage Bond. It is common cause that the *domicilium* address in question was a vacant piece of land. I am satisfied that the ground in question, challenging the validity of the service of the warrant of execution and notice of attachment, was raised in the founding papers of the applicants and the first and second respondents in fact responded thereto in their answering papers. In my view there is therefore no substance in the complaint that the matter was not raised in the founding papers.

The Question of Urgency

6]Before dealing with the merits of the matter, I need to deal with the preliminary issue

concerning the question of urgency, which the first and second respondents reserved for argument at the hearing of the application. In my view, events have overtaken the question of urgency. The matter was postponed on at least two occasions by agreement with the parties and the matter was, with the concurrence of the Judge President, referred to the semi-urgent roll for hearing on 16 February 2010. On 16 February 2010 the first and second respondents brought an application to file a further affidavit. The application was opposed by the applicants. On 22 February 2010, the court granted the application as well as leave to the applicants to file opposing affidavits. The matter eventually came before me for hearing on 14 October 2010. I do not think that the first and second respondents suffered any prejudice by the applicants bringing this matter as one of urgency. The first and second respondents were afforded adequate opportunity to file the necessary answering affidavit. In any event, the transfer of the properties was imminent and the applicants were entitled to come to court as a matter of urgency to protect their interests. In the circumstances, I am of the view that the complaint is misplaced.

The Merits

7]I now turn to deal with the merits of the matter, namely, the failure of the first and/or second respondent to serve the warrant of execution and the notice of attachment on the chosen *domicilium citandi et executandi* address as required by r 43(2)(a) read with r 9(3)(d). In this regard the dictum in **Campbell v Botha and Others** 2000 (1) SA 238 (A) by **Streicher JA** at para 18, is apposite:

> *"An attachment is effected by way of a notice by the sheriff served together with a copy of the warrant of execution upon the execution debtor as owner, upon the registrar of deeds, upon all registered holders of bonds registered against the property, if the property is in the*

occupation of some person other than the execution debtor, also upon such occupier and upon the local authority in whose area the property is situated (Rule 43(2)(a)). Whatever the position may be if service is not effected on any of the other interested persons there can, in my view, never be said to have been an attachment where neither the warrant nor the notice of attachment had been served on or brought to the notice of the owner."

8]It is not disputed that the *domicilium* address is a vacant piece of land and, at all relevant times prior to the purported attachment, first and second respondents communicated with the applicants at their residential address or through their appointed attorneys. It is common cause that the mortgaged property comprises three separate erven described as follows:

(a) Erf 4706, Kraaifontein, 793 square meters, consisting of a vacant erf, more commonly known as 123 Voortrekker Road, Kraaifontein ("the first property");

Remainder Erf 2816, Kraaifontein, 1377 square meters, consisting of brick buildings which previously housed a police station and more commonly described as 126, 3rd Avenue, Kraaifontein ("the second property); and
Remainder Erf 2817, Kraaifontein, 496 square meters, consisting of a vacant erf, more commonly known as 122, 3rd Avenue, Kraaifontein ("the third property").

9]It is common cause that clause 18 of the Mortgage Bond states:

"The Debtor hereby chooses as domicilium citandi et executandi at the mortgaged property or, should there be more than one property mortgaged, at the first property herein referred to as being mortgaged as security for indebtedness under this Bond – where all notices and legal processes in relation to this Bond or to any action hereunder may

be effectually delivered and served."

10]The first property that is mortgaged is the vacant Erf 4706, which is the first property. The return of service of the Sheriff dated 25 August 2008 describes the service of the documents by the Deputy Sheriff, Martin, as follows:

> "*On this 22nd day of August 2008 at 16.10 I served a copy of the Warrant of Execution & Notice of Attachment upon the OCCUPANT at 122 – 3rd AVENUE, KRAAIFONTEIN by affixing a copy of the said process to the outer or principle (sic) door as I found the premises locked. No other service possible after a diligent search. Rule 9(6).*"

The Sheriff goes on to describe the condition of the building as follows:

> "*DESCRIPTION : BUILDING ON ERF DAMAGED, NO DOORS OR WINDOWS, CEILINGS BROKEN.*"

11]From the Sheriff's return of service, it appears that the warrant of execution and the notice of attachment were served on the second property, which consisted of the buildings and which is more commonly known as 126, 3rd Avenue, Kraaifontein and not 122 – 3rd Avenue, Kraaifontein as described in the return of service. The first and second respondents admitted service was effected on the second property. This address did not qualify as the *domicilium* in terms of the provisions of the Mortgage Bond. The *domicilium* is the first property, which is more commonly described as 123, Voortrekker Road, Kraaifontein. This also happens to be a vacant piece of land. The address given on the return of service is that of the third property and which is also a vacant piece of land.

12]The first and second respondents contended that the summons was served on the applicants personally at the *domicilium.* It is not in dispute that, at the time, the applicants were conducting a business from the second property and they fortuitously happened to be present at the business when service was affected. However, at the time when the warrant and notice of attachment were served at the same address, the applicants had already closed the business and vacated the premises located on the second property and no personal service could be affected on them. Service was then affected by affixing the documents on the principal door of the second property, which was not the chosen *domicilium* address in terms of the Mortgage Bond. The *domicilium* address in terms thereof was the first property, which was a vacant piece of land. It is not disputed that the warrant of execution and the notice of attachment was served on the second property.

The Findings

13]Where service is to be effected on a *domicilium* address that is a vacant piece of land, strict compliance with proper and effective service is *sine qua non.* To affect service on a neighbouring property, even if it belongs to the same owner, when the *domicilium* is the first property is, in my view, not proper and effective service as required by the rules of court. I accordingly conclude that the service of the warrant of execution and the notice of attachment, on the second property and not on the first property, were not proper and effective service of the warrant of execution and notice of attachment on the applicants. In any case the applicants alleged that they were not aware of such service nor was it brought to their attention. They only discovered that the properties were sold in execution on 2 November 2009, when they contacted second respondent to ascertain the balance owing and were informed that the properties were sold on 6 November 2008.

14]In view of the defective service of the warrant of execution and the notice of attachment any subsequent steps taken leading up to the sale in execution of the properties are invalid and of no force and effect. In my view, there was no substantial compliance with the rules relating to the attachment of the immovable properties. In the result, the sheriff had no authority to conduct the sale of the properties (see **Rossouw and Steenkamp v Dawson** 1920 AD 173 at 180). The purported sale in execution is accordingly a nullity. In view of my findings it is not necessary to deal with all the other challenges mounted by the applicants on the validity of the sale in execution including those challenges that were mounted in applicants' replying papers, if any, or in their heads of argument. This would include the complaint regarding the change of name from "Saambou Bank Beperk" to "Firstrand Finance Company Limited", which was a technical objection. It in any case appears that the applicants accepted the change in names as they continued paying to the latter company without demur and it also appears that they did not suffer any prejudice.

The Costs

15]I now turn to the question of costs. There is no reason why costs should not follow the result. The applicants were substantially successful and they should be awarded the costs, including the costs of 8 and 11 December 2009, which stood over for later determination. The matter was only opposed by the first and second respondents and not by the third, fourth and fifth respondents. The first and second respondents should accordingly be held liable for the costs jointly and severally, the one paying the other to be absolved.

The Order

16]In the result, the following order is made:

(a) The sale in execution of properties being the remainder of Erf 4706, Kraaifontein, remainder of Erf 2816, Kraaifontein and remainder of Erf 2817, Kraaifontein, on 6 November 2008 to the third respondent, pursuant to a warrant of execution issued by the Kuils River Magistrate's Court under case No 2379/2002, is set aside;

(b) the first and second respondents are ordered to pay the costs of the applicants including the wasted costs occasioned on 8 and 11 December 2009, jointly and severally, the one paying the other to be absolved.

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