**Republic of South Africa**

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

Case number: 12598/2009

Before: The Hon. Mr Justice Binns-Ward
Hearing: 24 May 2017
Judgment: 30 May 2017

In the matter between:

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| **DEVANAYAGIE POLIZZI** | First Applicant |
| **SALVATORE POLIZZI** | Second Applicant |

and

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| **THE STANDARD BANK OF SOUTH AFRICA LIMITED** | First Respondent |
| **REGISTRAR OF DEEDS, CAPE TOWN** | Second Respondent |
| **THE TRI-ACTION INVESTMENT TRUST (IT4241/2005)** | Third Respondent |
| **SHERIFF OF THE HIGH COURT** | Fourth Respondent |

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**JUDGMENT**

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**BINNS-WARD J:**

[1] The applicants have applied for an order rescinding the order made by Blignault J on 26 May 2015, in terms of which a judgment sounding in money was entered against them in favour of the first respondent bank, and the immovable property that they owned in Milnerton, Cape Town, was declared directly executable. The judgment was founded on a mortgage debt. The property was subsequently sold to the third respondent at a sale in execution during November 2015. The applicants also seek an order setting the sale aside. The application was brought only in June 2016, after the third respondent had instituted proceedings in the magistrates' court for the eviction of the applicants from the property.

[2] The application has been on the roll several times without coming to a hearing. On the last occasion the matter was on the court roll (in February 2017), it was again postponed. At a conference in chambers with the Judge President and the Deputy Judge President the parties agreed that 24 May 2017 would be fixed as the date for the hearing of the matter. The case was allocated to me on 18 May 2017, and the parties were advised accordingly.

[3] On 23 May 2017, the applicants filed a notice of withdrawal of the application at the office of my registrar. The notice of withdrawal was filed together with a copy of a summons issued out at the instance of the applicants, also on 23 May 2017, in which they seek a judgment sounding in money against the first respondent bank and a declaration that they were not indebted to the bank. In the action they also seek an order declaring sub-rules 46(10) and (12) of the Uniform Rules to be incompatible with the Constitution.

[4] Rule 41(1) of the Uniform Rules allows a party who has instituted proceedings that have been set down for hearing to withdraw them with the consent of the other parties, or failing that, with the leave of the court. It was not apparent from the terms of the notice of withdrawal that the other parties had given their consent. And the matter therefore went to open court despite it. When the matter was called counsel for the first and third respondents indicated that those respondents did not consent to the withdrawal of the application and were opposed to the court granting leave in terms of rule 41(1) for that to happen. After hearing argument from the first applicant - who appeared in person, on behalf of herself and her husband, the second applicant - and from counsel for the first and third respondents, I gave an *ex tempore* judgment refusing the applicants leave to withdraw the rescission application.

[5] It is unnecessary to repeat here what I said in the *ex tempore* judgment. But an understanding of the part of this judgment that deals with the determination of an application

for a further postponement of the rescission application that was moved by the applicants after I had delivered it will be assisted by mention of the fact, discussed therein, that the allegations in the summons in the action issued by the applicants on 23 May 2017 were contradictory of any genuine intention by the applicants to withdraw the rescission application. The notion that the applicants wanted to withdraw the application was inconsistent with allegation in the particulars of claim that the issues in the rescission application and those in the action should be heard and determined together. The allegations in the summons in point of fact showed up the purported 'withdrawal' of the rescission application as nothing other than a gambit to achieve its postponement.

[6] The real position of the applicants was confirmed in the averments made by the first applicant in the application for the further postponement of the rescission application. They averred that they had not been represented by counsel at the hearing on 24 May 2017 because that would have involved unnecessarily incurring costs in respect of matter that fell to be dealt with in the freshly instituted action. It was also suggested that a postponement of the rescission application would better serve the convenience of the court because, so it was said, it would be a waste of the court's time to deal with the rescission application now in view of the pending freshly instituted action.

[7] I made an order refusing a further postponement of the rescission application and indicated that I would furnish the reasons for that decision in the judgment in the main application. Those reasons follow.

[8] The proceedings in which the order that is sought to be set aside was made were instituted as long ago as 2009. A settlement agreement was entered into between the applicants and the first respondent on 25 February 2010, in terms whereof the applicants acknowledged that they were in default of their mortgage bond obligations, and that they were at that time in arrears with their monthly bond instalments in the amount of R714 744,90. It was agreed that the applicants would settle the arrears by way of payments of R50 000 per month commencing on 24 March 2010 and thereafter on the 24th day of each succeeding month, with the remaining balance to be redeemed in full by a larger payment on 24 August 2010, which would also include the instalment due under the contract for August 2010. The agreement provided that the further bond instalments due thereafter would be paid in accordance with the contract as they fell due. It was further agreed that should the applicants default in performance under the terms of settlement, the full balance would thereupon become payable immediately and the first respondent would 'be entitled to

immediately and without further notice, obtain Judgment for the full outstanding amount together with the further relief as prayed for in the Summons, and issue the Warrant of Execution in respect thereof'.

[9] The Deed of Settlement included a clause providing for it to be made an order of court. Samela AJ made the agreement an order on the same day (25 February 2010).

[10] The applicants did not perform in terms of the settlement agreement; and, in the apparent misapprehension that the order made by Samela AJ entitled it to proceed to execute against the property, the first respondent procured the issue of a writ of execution against the applicants' property. The subsequent realisation by the first respondent of its error led to the withdrawal of the writ, and the matter then being brought before Blignault J for judgment in terms of in terms of rule 41(4).

[11] The applicants were aware that judgment was to be sought by the first respondent on 26 May 2015. The matter came up before Blignault J then because the applicants had previously succeeded, before Ndita J, on 22 April 2016 in obtaining a postponement to on that date. On 25 May 2015, the first applicant addressed a letter to the first respondent's attorneys advising that she would not be present at the hearing on the following day because she was unwell. The first respondent's attorneys responded that they nevertheless intended to proceed with the application for judgment. The first applicant's letter was placed before Blignault J before he made the order that the applicants now seek to have rescinded.

[12] The applicants were advised promptly by the first respondent's attorneys by email and registered post of the judgment that had been granted against them by Blignault J. The applicants did nothing to have to it set aside, and the mortgaged property was thereafter attached and sold in execution during November 2015.

[13] The sheriff was refused admission to the premises when he requested to inspect it for the purposes of settling the advertisement of the sale. The applicants were aware of the date of the sale because the applicant was present in person at the auction conducted at the property's address by the sheriff. Although there is a complaint that the description of the property in the advertisement for the sale was inadequate – an issue that I shall address presently – no point has been taken that there was not compliance with sub-rule 46(7)(e), which requires that notice of the sale be displayed at the place where it is to take place. As mentioned, it was only more than six months later, after the third respondent commenced eviction proceedings against the applicants, that the application for rescission was instituted.

[14] As also mentioned, the application has been postponed on terms intended to render it ready for hearing on four occasions (on 31 August 2016 before Canca AJ; on 31 October 2016 before Magona AJ, on 5 December 2016 before Pillay AJ and on 28 February 2017 before Goliath DJP).

[15] The last mentioned postponement was ordered by agreement by the parties as to a date that suited them all, as well as their legal representatives. The first respondent was at that stage represented of counsel by Mr *Jonker*. It appears that he subsequently discovered that the agreed date of 24 May 2017 clashed with the date for which another matter, in which he was engaged as junior to a senior advocate, had been reserved. Enquiries were then made of Mr Douglas J *Shaw*, who was counsel for the applicants, if Mr *Jonker*'s predicament could be accommodated by further postponing the matter to 31 May 2017. The relevant email correspondence was annexed to the first respondent's attorney's affidavit in opposition to the applicants' application for a postponement. It included an email from the first applicant confirming Mr *Shaw*'s availability on 24 May. It is not necessary to go into the detail, but it is evident from the correspondence that Mr *Shaw*'s reported commitment to the date of 24 May became less certain after he had been approached to accommodate Mr *Jonker*'s unavailability on that date. Mr *Shaw* did not address the request to move the hearing to 31 May. Instead, he indicated to the first respondent's attorneys that it had become apparent to him that the matter was complex and that it was 'now clear that it is not simply a matter of allocating a date for hearing'. He claimed that there was need to file a substantial amount of additional paper in the matter and that a timetable for this should be agreed. The clear implication in Mr *Shaw*'s communication was that a further postponement of the rescission application beyond the end of May was being suggested.

[16] The first respondent's attorneys informed Mr *Shaw* that in the circumstances the first respondent would engage different counsel in place of Mr *Jonker* and that the matter would proceed as arranged on 24 May. The clear implication in the response was that a further postponement of the matter would not be entertained. The first respondent's attorneys were dealing directly with Mr *Shaw* because there was (and still is) no indication on record of the identity of his instructing attorney. Enquiries of Mr *Shaw* as to who his instructing attorneys might be went unanswered. Heads of argument running to 68 pages were filed by the applicants on 23 May, well outside the time limit provided in terms of this courts rules of practice and that directed in terms of the order made by the Deputy Judge President on 28 February. The heads of argument were not signed, but they identified Mr *Shaw* as

'Drafter of Heads of Argument'. Mr *Shaw* did not, however, make an appearance when the matter was called on 24 May.

[17] The explanation for the applicants' appearance without any legal representation on 24 May was given in the supporting affidavit in the application for postponement. I have summarised the pertinent averments in paragraph [6] above. In oral argument, however, the first applicant submitted that it would do the applicants an injustice were the matter to proceed in the absence of their legal representatives.

[18] It is in the public interest that all litigation should be brought to finality with reasonable expedition. The personal interest of the first and third respondents in achieving finality in these proceedings is self-evident. The history of the matter shows that it has been inordinately protracted. It has been emphasised repeatedly by the courts that a postponement is an indulgence; it is not to be had just for the asking. In deciding an application for postponement the court exercises its discretion upon a holistic consideration of the issues. It is not only the position of the party seeking the indulgence that is considered, but also the effect of a postponement on the other parties and the administration of justice in general. Other litigants anxious to have their matters heard could not get their matters set down for 24 May because the available slots were fully subscribed; the one for this matter having been filled consequent upon the parties' aforementioned agreement.

[19] In the circumstances the explanation for the absence of the applicants' legal representatives when the matter was called was wholly unacceptable. It was not for the applicants and their legal representatives to decide unilaterally that the attendance of counsel on a specially pre-arranged date would be unnecessary because *they* had adjudged that the issues in the matter could better be determined in a different context of their own choosing – that is, in their freshly instituted action, rather than in their long pending application. The applicants had only themselves and their legal representatives to blame in the circumstances if the matter were to proceed on the appointed without the advantage of them being legally represented. Their wish to be legally represented had been more than adequately accommodated in the arrangements especially made under the auspices of the Deputy Judge President. Their conduct in acting in wanton disregard of those arrangements, and in the institution of fresh proceedings in terms of the summons mentioned earlier, supports the inference that their intention was to further delay the hearing of their own application. While the matter is delayed they continue to occupy the property that the third respondent has purchased. They pay no consideration for their occupation, and they are using the pending

proceedings as a means to stay the determination of the application that has been brought in the magistrates' court for their eviction.

[20] For those reasons, quite apart from the question of the merits of their application for rescission, to which I shall turn presently, I could find nothing of merit in the application for postponement, and therefore refused it.

[21] The application for rescission was not brought under any particular provision of the Uniform Rules. It was not an application for the setting aside of a default judgment in terms of rule 31. It also would not qualify to be brought in terms of rule 42. It would seem to follow therefore that it fell to be decided under the common law.

[22] An applicant for rescission under the common law is required to show 'sufficient cause'. The courts have refrained from precisely delineating the ambit of that concept, but certain minimum requirements have been identified. So, in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), at 765A-E, Miller JA held –

> The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:
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> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
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> (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. (*De Wet*'s case supra [*De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A)] at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357 - 8.)
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> It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.

[23] It is evident from the history that I have described that Blignault J made the order that the applicants seek to have rescinded having been apprised of the first applicant's proffered reason for failing to appear. It may be inferred that the learned judge must have found it unacceptable. In my judgment, the applicants' subsequent failure, upon being informed of the order very shortly after it was made, to do anything to have it rescinded is closely related to their failure to have appeared to oppose its making.

[24] The order made by Magona AJ on 31 October 2016, when the matter was postponed for hearing on 5 December 2016, contained a paragraph which, according to its tenor, appeared to condone the late institution of the rescission application by the applicants. There is no indication how that provision came to be inserted into the order postponing the rescission application. Moreover, no self-standing application for condonation was actually before the learned acting judge, and there was no separation of issues in the rescission application. There is furthermore no indication that a relevant condonation application was argued before her. The only condonation application requiring the court's attention at that stage was an application by *the respondents* for the late filing of their answering papers.

[25] It would in any event have been impossible in principle to deal with the question of condonation separately from the merits of the rescission application; the institution of a rescission of judgment under the common law is not subject to a prescribed time limit in terms of the rules of court. The delay in the bringing of the rescission application is a question that is inextricably bound up with the other considerations pertinent to its determination. They cannot properly be considered discretely. Thus, for example, as the extract from *Chetty* quoted above illustrates, there is no point in accepting an explanation for delay or default, if the substantive remedy sought by the applicant has no merit. That the two considerations go inseparably hand in hand is also illustrated in *Nkata v FirstRand Bank Limited* 2014 (2) SA 412 (WCC), in which condonation would have been refused despite the existence of a good case on the merits because the explanation for the delay was inadequate.[1] The respondents' answering papers are wholly inconsistent with them having consented to any condonation of the applicants' delay (which, as I have already noted, was inordinate). Indeed, by the time came before Magona AJ, heads of argument had been filed by the first respondent's counsel, in which it is plain that the late bringing of the rescission application was one of the bases upon which it was being opposed.

[26] The order of 31 October 2016 was made without reasons, and in circumstances when it would seem that the only matters to be determined by the acting judge were the late filing of the answering papers and the postponement of the rescission application. In all the circumstances it seems that the condonation provision in the order must have been included in error by whomsoever drafted the document – it has the appearance of a document drafted

[1] The applicant in *Nkata* succeeded in obtaining substantive relief not on the basis of her rescission application, but rather by virtue of a point raised in her favour by the court *mero motu* predicated on the operation of a statutory provision.

by a legal representative and presented to the court for endorsement – and signed by the acting judge in that form *per incuriam*. However, even if my interpretation of the circumstances in which the order appears to have been made is wrong, I do not consider that its effect could be to alter the approach that the court seized of the merits of the rescission application is enjoined to take, including taking into account the issue of delay.

[27] The only explanation for the delay given by the applicants is that they had engaged legal representatives to whom they allegedly paid fees in the amount of R14 000, but received no service in return. Having regard to the period of a year that intervened between the time that the applicants were informed of the order and their institution of the rescission application, the explanation that they have offered is starkly lacking. Not only did the applicants not explain their failure to act promptly in June 2016 when they were informed that the order had been granted, they also failed to do anything to stop the sale in execution, or to take steps promptly to have it set aside once they knew their property had been knocked down to the third respondent. Only the institution of eviction proceedings appears to have incentivised them to apply for the setting aside of the order. The timing of the institution of the rescission application, which cannot be divorced from their subsequent conduct in respect of its postponement on repeated occasions, is inconsistent with any bona fide belief in its merit, and bears the hallmarks of strategic opportunism. I would have dismissed the application on this ground alone. But, as I shall explain, I am also not persuaded that the applicants had reasonable prospects on the merits of their alleged defences to the first respondent's claim.

[28] The first defence raised is that the first respondent lacked standing to pursue the claim against the applicants because it had securitised the mortgage loan. The applicants have failed to establish that they have any cogent evidence to support this defence. The allegation has been denied and the inherent probabilities do not support it. Who is likely to have taken cession of the claim without also taking cession of the security given by the applicants for its redemption? As pointed out in the heads of argument drafted by Mr *Jonker*, the mortgage bond itself is conclusive proof of the identity of the mortgagee, who, alone, has the necessary standing to sue thereon. A mortgage can be conveyed to another only by means of a cession duly registered by the registrar of deeds in terms of the Deed Registries Act 47 of 1937; see *Lief v Dettmann* 1964 (2) SA 252 (A). There is no suggestion that the first respondent was not, at all times material, the registered mortgage-holder.

[29] The applicants also claim that the amount of the first respondent's claim against it was wrongly calculated, and overstated. They rely in this regard on a report by Lombard Registered Accountants and Auditors. The report was on its face qualified. It seems that the difference between the amount calculated by Lombard and the amount claimed by the first respondent is attributable to the withdrawal by the first respondent at a certain stage of a discretionary interest rate concession. The amount involved is in any event less than the shortfall between the judgment debt and the proceeds of the sale in execution.

[30] The applicants also seek to rely on their right to housing in terms of s 26 of the Constitution. Whereas Blignault J would have been bound to take any facts that the applicants might have relied upon in that connection before he made an order for the immovable property to be executable, the applicants are still in a position to assert any rights they have in that regard in the pending eviction proceedings instituted against them by the third respondent. The property has been developed and is apparently used by the applicants for a guesthouse business. The applicants have not adduced any evidence in the rescission application that has persuaded me that they would have been able, before Blignault J, to avoid an order declaring the property executable. The importance that the law accords to the enforceability of mortgagee rights has been acknowledged by the legislature and the courts; see s 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at para. 58, *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC), at paras. 16-20, where the relevant effect of the related jurisprudence in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) and *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) is discussed.

[31] In the circumstances the application for rescission will be refused.

[32] Turning now to the application for the setting aside of the sale in execution. The relief was sought on the grounds that there had been inadequate compliance with rule 46(7)(b), which provides:

> The execution creditor shall, after consultation with the sheriff conducting the sale, prepare a notice of sale containing a short description of the property, its situation and 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.

[33] It seems to me that the requirements of rule 47(7)(b) have been addressed dispositively in this Division in the judgment of the full court (per Van Zyl J, Knoll and

Yekiso JJ concurring) in *Hopkins Boerdery (Edms) Bpk v Colyn and Another* [2005] ZAWCHC 29; [2006] 1 All SA 497 (C). The following was said in the relevant respect at paras. 42-46 of the judgment:

> [42] … soos Eloff R [in *First Consolidated Leasing Corporation Ltd v Theron and Others* 1974 (4) SA 244 (T)] tereg bevind het, indien dit van die balju verwag sou word om ’n beskrywing van sodanige eienskappe in die kennisgewing te vermeld, sou dit vir hom 'n uiters moeilike taak wees om te besluit wat hy moet noem en wat hy moet weglaat. Dit sou nooit met die wetgewer se bedoeling betreffende ’n “kort beskrywing” van die eiendom kon strook nie. Louw R se voorstel met betrekking tot die eienskappe wat in die onderhawige geval genoem kon gewees het, kan, met eerbied, eenvoudig nie opgaan nie. Dit sou miskien van pas wees in die aanloklike advertensie van 'n eiendomsagent of afslaer, maar bepaald nie as deel van ’n “kort beskrywing” van die eiendom ingevolge reël 46(7)(b) nie.
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> [43] In ieder geval is dit debatteerbaar of die beskrywing van die aard van die boerdery wat op die plaas beoefen sou kon word, hetsy weiding, gesaai of gemeng, enigsins as ’n eienskap van die eiendom gereken sou kon word. Dieselfde geld vir die beskikbaarheid van Eskom-krag en die toeganklikheid van die Overberg veesuipingsskema, om nie te praat van die toerisme-potensiaal van die woning op die eiendom nie. Dit mag nuttige inligting wees vir doeleindes van 'n advertensie in die *Landbouweekblad* of iets soortgelyks, maar sou beswaarlik kwalifiseer as ’n “kort beskrywing” van die eiendom.
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> [44] Dit is veral so as gekyk word na die konteks waarbinne die “kort beskrywing” vereis word, naamlik vir doeleindes van die uitwinning van onroerende goed. Dit staan juis in kontras met die “volledige beskrywing van die aard en ligging” van die eiendom soos dit ingevolge reël 46(1) in die uitwinningslasbrief moet verskyn. Sodanige “volledige beskrywing” word vereis om die balju in staat te stel om die eiendom op te spoor en te identifiseer. Die “kort beskrywing” van die eiendom, tesame met besonderhede oor sy ligging en straatnommer (indien enige), soos vereis deur reël 46(7)(b), sou eweneens potensiële kopers in staat stel om die eiendom op te spoor en identifiseer.
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> [45] Indien potensiële kopers verdere inligting sou verlang, sou hulle dit maklik genoeg kon bekom, alternatiewelik sou hulle die aangewese roete kon volg om self die eiendom te besoek om eerstehands vas te stel wat presies op die mark is. Dit sou hulle beter daartoe in staat stel om die voor- en nadele van die eiendom te bepaal, met insluiting van die verwaarloosde toestand van die verbeterings. Deur niks oor die verbeterings te sê nie het die Landbank (as vonnisskuldeiser) en die balju waarskynlik 'n moontlike wanvoorstelling vrygespring.
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> [46] As die wetgewer dus praat van 'n “kort beskrywing” van die eiendom moet dit aldus uitgelê word binne die verband van die uitwinningsbepalings van reël 46 as geheel. Daar is geen suggestie in die betrokke reël dat verdere besonderhede benodig word om voornemende kopers se belangstelling aan te wakker met die oog op die behaal van die bes moontlike prys ten tye van die geregtelike veiling nie. In hierdie verband word daar nie 'n woord gerep oor die beweerde noodsaaklikheid om verbeterings aan die eiendom te beskryf nie, om nie te praat van enige ander eienskappe daarvan nie. Ek koester, met eerbied, enigsins bedenkinge oor die korrektheid van die bevinding in dier voege in die *Pillay* [*Messenger of the Magistrate’s Court, Durban v Pillay* 1952 (3) SA 678 (A)] en ander sake

> waarop die respondente gesteun het (par [32] - [35] hierbo). Vir sover hulle almal oor residensiële eiendom gegaan het, en dus onderskeibaar is van die onderhawige saak, is dit egter nie nodig om daarmee te handel nie.

[34] I am conscious that *Hopkins Boerdery* concerned the sale in execution of agricultural property and it has been thought that there might be a basis, to avoid what have been regarded as the strictures of the advertising requirements as they were described in *Pillay*, for distinguishing that from what is required in respect of urban property. The sub-rule does not itself make for any such distinction. In my respectful view sounder bases for distinction lie in the facts that in *Pillay*'s case the advertisement was admitted to have been non-compliant and the advertisement in that matter gave only the deeds office description of the property.[2] The advertisement in the current matter, by contrast, identified the nature of the property and gave the street address. It described that the property had been improved by the construction of a commodious dwelling house. The applicants can hardly be heard to complain that the number of bedrooms was given incorrectly as eight, instead of 10, when they had refused entry to the property to allow the Sheriff to formulate the description. The purpose of the short description 'is to inform the public what is being sold with the object of attracting bidders so as to obtain as high a price as possible for the property'.[3] The evidence that a large number of interested persons attended the sale and that a materially higher price than had been estimated was realised proved that the advertisement plainly served its purpose.

[35] Perhaps more importantly, however, the applicants knew about the impending sale in execution and did not object to it - whether on account of an alleged deficiency in the advertisement, or for any other reason. Nor did they take steps to have the sale stayed, or to interdict the transfer of the property to the third respondent. It is therefore too late now for them to ask for the sale to be set aside on the grounds of an arguably inadequate compliance with sub-rule 46(7)(b). As noted in *Pillay* supra, the common law treats sales *sub hasta* as 'sacrosanct'. Van den Heever JA stated that s 70 of the Magistrates' Court Act 32 of 1944, which provides '*A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of*

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[2] That was also the case in *Chasfre Investment (Pty) Ltd v Majavie and Others* 1971 (1) SA 219 (C) and, essentially so, in *Maritz t/a Maritz & Kie Rekenmeester v Walters; Maritz t/a Maritz & Kie Rekenmeester v Walters Bank Ltd Intervening; Maritz t/a Maritz & Kie Rekenmeester v Walters* 2002 (1) SA 689 (C), in which the advertised 'short descriptions' of the properties subject of the sales in execution were non-compliant.

[3] *Chasfre Investment* supra, at p. 222G.

*transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect*' was consistent with the position under the common law.

[36] Now that transfer of the property has been given to the third respondent, it would be incumbent upon the applicants, in order to have the sale set aside, to show that the purchaser took transfer in bad faith with knowledge of the alleged defect; see *Sookdeyi and Others v Sahadeo and Others* 1952 (4) SA 568 (A) at 571H-572F and *FirstRand Bank Ltd v Nkata* 2015 (4) SA 417 (SCA) at para. 35.[4] The applicants have alleged that the third respondent, which is an *inter vivos* trust, is the instrument of a certain Mr Butcher, an insolvent, and have cast aspersions on Mr Butcher's probity, but they have said nothing to support a conclusion that the trustees of the third respondent took transfer of the property in bad faith and with knowledge of any defect in the sale. The application to set aside the sale therefore cannot succeed.

[37] In my judgment it was also incumbent upon the applicants to raise any challenge to the sale predicated on an alleged constitutional incompatibility between any of the provisions of rule 46 before transfer of the property was effected to the purchaser in terms of the judicial sale. As mentioned, that is an issue that the applicants seek to pursue in the action that they have launched, not in this application. It is not necessary therefore to deal with it, but it might be helpful to point out that the contention that the absence of any provision in the rule for a market-related reserve price renders sales in execution of immovable property under the rule unconstitutional has already been considered and rejected by this court in another case; see *Bartezky and Another v Standard Bank of South Africa Limited and Others* [2017] ZAWCHC 9 (16 February 2017).

[38] The first respondent's counsel submitted that it would be appropriate to award punitive costs against the applicants. Whilst the applicants' conduct of the litigation is open to suspicion as an abuse of process, I have not been persuaded that their conduct has been sufficently egregious to merit the exceptional measure of a punitive costs order.

[39] The application is dismissed with costs.

**A.G. BINNS-WARD**

[4] The statement of the law in the passage cited in the SCA's judgment in *Nkata* was unaffected by the subsequent reversal of the court's decision on appeal from it to the Constitutional Court.

**Judge of the High Court**