**Republic of South Africa**

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

**Case No: 20373/10 & 1467/12**

Before: The Hon Mr Justice Binns-Ward

In the matter between:

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| **ELIZORA OLIVIER TODD** | **Applicant** |
| **and** | |
| **FIRSTRAND BANK LIMITED** | **1st Respondent** |
| **THE SHERIFF OF THE COURT, MALMESBURY** | **2nd Respondent** |
| **FREDERICK JACOBUS VAN ZYL** | **3rd Respondent** |
| **TIMOTHY OLIVER PRICE** | **4th Respondent (1467/12)** |
| **DANIEL PIERRE FOURIE** | **5th Respondent (1467/12)** |
| **JOAN BOOYSEN** | **6th Respondent (1467/12)** |
| **STANDARD BANK OF SA LTD** | **7th Respondent (1467/12)** |

**JUDGMENT DELIVERED: 9 FEBRUARY 2012**

**BINNS-WARD, J:**

[1] In this matter (case no. 20373/2010) the applicant instituted proceedings on 14 September 2010, as a matter of urgency, claiming the following relief:

1. That this application be heard as a matter of urgency, as contemplated by the provisions of rule 6(12) and that the ordinary forms and service be dispensed with;
2. That the rule *nisi* do issue calling on Respondents to show cause, if any, on 15 November 2010 why an order in the following terms should not be granted;
   2.1 That the Sale of Execution under High Court case number 11033/2006 in respect of ERF 2775 Malmesbury, also known as 2 Louw Street, Malmesbury which was held on 16 August 2010, is declared invalid and set aside;

2.2 That Respondents refrain from registering the said property in the name of Third Respondent.

3. That paragraph 2.2 above shall operate as a temporary interdict pending the finalization of this application;

4. Granting such further and/or alternative relief as the above Honourable Court may deem fit.

That First and Second Respondents (and Third Respondent only if he opposes this application) pay the costs of this application.

[2] As might be deduced from the relief sought, the matter which gave rise to the proceedings was the sale in execution of erf 2775, Malmesbury. The sale occurred consequent upon a judgment obtained against the applicant and her co-owner of the property (whose current whereabouts are said to be unknown) as a result of their failure to service the mortgage loan which had been advanced by the first respondent bank against the security of the property. The property is residential in character. The dwelling house erected thereon has at all times material been occupied by a retired attorney, one Gert Erasmus Olivier, from whom the applicant and her ex-husband purchased the property. Mr. Olivier is the father of the applicant and is the person who, on her behalf, has deposed to all the substantive affidavits for the applicant in the matter and also in related proceedings instituted under case no. 1467/2012. Perhaps tellingly, Mr. Olivier more than once refers in his affidavits to the applicant's attorney as 'my attorney'. It is also apparent from his averments that he was independently active in seeking to stop the sale before it occurred because of his awareness that there had not been compliance with one of the prescribed pre-sale procedures.

[3] The only ground upon which the application was brought was the alleged non-compliance by the judgment creditor with one of the requirements of rule 46(7)(e) of the Uniform Rules of court. I shall describe the nature of the non-compliance, which is admitted by the respondents, presently.

[4] When the matter first came before court it was postponed by agreement, with an interim interdict being granted to the applicant prohibiting the transfer of the property pending the determination of the application to set aside the sale. In breach of the prohibitory interdict, and allegedly as a consequence of a concatenation of errors in the offices of the transferring attorneys, transfer of the property was effected to the third respondent. Notwithstanding this regrettable development the applicant did not see fit, as one would have expected, to amend the relief sought in terms of her notice of motion by substituting, in lieu of the relief originally sought in terms of para.s 2.2. and 3 thereof, a prayer for an order directing the reversal of the transfer consequent upon the setting aside of the sale. The applicant also did not apply for an interdict prohibiting the third respondent transferee from purporting to alienate the property pending the determination of the validity of the sale in execution. Even more curiously, despite a tender by the judgment creditor (the first respondent in this case) on 4 April 2011 to withdraw its opposition to the application and to consent to the order sought by the applicant setting aside the sale,[1] and an absence at that stage of any opposition to the application by the third respondent purchaser of the property, the applicant did not move the court for the principal relief sought in the application. Represented in this respect by Mr. Olivier, she appears instead to have adopted that the attitude that the parties responsible for the breach of the interim interdict should first purge their wrong, and obtain the reversal of the registration, before she was required to prosecute her application further.

[5] As a consequence of this attitude by the applicant, the matter has dragged on, without resolution, in this court since September 2010, that is for almost one and a half years. During this interval, the application has been postponed on three

[1] The first respondent had opposed the application and instituted a counter-application seeking condonation of any 'deemed' non-compliance with rule 46(7)(3) (sic).

occasions despite opposition at one stage from the first respondent. An opposed application for postponement by the applicant in April 2011[2] eventually went in the applicant's favour with the reluctant agreement of the first respondent, reportedly because no judge could be made available to hear the matter on the appointed date. Furthermore, despite the evident absence of any anxiety on the part of the applicant to have the matter determined expeditiously, the matter was on each occasion postponed for hearing on the semi-urgent roll. And indeed, it was on that roll that the matter was called for hearing before me on 2 February 2012.

[6] During the time that has elapsed since the applicant's first approach to the court, as mentioned, on urgency, the applicant's father has continued in residence at the property, the rates and taxes on the property have been paid by the third respondent as the registered owner, and the amount outstanding in terms of the judgment debt has increased substantially because of the accrual of *mora* interest. Attempts have been made at various times to settle the bank's claim by arrangements entered into between the applicant and the first respondent bank. All of these failed to come to fruition. In addition, an application has been made by the Sheriff, represented in that regard by the first respondent's attorneys in the current matter, to obtain an order setting the transfer aside. That application under case no. 2004/2011 is not before me; although I was informed by counsel that it had also been set down for hearing on 2 February 2012 in the expectation that it would be heard together with this matter. It appears from the papers before me that the application in case no. 2004/2011 is being opposed by the applicant in case no. 20373. The grounds of opposition are, however, not apparent on the papers

[2] The application in case no. 20373/2010, including the counter-application mentioned in note 1, above, had been postponed on 18 October 2010, by agreement between the applicant and the first respondent, to 19 April 2011.

before me. It may be that it is directed at the terms on which a reversal of transfer is sought.

[7] It was only in November 2011 that the first respondent, evidently frustrated by the failure of the applicant to bring the matter to finality, informed the applicant of the withdrawal of its tender of an order setting aside the sale and of its intention to oppose the application and prosecute its counter-application for condonation of the non-compliance with the applicable rule. The first respondent had delivered its answering affidavit, which also served as the supporting affidavit in the counter-application in September 2010, and the applicant had replied thereto in October 2010.

[8] The third respondent, who is separately represented, had also, understandably, grown impatient with the delay, and deciding that he could no longer rely on the applicant and the bank to bring the matters to expeditious resolution, also delivered answering papers. These were delivered on 1 December 2011. In terms of the rules of procedure, the applicant, if so advised, should have delivered any reply she wished to make to the third respondent's answering papers by 15 December 2011. No replying affidavits were delivered. In addition, no heads of argument were filed by the applicant by the date fixed in terms of this court's consolidated practice notes; that is by 10 days before the date of hearing. Indeed, it appeared from information imparted by the applicant's counsel during his address in support of the application for postponement discussed below that the applicant instructed counsel only a week and a half before the hearing date.

[9] On 30 January 2012, the applicant caused a notice of motion to be issued under case no. 1467/12, in which the following relief was claimed:

1. That this application be heard as a matter of urgency, as contemplated by the provisions of rule 6(12) and that the ordinary forms and service be dispensed with;
2. For an order declaring Second Respondent (M S T Basson), Fourth Respondent (Timothy Oliver Price), Fifth Respondent (Daniel Pierre Fourie) and Sixth Respondent (Joan Booysen) to be in contempt of Court;
3. An order committing Second Respondent (M S T Basson), Fourth Respondent (Timothy Oliver Price), Fifth Respondent (Daniel Pierre Fourie) and Sixth Respondent (Joan Booysen) to prison for 60 days or such other period as the Court may determine, suspended for such period as the Court may determine on the conditions as this Court may determine.
4. An order interdicting Respondents from prosecuting their defence (if any) to the application lodged by Applicant under High Court case no. 20373/2010 until the application lodged by Second Respondent under High Court case no. 2004/2011 is heard, decided and given effect to (if any);
5. An order postponing the application under High Court case no. 20373/2010 *sine die* until completion of the application under High Court case no. 2004/2011 as referred to in paragraph 4 herein;
6. An order postponing the application under High Court case no. 2004/2011 to the semi-urgent role on a date arranged between the parties or on a date decided upon by the Court;
7. An order granting leave to Applicant to file answering [i.e. replying] affidavits in cases number 20373/2010 and number 2004/2011 within 15 days of the hearing of this matter.
8. That Second, Fourth, Fifth and Sixth Respondents pay the costs of this application

[10] When the matters in case no. 20373/2010 and case no. 1467/2012 were called I directed that the postponement of case no. 20373/2010 sought in terms of para 5 of the notice of motion in case no. 1467/2012 be argued and determined before the remaining issues in the cases. The application for postponement was opposed by the first and third respondents in case no. 20373/2010. After hearing argument on that issue I made an order refusing the application for postponement - the costs being reserved for determination with the principal case - and indicated that my reasons for doing so would be given later, if necessary. These reasons follow.

[11] The suggestion that it would be appropriate to postpone the already much delayed determination of case no. 20373/2010 until after the determination of the

application in case no. 2004/2011 is wholly lacking in merit, as is the averment by Mr Olivier that an order setting aside the sale will have no effect. No purpose will be served in granting an order directing the reversal of the transfer to the person who purchased the property at the sale in execution if the application in case no. 20373/2010 for a setting aside of the sale is refused; put differently no point will be served in entertaining the application case no 2004/2011 if the procedural defect admittedly attending the sale in execution of the property is condoned, as sought by the first respondent in case no. 20373/2010, or determined to have been of a non-vitiating nature as contended by the third respondent. The usual approach in such matters is to impugn the sale pursuant to which transfer has taken place. If the sale cannot be successfully impugned an attack on the consequent transfer would be baseless. Any relief directed at reversing the transfer would be consequential upon and ancillary to an order setting aside the sale.

[12] The failure of the applicant to have delivered replying affidavits within the time period prescribed in the rules was inadequately explained. The explanation was limited to the following averments at para 29.9 of the supporting affidavit in case no. 1467/2012:

> In order to protect her rights Applicant will have to file [replying] papers in that matter [i.e. case no. 20373/2010] as well.
>
> Applicant needs time to prepare herself seeing that the documents of Mr van Zyl [the third respondent in case no. 20373/2010] was delivered only on 30 November 2011 when it was a busy time for counsel and shortly before offices closed for the holiday period.
>
> Counsel needs more time to deal with the issues and will also have to investigate the detailed averments made by Mr van Zyl regarding the value of the property.
>
> I therefore request postponement in these matters [i.e. case no.s 20373/2010 and 2004/2011] in order to prepare properly.

The affidavit proceeded in para. 2.10:

> ....Applicant came to court on an urgent basis in September 2010 and was prepared and willing to deal with the matter there and then.
>
> Respondents caused the delay and cannot now expect the Court to overlook the misconduct of certain parties to this action (sic).

[13] No particularity is given as to why the applicant could not reply to the answering papers within the time afforded in the rules. As mentioned, it was apparent from the statement of the applicant's counsel from the bar during argument that he had only been instructed in the matter a week and a half or so before the matter was due to be heard on 2 February 2012 – that is nearly two months after the delivery of the respondents' answering papers. Counsel's statement from the bar that had he been briefed in December, he would in fact have been too busy to attend to the matter before he left on holiday on 15 December does not assist the applicant. If Mr. *J.A.B. Nel*, who appeared for her at the hearing, had indeed been unable, by reason of other commitments, to accept instructions, the applicant was required to find other counsel who was available to deal with the case. The procedures of the court and the interest of the other parties in obtaining finality cannot be held to ransom by reason of the non-availability of one of the party's counsel of first choice. The vaguely described further investigations allegedly required in order to prepare replying papers were in any event the responsibility of the applicant's attorney. It was not explained why the attorney, assisted, if need be, by the guidance of alternative counsel, could not undertake the enquiries. Insofar as the main object of the postulated further enquiries appears to have been the obtaining of evidence with which to refute Mr. van Zyl's allegations concerning the market value of the property, that fact in any event is not particularly germane to the determination of the principal case.

[14] There was no explanation on affidavit whatsoever as to when counsel was first approached in the matter, nor was it explained why an application for postponement was delivered only three court days before the setdown date and seven court days after the applicant's heads of argument had been due.

[15] The proper approach to applications for postponement was described by Mohamed AJA in *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (Nm) at 314-315, in a passage that has become something of a *locus classicus* on the subject. The applicable principles include the requirement that the applicant's reason for being unprepared to proceed should be 'fully explained', and should not be due to delaying tactics. The application must be made timeously, as soon as circumstances which might justify such an application become known to the applicant. The application must be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled. Questions of prejudice should be weighed; it is not only the position of the applicant, but also that of the other parties that is relevant in this regard. An applicant for a postponement seeks an indulgence from the court, which will not be granted unless it is in the interest of justice to do so. Furthermore, in considering an application for postponement, the policy that it is in the public interest that there should be an end to litigation should be borne in mind. (See Herbstein and van Winsen *The Civil Practice of the High Courts of South Africa* Fifth Edition at 754-757.)

[16] I have already highlighted some respects in which the applicant has fallen woefully short of what is required of an applicant for a postponement. In addition, I look askance at the manner in which the applicant has prosecuted the main

application. On the basis of the first's respondent's abovementioned tender and the third respondent's initial failure to oppose the relief sought, the applicant could have taken an order setting aside the sale quite some time ago without opposition. Her reasons for not having done so lack any cogency, and could fairly be described as spurious. It is evident that the delay has postponed the achievement of certainty in the ownership of the property and, if the sale is to be set aside, delayed the opportunity for the first respondent to resell the property with full and proper compliance with the procedural requirements of sales in execution. It is evident that the only person who stood to benefit from the manner in which the applicant has conducted the proceedings was been her father, Mr. Olivier, whose ability to continue living in the property has been extended by the delay. In that context it has been striking that it has been Mr Olivier who has deposed to all the substantive affidavits in the applicant's case, including the principal affidavit in support of the application for the postponement. It is also evident that it is Mr Olivier who was astute to the procedural irregularity in the pre-sale procedures. In my view it is apparent that the manner in which the applicant has refrained for a year and a half from pressing home her application, and has instead chosen to resist the matter coming to an early conclusion, is lacking in *bona fides* and has been directed at obtaining an illegitimate tactical advantage in the form of providing a pretext for Mr. Olivier's extended occupation of the property. I have already referred to the attendant prejudice occasioned to the first and the third respondents by the delay (the latter being an entirely innocent party). All of these considerations informed my decision to refuse the application for postponement. The applicant will be directed to pay the first and third respondents' costs of suit in the postponement application.

[17] The application for the committal of various respondents for contempt of court set out in paragraphs 2 and 3 of the notice of motion in case no. 1467/2012 arises out of the breach of the interim interdict described earlier. The applicant has been aware of the breach of the interdict for nearly 18 months. For her to bring a contempt application in connection with it as a matter or alleged urgency at this stage – particularly in circumstances in which she is aware from the content of the affidavits from the respondents in case no. 20373/2010 that an explanation inconsistent with any intention by them to act in contempt of the court order has been offered, and that on any approach it is thus evident if the allegations of contempt were to be pressed, the case could only be determined on oral evidence – is a flagrant abuse of process. The opprobrium attaching to the applicant's conduct in this regard is exacerbated by the fact that the most probable explanation for the stratagem of bringing the contempt application at this remove is that it was a tactic to assist in engineering a further postponement of the main application. Mr *Nel* realistically conceded that he could not press for the relief set out in para.s 2 and 3 of the notice of motion in case no. 1467/2012 as a matter of urgency. The contempt of court application will thus be struck from the roll.

[18] The relief sought in terms of para. 4 of the notice of motion in case no. 1467/2012 falls away by virtue of my refusal to postpone the hearing in case no. 20373/2010, and my decision to determine that case on the papers as they stand. As mentioned, case no 2004/2011 is not before me. I am therefore not disposed to entertain the application in terms of para. 6 of the notice of motion in case no. 1467/2012 in which a postponement of case no. 2004/2011 is sought. In any event all the indications are that the case has not been allocated to a judge for hearing. Mr *van Reenen*, who appears for the first respondent in the matters before

me, advised that he is also instructed on behalf of the applicant in case no. 2004/2011. He intimated that in the event of the application in case no. 20373/2010 succeeding, the substantive relief sought in case no. 2004/2011 would follow as a formality; alternatively, that in the event of the application in case no. 20373 being dismissed, no purpose would be served by the applicant in case no. 2004/11 pursuing the substantive relief sought in that matter.

[19] Turning now to the principal case in case no. 20373/2010. Rule 46(7)(e) of the Uniform Rules provides:

> Not less than 10 days prior to the date of the sale, the sheriff conducting the sale shall affix one copy of the notice on the notice-board of the magistrate's court of the district in which the property is situate, or if the property be situate in the district in which the court out of which the writ issued is situate, then on the notice-board of such court, and one copy at or as near as may be to the place where the said sale is actually to take place.

[20] The defect relied upon by the applicant is the failure by the Sheriff to affix a copy of the notice of sale at the place where the sale was to take place. The appointed date for the sale in execution of the property was 16 August 2010. Having regard to the provision in the definition of '*court day*' in rule 1 of the Uniform Rules that '*only court days shall be included in the computation of any time expressed in days prescribed by these rules*', and the provisions of rule 46(16), the requirements of rule 46(7)(e) fell to be complied with by no later than 30 July 2010. The Deputy Sheriff, however, proceeded to the property only on 6 August 2010 to affix a copy of the notice of sale as required by the rule, that is some five court days before the date appointed for the sale. When he arrived there he was met by Mr. Olivier.

[21] According to the Deputy Sheriff, he explained the purpose of his visit to Mr. Olivier. In an affidavit filed by the first respondent in support of its opposition and counter-application in case no. 20373/2010, the Deputy Sheriff averred:

> On 6 August 2010 at 08h15, I went to 2 Louw Street, Malmesbury to affix a copy of the Notice of sale scheduled for 16 august 2010 at 10h00 am as per court rules. On my arrival....Mr G Olivier, the occupant opened the door and asked me if he could assist me. Please note that there are (sic) a security door about a meter from the front door. I explained to him that I need to affix a copy of the said Notice of sale on the premises. Mr Olivier then took the copy from me. Attached find a copy of the return of service, marked "A".
>
> The letter from Mr J Harmse [the attorney approached by Mr Olivier in connection with the non-compliance with rule 46(7)(e)] on 12 August 2010 was received by our office. I deny that I said that the rules were not followed. I did say that I think a personal service is better than affixing and that the sale will proceed as advertised. On 13 August 2010 I again confirmed telephonically to Mr Harmse that the sale will proceed.

Mr. Olivier denied that the Deputy Sheriff gave any indication of intending to affix the notice to the property. Olivier averred that the Deputy Sheriff merely handed him a copy of the notice.

[22] It is quite clear from the averments made by the Deputy Sheriff that he misapprehended the purpose of the notice. Whereas the purpose of affixing the notice is to advertise the sale at the place at which it is to be conducted, it is implicit in the evidence of the Deputy Sheriff that he apprehended that the object was to give notice of the sale to the occupant of the property (notice to the occupant being a matter to be dealt with in the attachment process in terms of rule 46(3)). I have approached the matter accepting in favour of the applicant that the Deputy Sheriff did not inform Mr. Olivier that his intention was to affix the notice to the property. The copy of the notice handed to Olivier was annexed as annexure B to his founding affidavit in case no. 20373/2010. Annexure B bears a handwritten annotation, apparently made by Olivier, or in accordance with his instructions, which reads

'*Ontvang op Vrydag 6 Augustus teen ± 8·30 am (oggend). Dis net 5 Hof dae voor veiling en dis nie affix nie.*' The affidavit does not explain in what circumstances the annotation was inscribed on the document. The content of the annotation does, however, suggest that Mr Olivier was astute to the fact that the purpose of the Sheriff in bringing the notice of sale to the property on 6 August 2010 was to purport thereby to comply with rule 46(7)(e).

[23] Mr. Olivier averred that 'being aware' that the Sheriff had not affixed a copy of the notice at or near the house he contacted his attorney, Mr Johann Harmse (also the applicant's attorney of record in the application), and advised him of 'the situation'. Harmse confirmed this with the Deputy Sheriff on 11 August 2010 and thereafter wrote to the first respondent's attorneys on 12 August 2010, as follows:

> Ons bevestig dat ons optree namens MA & E Todd in hierdie aangeleentheid.
>
> Ons instruksies is dat daar nie voldoen is aan Reël 46(7)(e) van die Hooggeregshof nie, en verwys u na Hopkins Boerdery (EDMS) Bpk van (sic) Colyn & Ander [2006] 1 All SA 497 (c) (sic):
>
> [The Afrikaans text of rule 46(7)(e) was then set out with the parts thereof emphasised by van Zyl J being underlined][3]
>
> Dit is ons verdure instruksies dat die Balju versuim het om die kennisgewing aan te bring op of so na as moontlik aan die plek waar die verkoping werklik sal plaasvind. Bogenoemde is bevestig deur die Balju en is daar dus nie aan hierdie gebiedende reël voldoen nie.
>
> Derhalwe vereis ons hiermee dat die beoogde veiling onmiddelik afgelas word en ontvang ons graag u skriftelike bevestiging daarvan per kerende faksimilee.
>
> Indien die veiling voortgaan, sal ons kliënte die nodige regshulp aanvra om hul belange te beskerm.

[3] It should perhaps be mentioned that the court in *Hopkins Boerdery* did not discuss the import of rule 46(7)(e) at all. The reason for the learned judge's emphasis by means of italic font of parts of the sub-rule quoted in the judgment is thus not apparent.

No immediate response having been received to the letter, Harmse enquired of the first respondent's attorneys on 13 August 2010, whether, notwithstanding the reported non-compliance with the rules, the sale would be proceeding.

[24] On 13 August 2010, the first respondent's attorney, responded to the applicant's attorney's letter of 12 August as follows:

> We refer to the above and your fax of 12 August 2010.
>
> We have discussed the matter with the Sheriff and are notified that all legal requirements have been met.
>
> In the circumstances and unless the full arrears are paid prior to the Sale in Execution same must proceed.
>
> Should your client attempt to stay the sale by way of a High Court Application, a pubnitive costs order will be sought against them.
>
> The arrears on the account totals R385 817,48.
>
> Kindly advise your clients accordingly.

[25] After Mr. Olivier's attorney had spoken to the Deputy Sheriff on 11 August 2010, the latter put up a notice board on the pavement outside the property. According to Mr. Olivier, the notice displayed on this board merely indicated that a sale in execution would take place. It did not set out the particulars set out in the notice of sale. Mr. Olivier's allegations in this respect have not been refuted. Be that as it may, it is common cause that soon after its placement in position, the notice board was removed.

[26] The first respondent's attorney suspects that Mr. Olivier is the person responsible for the removal of the notice board. Olivier denies the allegation. The Deputy Sheriff also denies that anyone from his office removed the board. Nothing really turns on this because the notice board did not in any event comply with the requirements of the sub-rule. The only significance of the removal of the board is

that it tends to show how vulnerable notices placed on the property, or as near might be to it, are to removal by mischievous persons. In this respect it is significant that the sub-rule merely requires the Sheriff to affix the notice; it does not impose a duty on the Sheriff to ensure that it remains affixed. Furthermore, on the interpretation given to the relevant sub-rule in *Botha and another v Absa Bank Ltd and another* [2002] 1 All SA 579 (SE), it is not a requirement that the notice be displayed in such a manner as to be visible to passing pedestrians. These are considerations to which I shall return in determining the materiality of non-compliance with the sub-rule in the context of its relative importance or non-importance in the procedural scheme pertaining to sales in execution of immovable property.

[27] The sale proceeded on 16 August 2010, as had been indicated in the first respondent's attorneys' abovementioned letter of 13 August and orally confirmed by the Deputy Sheriff in a chance encounter with Mr. Olivier earlier on the morning of 16 August. The property was knocked down to the third respondent at the sale for a price which it is accepted was below the market value of the property. It is not suggested that the third respondent had any knowledge of the defect in the procedures which had preceded the sale.

[28] Neither Mr. Olivier, nor the applicant took any steps to prevent the occurrence of the sale. I do not consider that they are liable to serious criticism on this account as it appears from the fax data imprint on the header to the first respondent's letter of 13 August that it was faxed to Mr. Olivier's attorney only in the afternoon of that day. The 14th and 15th August fell over a weekend.

[29] Having summarised the salient facts, it is time to consider the applicable principles.

[30] The courts have historically adopted a relatively strict approach in requiring compliance with the prescribed formalities attending on sales *sub hasta*; see e.g. *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 684E-F, at which reference is made to the comment in Matthaeus, *De Auctionibus*, 1.16.8 et seq that non-compliance with any prescribed formality, especially advertisement of the attached property, will in general render the sale in execution null and void. Van den Heever JA expressed the view that to construe the rules regulating sales in execution as peremptory in character 'leaves them in harmony rather than in conflict with the Common Law'. However, as observed by McCall AJ (as he then was) in *Joosub v JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd)* 1992 (2) SA 665 (N), at 672E, Mattheus op cit at 1.16.11 makes it clear that a sale will not be void if there has only been non-compliance with a slight formality which does not go to the root of the matter.

[31] The peremptory language of the rules, upon which Mr *Nel* placed some emphasis in argument, is not determinative. This much was made clear by Nestadt J (as he then was) in *Krugel v Minister of Police* 1981 (1) SA 765 (T), in which the learned judge reasoned that the effect of rule 27(3) of the Uniform Rules is that even non-compliance with a requirement of the rules expressed in peremptory language is capable of condonation, provided that the result of condonation does not purport to validate a nullity. I am, with respect, in general agreement with that interpretation of the effect of rule 27. Thus, for example, a court will not condone non-compliance with the requirement that a summons issued through a firm of attorneys be signed by a legal practitioner qualified in terms of the rules to sign pleadings before the court because the resultant process is a nullity. But the current matter does not, in my view, fall to be dealt with in terms of rule 27(3). The rule is invoked only in the first

respondent's contingent counter-application. The contingent application is unfounded on the approach enunciated by Nestadt J, for if the sale is set aside pursuant to the application of the applicant that is the end of the matter; aliter, if it is not set aside the issue of condonation for non-compliance with the rules does not arise.

[32] A sale in execution is part of the administrative process by which a judgment creditor can enforce a judgment given in its favour by a court. In effecting the sale the Sheriff exercises a public function in terms of legislation. In my view a sale in execution purportedly effected by the Sheriff has factual and legal consequences unless and until set aside by a competent court; cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA).

[33] Any impugnment of a so-called 'judicial sale' on grounds that the Sheriff has failed to comply with the applicable legislation is thus essentially a review of administrative action, and amenable to the courts' wide discretion in such matters. That applications in this type of case are more often than not framed as applications for declaratory orders assisted by ancillary relief (cf. e.g. *Menqa and another v Markom and others* 2008 (2) SA 120 (SCA)), and not in a form consonant with the procedure in terms of rule 53, does not detract from this characterisation (see *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A)). Thus in an appropriate case, for example one in which the judgment creditor delayed unreasonably in seeking to impugn the sale, the court might decline to interfere notwithstanding that through non-compliance with a material procedural requirement the sale might be legally invalid, and thus notionally a nullity. The court's decision not to interfere would for all intents and purposes mean that, notwithstanding its notional invalidity, the sale would

nonetheless fall to be treated for all practical purposes as if it were valid (cf. *Hamacker v Minister of the Interior* 1965 (1) SA 372 (C) at 381C).

[34] Approaching the current matter on judicial review principles entails that the sale will not be set aside unless the non-compliance with rule 46(7)(e) is shown to constitute a material defect in the process. The result on this approach (which is one essentially consonant with that contended for by Mr *D van der Merwe* on behalf of the third respondent) is also, albeit incidentally, consistent with that of the Common Law mentioned earlier - that a sale will not be treated as void if there has only been non-compliance with a slight formality which does not go to the root of the matter.

[35] The applicant's complaint is that the non-compliance with the relevant requirement of rule 46(7)(e) was materially prejudicial to her interest in that it curtailed the proper advertisement of the sale with the consequent possibility that a potential purchaser willing to pay more than the price at which the property was knocked down to the third respondent. The relevant allegations in this regard in the founding affidavit were limited to the following averments by Mr. Olivier:

> 30. Rule 46(7), I submit, is prescriptive because it is aimed to secure the best possible interest in the sale and the best possible price in the circumstances. That can only be achieved if the advertising is in compliance with the legal requirements.
>
> 31. The property is sitauated on the corner of Louw and Wethmar Streets which are fairly busy roads where cars and pedestrians frequently pass by. It is also in a good residential area in town. If the notice was affixed as prescribed by the rules it is probable that there would have been more interest in the sale resulting in more competitive bidding.
>
> 32. I submit that Applicant was prejudiced by the fact that rule 46(7)(e) was not complied with.

In the context of the rest of the affidavit, those paragraphs imply that the prejudice alleged to have been suffered by the applicant manifested in the attendance of only

'about six' persons at the auction and active bidding by just two of those attending. As mentioned, the sale occurred at a price less than the market value of the property.

[36] In order to assess the cogency of the applicant's complaint it is relevant to consider the pertinent provisions of rule 46 more widely:

1. In terms of rule 46(4) the sale of the property should take place in the district in which it is situate. This provision is subject to the power of the sheriff to determine otherwise on good cause shown. Significantly, in the context of the prejudice alleged by the applicant to have been inherent in the failure of the Deputy Sheriff to affix a notice to the property itself, there is no requirement that the sale must occur at the site of the *res vendita*.

2. In terms of rule 46(7)(a) the sheriff appoints the date and place of the sale.

3. Rule 46(7)(b) provides that the execution creditor shall then, after consultation with the Sheriff, prepare a notice of sale setting out the place and time of the sale and giving a short description of the property, including its situation and street number, if any. This notice must also state that the conditions of sale may be inspected at the office of the sheriff conducting the sale.

4. The execution creditor must then advertise the sale by publication of the notice of sale in one edition of the Government Gazette and one edition of a newspaper circulating in the district in which the immovable property is situate. The required publication must occur not more than 15 days before and not less than five days before the date of the sale. The execution creditor is required to furnish proof of this publication to the sheriff. See rule 46(7)(c).

5. The sheriff is required not less than 10 days before the date of the sale to furnish a copy of the notice of sale by registered post to every execution creditor who has caused the attachment of the property and to every mortgagee of the property whose address is known, and to simultaneously furnish a copy of the notice of sale to every other sheriff appointed in the district. See rule 46(7)(d).

6. The requirements of rule 46(7)(e) are apparent from its terms, which have already been quoted, above.[4] They entail the Sheriff posting of the notice on the court's notice board and affixing a copy at the place where the sale is to take place.

[37] It is evident from these provisions that the advertisement of the sale occurs primarily by advertisement in the Government Gazette and in a newspaper. Additional publicity to the intended sale in execution is obtained consequent upon the display of the notice on the notice board of the court of the district in which the property is situate, or, if the property is within the district in which the seat of the High Court is situate, on the High Court's notice board. All the aforementioned means of publicising the intended sale can be expected to have varying degrees of general effectiveness. Publication in a local newspaper, for instance, might objectively be considered to give the widest general publicity to the event because a broad spectrum of the population might be expected to read and take notice of the contents of such a publication. Publication in the Government Gazette on the other hand would have more limited effect because, I think, judicial notice may be taken that it is

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[4] At para [19].

not a publication that the ordinary member of the public reads regularly. There is no doubt, however, a class of person interested in judicial sales which will be on the lookout for what is on offer and members of such class might well be expected to regularly peruse the Gazette for information about such sales. Court notice boards will serve as an effective means of publicity only to that very limited section of the public who might refer to such boards because of a particular interest in the sort of information that gets posted there.

[38] Affixing the notice of the sale to the place at which the sale will take place will in general attract the notice only of immediate neighbours in that locality, which, as mentioned, will not necessarily be the locality of the property on sale. So, for example, the sale – which, in terms of the rules, must be conducted by auction – could be conducted at the offices of the sheriff, or any other venue determined for the purpose. The effectiveness of the affixed notice would depend on the extent to which members of the public might have frequent and common exposure to the chosen venue. (In the current case, the evidence of the third respondent, which, applying the *Plascon-Evans* principle, I must accept, is that the place of the sale was on a quiet suburban road not generally accessed other than by the residents of neighbouring erven.) There is no requirement in the rule that the place chosen for the sale must be a place with a particular degree of exposure. Equally, it is not implicit in the affixment requirement that its primary object is intended to publicise the sale to immediate neighbours of the property for sale. It is evident, for example, from the addresses given in the *Botha* judgment, to which I referred earlier,[5] that the place of sale in that matter was not at the address of the property being sold; and also not

[5] At para. [25].

at a place that was easily visible to persons passing by. Chetty J, correctly in my respectful view, held that those characteristics did not place a duty on the Sheriff in terms of the sub-rule to take additional or exceptional measures to affix the notice in a place where more people might be expected to see it.

[39] Having regard to the affixment provision within the context described in the preceding paragraphs I am able to recognise the force in the averments of the first respondent's attorney and the third respondent (who frequently buys property at judicial sales for speculative purposes) that it does not provide a particularly effective form of publicity for sales in execution. An additional consideration is that having affixed the notice, there is no duty on the Sheriff to ensure that it remains affixed, or to replace it if it is removed by anyone, as was the notice board erected by the Deputy Sheriff in the current case, for example. I have therefore concluded that within the general scheme of rule 46, the affixment provision in terms of rule 46(7)(e) might fairly be regarded as what has been termed 'a slight formality'. There is nothing in the evidence to suggest that non-compliance with the requirement could be said to have gone 'to the root of the matter'. On the contrary, the evidence shows that the property had been intensively marketed over a six month period on the first respondent's 'Quicksell' programme without any interest being elicited from the buying public. It seems that the property could be realised only on a forced sale; it being notorious that prices realised at such sales might be expected to be lower than those which the owner would hope to achieve in a transaction at arm's length between willing buyer and seller.

[40] Considerations of materiality thus weigh heavily against granting the setting aside of the sale sought by the applicant. In determining to overlook the non-

compliance I have also taken into account the manner in which the applicant has conducted these proceedings, as well as the prejudice that would be occasioned to the third respondent, who has been an innocent party in the process were the sale to be set aside.

[41] This judgment should not be misread to afford a warrant to anyone to not comply punctiliously with all the requirements of the rules of court. This application was refused only because of the relative slightness of the formality involved and the lack of materiality attending the non-compliance judged in the peculiar factual context. The first respondent should not in my view have proceeded with the sale after notice of the non-compliance had been brought to its attention by the applicant's attorney. While a degree of frustration on the first respondent's part by that stage with the delays in executing its judgment might be understandable that does not excuse the decision to proceed without more carefully interrogating the information apparently provided by the Deputy Sheriff to the effect that he had complied with the rule. I intend to mark the court's disapproval by declining to award the first respondent part of the costs that would ordinarily have fallen in its favour as a successful party in the proceedings. There is, however, no reason why the first respondent should not have its costs incurred after its abovementioned tender of 4 April 2011. Allowing the applicant a reasonable *spatium deliberandi* from that date, I consider that there is no reason to extend the deprivation of the first respondent of the costs to which it would ordinarily be entitled beyond 14 April 2011.

[42] In the result the following orders are made (it is convenient to deal first with case no. 1467/2012):

A. In case no. 1467/2012

1. The applicant is directed to pay the costs of the first and third respondents attendant upon the dismissal of her application, in terms of paragraph 5 of the notice of motion, for a postponement of the hearing in case no. 20373/2010.

2. The application for relief in terms of paragraphs 2 and 3 of the notice of motion is struck from the roll.

3. The application for an interdict in terms of paragraph 4 of the notice of motion is dismissed with costs.

4. It is recorded that no orders are made in respect the relief sought in terms of paragraph 6 of the notice of motion and also paragraph 7 of the notice of motion insofar as that paragraph bears on case no. 2004/2011 because case no. 2004/2011 did not serve before this court.

B. In case no. 20373/2010

1. The application is dismissed.

2. The applicant shall be liable for the third respondent's costs of suit; and in for the first respondent's costs of suit incurred after 14 April 2011.

**A.G. BINNS-WARD**
**Judge of the High Court**