IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 10122/2013

DATE: 5 NOVEMBER 2013

In the matter between:

CHRISJAN LOUW Applicant

and

FIRSTRAND BANK LIMITED 1st Respondent

MOEGAMAD SOLOMONS 2nd Respondent

THE SHERIFF, WYNBERG EAST 3rd Respondent

THE REGISTRAR OF DEEDS 4th Respondent

J U D G M E N T

DAVIS, J:

Introduction:

This is an application in which the applicant seeks an order, *inter alia*, that the attachment in sale in execution of Erf 100980, Athlone, also known as 3 Guardian Road, Heideveld, Western Cape ("the property"), which was held on 20 May

2013, be set aside. Other relief is also sought by the applicant, but that is not entirely relevant to the disposition of this case. I should add that the applicant initially sought an order that the default judgment, which was granted against him in favour of the respondent on 17 January 2012, be rescinded. After this aspect was dealt with by the first respondent in an answering affidavit, the applicant did not pursue the application for rescission. In short, the order which was granted on 17 January 2012 remains valid.

The relief now sought by the applicant is opposed by the first respondent but it is not opposed by the second respondent nor the other respondents. In essence, the applicant bases a claim for relief on the allegation that the sheriff did not comply with Rule 46(3) of the Uniform Rules of Court, in that the writ of attachment was served by the Sheriff, who cited the incorrect rule in her return of service and served on a person of whom it was said was the applicant's wife, when it is common cause that he does not have a wife. Further, the applicant contends that the notice was not served on him.

First respondent accepts that there has been non-compliance with Rule 46(3). However this does not go to the root of the matter and the sale in execution should be considered to be valid. To the extent that the court is not satisfied with the

question of compliance, it should exercise a discretion and condone the second respondent's failure to comply strictly with the rule in question. In addition, the first respondent contends that no prejudice was suffered as a result of the non-compliance with the rule.

Briefly, this court can take the following facts into account: Applicant entered into a loan with the first respondent, which was secured by a mortgage bond registered of the property. The applicant chose his *domicilium* address as 10 Northumberland Close, Parklands. In 2010, applicant, who had owned the property, sold it, but failed to inform the first respondent of any change of his address. He did not alter his *domicilium* address. It appears that the applicant breached the terms of the agreement with first respondent and that first respondent then instituted action against the applicant in 2011.

On 17 January 2012, as I have already mentioned, judgment was granted against the applicant, which included an order that the property be declared executable. On 18 January 2012, a writ of execution was issued. On 14 February 2012, a notice of attachment was prepared by the third respondent. Furthermore, a letter was generated on the same day, in which the third respondent requested the Sheriff for Cape Town to serve the warrant of execution and notice of attachment at the

applicant's *domicilium* address. It appears that there is no record that the warrant of execution and the notice of attachment were served at the applicant's *domicilium* address.

In February 2012, the property at the *domicilium* address was sold and the applicant was not living there. A Mr Bloemberg, who has some business relationship with the applicant, was apparently residing at the address at that time. On 23 February 2012, third respondent served a writ of execution on a person, whom she described as a 'Mrs Louw'. As I have already mentioned, this purported to be the wife of the applicant. It is common cause that the applicant has no wife. The sheriff was allowed access to the property. Her return of service specifies the features of the house. On 28 February 2012, the sheriff served a copy of the warrant of execution and notice of attachment on the fourth respondent.

Before the sale in execution, which was scheduled for 12 June 2012, applicant's attention was drawn to the sale by an SMS he received from a company called Consumer Guardian Services. On 12 June 2012, the sale of execution scheduled in respect of the property was cancelled, because the applicant made payment in the amount of R25 500,00 to first respondent. A similar pattern took place in December 2012. Before the sale in execution scheduled for 11 December 2012,

it appears that applicant's attention was again drawn to the sale by another SMS he received from the same company, Consumer Guardian Services. On 11 December 2012, this sale in execution was stopped as the applicant paid the arrears on his account.

On 20 May 2013, a sale in execution was conducted at the property by the third respondent and the property was sold to the second respondent in the amount of R282 000,00. On 20 May 2013, applicant received a call from a tenant who occupied the garage at the property, Mr Rage, who informed the applicant that he had been approached by persons who claimed that they had purchased the property on that day.

So much for the essential facts. It is accepted by Mr Van Reenen, who appears on behalf of first respondent, that, albeit that there was service on the occupier (and I am prepared to assume that there was proper service in terms of Rule 46(3) no matter that the notice referred to a Mrs Louw), and further that there was service on the fourth respondent, there was no proper service on the applicant. Accordingly, the question arises as to whether the relief sought by the applicant is justifiable for want of non-compliance with Rule 46(3).

I was referred in this connection to a concurring judgment of

Cloete JA (significantly only signed by two of the five members of the court) in Menqa & Another v Markham & Others 2008 (2) SA 120 (SCA), who at para 46 concluded that:

> "[A]t common law, a sale in execution was void for want of compliance with an essential formality, but that non-compliance with non-essential formalities did not have this result."

Notwithstanding the impressive learning displayed in this judgment, in particular with regard to the work of Matthaeus, the judgment does not really take the matter further than the position which existed prior thereto. Indeed, the dicta in this judgment are rendered irrelevant, because of later jurisprudence emanating from the Supreme Court of Appeal in the judgment in Todd v FirstRand Bank & Others [2013] ZASCA 61 (SCA). In this case, Lewis, JA, at para 11, noted that our courts had adopted a strict approach to compliance with prescribed formalities for a sale in execution. However, at para 12, she said:

> "As this court pointed out in *Menqa*, because legislation (and I would add the rules of court) regulate the requirements that must be made for a valid sale in execution, resort to the Roman Dutch authorities is not

always helpful."

En passant I should add that this caution is welcomed, particularly when it is the rules of court which govern the procedure rather than an oldauthority which really has very little application in this connection.

What is helpful, however, is the basic principle that non-fulfilment of a requirement will not vitiate a sale in execution if it does not 'go to the root of the matter.

What is the meaning of the phrase 'the root of the matter'? In paragraph 21, Lewis JA suggests the following:

> "The proposed requirement that there be strict compliance with every requirement to rule 46 for a sale in execution to be valid, would limit the ability of a court to ensure that the interests of justice and fairness are served. The common law allows a court to condone non-compliance only where it does not go to the root of the matter. As I have said, that entails an enquiry, whether the failure to observe a requirement defeats the purpose of the rule or sub-rule and that prejudice would be suffered by the debtor if absolute compliance were not required.

> That test gives the court the discretion to determine what effect the non-compliance has had - whether it prejudices a judgment debtor, or whether the judgment creditor (who may not be responsible for the failure to observe a formality, as was the case here) will be prejudiced by an order that the sale is invalid. A requirement of absolute strict compliance could operate harshly against both debtors and creditors and might have unjust consequences."

To tease out the meaning of the phrase, "the root of the matter", it is necessary to ask the question as to the purpose of the rule. Rule 46(3)(a) provides:

> "The mode of attachment of immovable property shall be by notice in writing by the sheriff served upon the owner thereof, and upon the Registrar of Deeds or another officer charged with the registration of such immovable property, and if the property is in the occupation of some person other than the owner, also upon such occupier."

As I have already indicated, there was non-compliance with the rule, because although I am prepared to accept that there was service upon the occupier and upon the fourth respondent,

there was no service upon the applicant. That, however, is not the end of the matter. Rule 46(7)(a), inter alia, provides:

> "(a) The sheriff conducting the sale, shall appoint a day and place for the sale of such property, such day being except by special leave of a magistrate, not less than one month after service of the notice of attachment and shall forthwith inform all other sheriffs appointed in the district, of such date and place.
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> (b) The execution creditor shall, after consultation with the sheriff conducting the sale, prepare a notice of sale, containing a short description of the property, situation, the street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the sheriff conducting the sale, and he or she shall furnish the said sheriff with as many copies of the notice as the latter may require."

I have cited a significant portion of Rule 46(7) for the specific purpose of seeking an answer to the question in whose benefit is this rule? Unquestionably, the rule is directed at the owner, being that the sheriff cannot conduct a sale for at least a

month after service of the notice of attachment; once notice is served, pursuant to Rule 46(3), a month must pass before a sale in execution can take place. The purpose thereof is clear. It provides an owner with knowledge firstly that an attachment has been effected pursuant to an order that has been granted by the court and secondly, that a sale is now imminent.

The further question which arises is: if this is the purpose of the rule, how does this impact upon applicant's case in the present dispute? As set out in the narrative, it is clear that a notice of attachment was prepared on 14 February 2012. As at that date, and subsequent thereto, there was no proper service of the notice upon the applicant. But as at 12 June 2012, and again on 11 December 2012, applicant must have known:

1. That a notice of attachment was generated.
2. That the property was about to be sold.

There is no other explanation for how it came to pass on two occasions that the applicant emerged out of the darkness of non-service and produced funds to stay the sale. In other words, whatever the purpose of the rule, the applicant knew about the attachment and the impending sale. This is the only inference that can reasonably be drawn from the facts.

To return to Lewis, JA's judgment in Todd *supra* the enquiry is whether the failure to observe a requirement defeats the purpose of the rule. The second question which arises concerns the prejudice suffered by the debtor, if absolute compliance was not required.

Rhetorically, one may ask, in a case such as the present,: was this purpose fulfilled? It was not fulfulled by virtue of a strict compliance with Rule 46(3), but the applicant had knowledge long before the final sale that there had been a notice of attachment and that a sale in execution, pursuant to the order that had been granted, was about to take place. To an extent, this is similar to the position in Hopkins Boerdery (Edms) Bpk v Colyn [2006] 1 ALL SA 497 (C), at paragraphs 48ff. In this judgment (a Full Bench judgment of this Division), one of the issues that arose was whether there had been compliance with Rule 46(3). The question in this case was whether there had been notice provided to both co-owners. It was common cause that, while there had been notice on the one owner, there had been no such notice provided to the co-owner. To this, Van Zyl, J at para 50 said the following:

> "Daar bestaan geen twyfel nie dat die tweede respondent deurgaans bewus was van die regstappe wat teen die eerste respondent geneem is, vanaf

> aanmaning en dagvaarding tot en met die geregtelike verkoping van die eiendom. Sy was tans meestal persoonlik teenwoordig toe die relevante dokumentasie op hom beteken is en sy was inderdaad persoonlik teenwoordig ten tye van die geregtelike verkoping. Op geen stadium het sy enige beswaar geopper teen die feit dat sy as mede-eienaar van die eiendom nie as party tot die lening of daaropvolgende regsprosedures gevoeg is nie. Sy het ook nooit gepoog om haar onverdeelde helfte van die eiendom uit te sluit of andersins te beskerm nie."

I accept that Van Zyl J was confronted with a somewhat different set of facts. But there are significant similarities. In both cases, the court could assume that there was full knowledge on the part of the applicant as to the procedures which had been initiated, firstly with respect to the notice of attachment and secondly, with regard to the sale in execution, both of which in this case followed from the judgment which had been granted on 17 January 2012. In short, in Hopkins *supra*, the court looked at the substance of the purpose of the rule and used its definition of the purpose as the touchstone for the determination of the case. This approach, in my view, is correct and within the context of this case is fatal to the

application brought by the applicant.

It is important to say something with regard to the question of prejudice. Mr Van Reenen correctly contended, as I have already noted, that the applicant was aware of the steps taken to attach the property, both in June 2012 and December 2012. The applicant knew of the attachment and cannot argue, therefore, as he had done, that he was prejudiced by the lack of service of the notice of attachment over a year before the sale actually took place. There is no question that the present application is an attempt to seize upon a technical argument to frustrate the first respondent and the recovery of funds which are legitimately owing to it.

Applicant, but only in reply, suggested three avenues which he would have explored had the notice of attachment been served on him:

1. Mr Bloemberg could have purchased the property.
2. The property could have been sold outright to a purchaser.
3. Mr Bloemberg would have advanced the arrears owing to the first respondent and reclaimed this money from the applicant upon the sale of the property.

Mr Van Reenen submitted that all of these hypotheticals are misconceived. It is doubtful that Mr Bloemberg could have raised the money to purchase the property. There is no indication that he could or would have done so. The applicant must have been aware that he had fallen into arrears between the previous payment to the first respondent in December 2012 and the impugned sale. He knew from previous experience that the sale would be arranged (in that having fallen into arrears between June and December 2012, a further sale was indeed arranged). He could hardly have been taken by surprise as to what then transpired.

The main option which the applicant considered was the sale of the property. But, given arguments about prejudice, the applicant has not alleged that the sale in execution caused the property to be sold at a price below its market value.

In my view, in the light of the decision in Todd *supra* in which a court is enjoined to go to the root of the matter and, therefore, to have recourse to the very purpose of the rule or sub-rule, together with the prejudice which might have been suffered by the debtor if absolute compliance were not required, this is a case where there has not been prejudice. Indeed there was sufficient knowledge, by virtue of the conduct of the applicant, which renders this application unsustainable.

Accordingly, the application is dismissed with costs.

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DAVIS, J