REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF JUSTICE
(GAUTENG DIVISION, PRETORIA)

CASE NO: 13644/13

15/10/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES / NO.~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES / NO.~~

(3) REVISED.

15/10/15 .....

DATE **SIGNATURE**

IN THE MATTER BETWEEN

THE SHERIFF OF THE HIGH COURT, ROODEPOORT	Applicant
and	
MAKHOSONKE SIZWE SIBUSISO MAGWAZA	Respondent
In RE:	
STANDARD BANK OF SOUTH AFRICA	Plaintiff
And	
MASHILO SHADRACK SEBOLA	First Defendant
NOMBEKO DAPHNEY RAKWENA	Second Defendant

JUDGMENT

LEGODI J

HEARD ON: 21 AUGUST 2015
JUDGMENT HANDED DOWN: 15 OCTOBER 2015

[1] This is an application for the setting aside of a sale in execution which took place on 14 November 2014 and authorization to again sell in execution the immovable property forming the subject of the sale in execution. In addition, and of relevance, the Sheriff asks for relief framed as follows:

> *"3. That the Respondent forfeits the commission plus the vat thereon paid to the applicant.*
>
> *4. That the Respondent be held liable for all wasted costs, including the costs of the resale in execution of the above property and that the Applicant may pay such costs from the payment held in trust once this order has been granted.*
>
> *5. Ordering the Respondent to pay costs hereof.*
>
> *6. That the payment made by the Respondent shall remain in the trust account of the Applicant until completion of the next sale, when any profit or loss can be proven. Refer SHERIFF v JAITHOON 1955 (3) SA 416 (N) AT 417G*
>
> *7. ..."*

[2] The applicant is the sheriff who was involved in the sale in execution and the respondent is the purchaser. The latter does not oppose the order for the setting aside of the sale in execution and the resale of the property in question. What is in issue is the relief sought in prayers 3, 4 and 6 quoted in paragraph 1 of this judgment. As regards pray 4, it cannot be in contention that the purchaser will ordinarily be liable to pay the wasted costs and the costs of the application in accordance with prayer 5 provided it is on application of the aggrieved creditor contemplated in rule 46 (11) (b).

[3] On 21 August 2015 when this matter was laid before me, I was concerned about none observance of some of the conditions in Form 21 of the Uniform Rules and the apparent abuse of cancellation of sales in execution occasioned mainly by failure to observe condition 4 of Form 21.

[4] I directed the parties to file supplementary heads to deal with Form 21 conditions in particular condition 4 and Rule 46 11 (b). That is, whether the Sheriff can bring an

application for any loss sustained by reason of the purchaser's failure to pay the balance of the purchase price without complince with the provisions of rule 46 (11) (b).

[5] Standard bank obtained a judgment against Mr and Mrs Sebola, the latter having failed to comply with their obligations to pay in terms of the mortgage loan agreement. The property, a primary residence, was also declared specially executable, attached and sold on 14 November 2014 to the purchaser during sale in execution conducted by the Sheriff of this court for the areas of Roodepoort. It was sold for R520 000 and 10% deposit in the amount of R52 000 was paid after the fall of the hammer. In addition, the purchaser paid the Sheriff's commission in the amount of R9 655.00 plus VAT of R1 351.70 as stated in the Sheriff's return on the sale in execution. I deal hereunder with the relief sought and the sheriff's alleged right to ask for an order for costs. I prefer to start with the latter.

THE APPLICATION BY THE SHERIFF

[6] Rule 11(b) provides:

> *"The Purchaser shall be responsibility for any loss sustained by reason of his or her default, which loss may, on the application of any aggrieved creditor whose name appears on the said sheriff's distribution account, be recovered from him or her under judgment of the judge pronounced summarily on a written report by the said sheriff, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purchase".*

[7] The underlining is my emphasis. There seems to be two processes under sub-rule (11) of Rule 46 both of which are dealt with by a judge in chambers. The present application was however brought in the opposed motion roll as the purchaser opposed the application. In terms of this court's practice directive, such an application if opposed ought to be heard in an open court in the opposed motion roll.

[8] Coming back to the two processes under sub-rule (11), the first one is cancellation of the sale in execution and authorization by a judge summarily in chambers for resale as contemplated in paragraph (a) of sub-rule (11). Whilst sub-rule (11)(a) does not contemplate a formal application by the sheriff, the practice in this division is by

way of notice of motion supported by an affidavit setting out the nature of the default. Such matters are heard in chambers and the judge in chambers if satisfied that the purchaser is in default and has been given a notice of the application to be heard in chambers, he or she may then order cancellation and resale.

[9] Sub-rule (11)(a) does not empower the sheriff to ask for costs. This is so, because all what is required of the Sheriff is to submit its distribution account and to file a report. Therefore, in the absence of an opposition to report for cancellation and resale, there will be no need to make an order for costs[1].

[10] In the present case, the Sheriff does not only ask for cancellation of the sale in execution of 24 November 2014 and authorization for resale thereof, but also asks for costs relief as quoted in paragraph 1of this judgment. That raised the question, whether the Sheriff has the authority to ask for such relief. The answer in my view, is found in subrule (11)(b) quoted in paragraph 6 of this judgment.

[11] Subrule (11)(b) is clear. 'Any loss sustained by reason of the purchaser's default, may on application of any aggrieved creditor whose name appears on the Sheriff's distribution, be recovered from the purchaser under judgment of the judge pronounced summarily on a written report by the said Sheriff'. The practice by both the Sheriff and attorneys of the judgement creditor is to incorporate both subrule 11(a) and (b) in one application and without compliance with other imperatives in paragraph (b) of subrule (11).

[12] In the present application for example, the Sheriff having stated the nature of the default, concluded:

"8.

The Respondent paid the auctioneer's commission and R52 000.00 in respect of the deposit to me on 14 November 2014. The Respondent breached clauses 4.4 and 4.7 of the said conditions of sale in that he failed to pay the balance of the purchase price and/or the transfer costs and levies and/or outstanding rates and

[1] *See Sheriff, Hlabisa and Nongoma v Shobede* 2009(6) SA 222 (KZP) at 276 F-H.

taxes, or furnish an acceptable guarantee as described in clause 4.4. and 4.7 of the conditions of sale.

9.

Once the order in terms of the notice of motion to which this affidavit is attached has been granted, Findlay & Niemeyer Inc will attend to drawing a Bill of Costs, which will be submitted to me. I will say over the amount of the wasted costs to Findaly & Niemeyer's trust account from the deposit held in my trust. I will hold over the balance of the deposit in my trust account until any profit or loss can be proven. In this respect I refer the above Honourable Court to SHERIFF vs JAITHON 1955 (3) SA 416 (N) AT 417G'. Should there be a surplus after Findlay & Niemeyer has been paid I will refund the purchaser.

10.

On 19 December 2014 a letter marked Annexure "C" written by the conveyancing attorney, was posted to the Respondent, placing him on terms. To date however, the Respondent has not complied herewith".

[13] There are certain jurisdictional factors to be met before a judge in chambers could grant an order for any loss sustained by reason of purchaser's fault. These are: (a) There must be an application by/of any aggrieved creditor, (b) the sheriff must submit his or her distribution account, (c) the name of the aggrieved creditor who alleges to have sustained any loss by reason of the default of the purchaser must appear on the sheriff's distribution account, (d) the sheriff must submit a written report for judgment of a judge to be pronounced summarily in chambers and (e) the purchaser must be given a notice of the sheriff's submission of the report. Without compliance with all of the above, no judgment can be pronounced summarily in respect of loss sustained or occasioned by the purchaser's default and subsequent cancellation and resale in execution. In the present case, the Sheriff in her affidavit makes no mention of any aggrieved creditor or the latter's application. Furthermore, there is no Sheriff's distribution account and names of aggrieved creditor thereon. Therefore, this court is not competent to grant any of the relief quoted in paragraph 1 of this judgment.

ESSENCE OF RULE 46(11)

[14] As correctly indicated in the *Sheriff, Hlabisa and Nongoma supra,* Rule 46(11) provides for a quick and inexpensive procedure for the prompt resale of the property concerned, without compromising the rights of notice and the *audi alteram partem* rule. It allows that the property to be quickly realized for the benefit of both the judgment creditor and the judgment debtor without increasing the interest on the outstanding debt. Most importantly, for the purpose of the present case, the essence is to ensure neither of the parties involved including the purchaser incur unnecessary costs of following the conventional route of an application which is heard in an open court. That is, no provision is made for costs when the Sheriff approaches the Judge in chambers in terms of sub-rule 11(a).

[15] In the absence of compliance with subrule (11)(b), it would ordinarily not be necessary to deal with the relief sought as quoted in paragraph (1) of this judgment. But, because of my experience in this division, I find it necessary to do so. In some instances one finds that there was cancellation and resale twice or more in respect of one property arising from a single judgment. In all those instances, deposits are retained and commissions and wasted costs for resale are claimed and paid. This in my view, is not only prejudicial to the judgment debtor and purchasers who pay the Sheriff's commissions and huge costs arising from cancellations. That tendency must be curbed. Of course it can only happen if we are vigilant when these matters are dealt with in chambers. I now turn to deal with Form 21 and the relief sought as indicated in paragraph 1 of this judgment.

ESSENCE OF CONDITION 4 OF FORM 21

[16] Rule 46(18)(a)(i) provides that 'the conditions of sale shall, not less than 20 days prior to the date of the sale, be prepared by the execution creditor corresponding substantially with Form 21 of the First Schedule, and the said conditions shall be submitted to the Sheriff concluding the sale <u>to settle them</u>'. The underlining is my emphasis. 'To settle them' is not explained in the Rule. Whilst it is not the responsibility of the Sheriff to prepare conditions of sale, but that of the execution creditor or his or attorney, it is in my view, his responsibility to ensure that conditions are such that they

will enable him to conduct the sale in execution without any prejudice to any of the parties. If for example, the Sheriff feels any condition in the agreement is not sufficient or might be prejudicial to any interested party or to his or her obligation to conduct the sale in execution, he or she should be entitled to raise his or her concern with the execution creditor or its attorneys.

[17] What is stated above must be seen in the context of condition 4 of Form 21. The Form contains the conditions of sale in execution of immovable property referred to in subrule (8)(a)(i) of Rule. Of importance is condition 4, and of relevance, it reads:

> *"... If the auctioneer suspects that a bidder is unable to pay either the deposit referred to in condition 6 or the balance of the purchase price he may refuse to accept the bid of such bidder, or accept it provisionally until such bidder or accept it provisionally until such bidder shall have satisfied him that he is in a position to pay both such amounts. On the refusal of a bid under such circumstances, the property may immediately be again put up to auction".*

[18] Similar condition is found in clause 2.4 signed by the purchaser upon acceptance of his bid by the Sheriff on 14 November 2014. The question is what is required of the Sheriff in terms of condition 4 quoted above and clause 2.4 of the signed agreement between the purchaser and the Sheriff. Counsel for the Sheriff in his supplementary heads deals with clause 2.4 as follows:

> *"11. The provision of clause 2.4 is for the benefit of the Sheriff as it entitles him to refuse to accept a bid if he suspects that the purchaser will be unable to pay the deposit or the balance of the purchase price. It is a tool which the Sheriff may employ to avoid dealing with bogus bids. It imposes no obligation on the Sheriff to ensure that the purchaser will indeed be able to pay the balance of the purchase price.*
>
> *12. The word "suspects" necessarily implies that the Sheriff will make a subjective decision. If he doesn't have any reason to suspect that the purchaser will not be able to perform, there is no obligation on him to do anything more but to conduct the sale.*

13. *It is submitted that it will in any event be an overly arduous task if imposed upon the Sheriff to conduct a credit assessment on prospective bidders before conducting the sale. It cannot reasonably be expected of the Sheriff to report to the court the extent of his enquiries into the financial means of prospective purchaser whose bids he has accepted but who then cannot obtain credit to pay the balance of the purchase price or for some other reason fails to provide the guarantees".*

[19] Clause 2.4 read with condition 4 of Form 21 quoted in paragraph 17 above is not for the benefit only of the sheriff. If it is, it is only insofar as it relates to his commission. He or she must however ensure that the purchaser is able to pay the deposit and most importantly, the balance of the purchase price. The purpose of the relevant portion of clause 2.4; and condition 4, is to ensure as correctly stated in paragraph 11 of the supplementary heads quoted above, that no bogus purchaser participates in the bid to the prejudice of the execution creditor and execution debtor. Any delay in concluding the sale in execution and seeing that the amount due to the judgment creditor is paid, is prejudicial as it results in huge costs and interest accruing at enormous amount. A measure of certainty ought to be achieved by ensuring that a bidder is in a position to pay the balance of the purchase price.

[20] I cannot agree that condition 4 of Form 21 read with clause 2.4 in the present case 'imposed no obligation on the Sheriff to ensure that the purchaser will indeed be able to pay the balance of the purchase price'. The ability to pay a deposit of R52 222 in the instant case, was not a guarantee that the balance of over R500 000 will be secured within 21 days. The Sheriff as an auctioneer stands in the shoes of execution creditor. He or she is a seller who after the fall of a hammer concludes in his or her names a sale agreement with the successful bidder. To suggest that he or she has no responsibility to verify the purchaser's ability to pay the balance of the purchase price, in my view, smacks the essence of the sales in execution. It will only be the Sheriff to benefit from the commission if he or she has nothing to do with the bidder's ability to pay the balance of the purchase price.

[21] Condition 4 quoted in paragraph 17 above, and in this case, clause 2.4 as well, will be of no use if the Sheriff was to stand by the fence and makes no enquiries about the ability of the bidder to pay the full purchase price. Put simply, the auctioneer will

have nothing to suspect unless he or she makes enquiries about the bidder's ability to pay the balance of the purchase price. Even applying the 'subjective' test, contended on behalf of the Sheriff, you still need to be satisfied that the highest bidder has the ability to pay both the deposit and the balance of the purchase price before subjecting each other to pen and paper. Otherwise, it would mean that in order to avoid suspicion of inability to pay the deposit and or the balance of the purchase price, just don't make enquiries. If that was to happen it would render condition 4 moot. Conditions in Form 21 are binding and they form part of Rule 46(8)(a)(i) of the Uniform Rules.

[22] To suggest that it will be 'overly arduous task if imposed upon the Sheriff to conduct a credit assessment on prospective bidders before conducting the sale, is with respect looking at the whole process of sales in execution in a narrow sense. It can never be overly arduous to make a condition that any bidder should produce proof of guarantee granted provisionally by a banking institution. It cannot be difficult to any person who wishes to participate in any auction to provide a guarantee for a particular amount. If he or she cannot succeed in securing a guarantee for a particular amount and for the purpose of participating in the bid, then it means he or she does not qualify to participate in the bid for the amount which he or she does not have. I am dealing with this issue just to emphasis the point that there is much that can be done by the judgment creditors, their attorneys and the sheriffs to ensure that we do not have many fruitless sales in execution.

FORFEITURE OF THE COMMISSION PAID TO SHERIFF

[23] In prayer 3, the Sheriff wants the purchaser to forfeit the commission amount of R9 655 plus VAT in the amount of R1 351.70 paid by the purchaser to the Sheriff. A Sheriff who is interested in the payment of the commission and the deposit and thus concluding a sale agreement after the fall of the hammer, without verifying the purchaser's ability to pay the balance of the purchase price, might have to be restrained in part or as a whole from appropriating such payments for his commission.

[24] It will be a reckless conducting of sales in execution, if the Sheriffs were to be allowed to conclude the sales in execution agreement with the bidders after the fall of the hammer without verifying the ability to pay the balance of the purchase price. When that is found to pay the case, an order for forfeiture of the commission might be refused

or limited. What the Sheriff is saying in the present case, is that, he or she was not bound to investigate the purchaser's ability to pay the balance of the purchase price. He was therefore only content with payment of his commission and the deposit. That can never have been the essence of condition 4 quoted in paragraph 17 of this judgment.

LIABILITY TO PAY COSTS OF RESALE

[25] I deal with this topic despite the fact that a finding has already been made that no costs order can be made without complying with the provisions of rule 46 (11) (b). It is not clear from the papers as to who ordinarily is liable to pay the costs of the resale regarding the failed sale in execution. Assuming that in the present case, the purchaser was not liable to pay the costs of the sale in execution, I am talking here about, for example, costs of advertisement of the notice of sale in execution in a newspaper and other related costs. If any purchaser at a sale in execution is liable for such costs, why will such costs not be paid by the purchaser in the subsequent sale in execution? If any purchaser is not liable for the costs of sale in execution, why should a purchaser in the failed sale in execution be liable to pay the costs of resale and not only those wasted costs of the sale in execution incurred in the failed sale in execution? Any purchaser in a failed sale in execution should be found liable for wasted costs directly occasioned by his or her default. Once wasted costs which were directly occasioned by the default are paid, the judgment or execution creditor is then placed in the same position he or she was before the failed sale in execution. Therefore on the facts of this case, no case has been made for an order that costs of resale be paid by the purchaser.

RETENTION OF THE DEPOSIT UNTIL THE NEXT SALE

[26] This is a relief sought in prayer 6 of the notice of motion quoted in paragraph 1 of this judgment. This appears to for damages. But I think such a retention pending possible claim for damages upon the second sale in execution must be substantiated. The Sheriff in his founding affidavit did not set out the facts relevant to the relief sought for the retention of the purchaser's deposit. For example, how many bidders participated and to what amount did they bid? The enquiry is important. Say for example, at the second sale in execution the highest bidder is for the amount of R300 000 whilst during the first sale in execution the second highest bidder was R400 000. In such circumstances, it could be argued that the extent of the damages by the aggrieved

creditor is R100 000. But again, this will be guided by what information or evidence is there that the second highest bidder during the first sale in execution would have been able to pay the full purchase price.

[27] The Sheriff has not put facts to persuade this court to agree to the retention of the deposit pending the resale and assessment of damages. For this, the relief sought in prayer 6 is without factual basis. Therefore, even if I was to be wrong with regard to the timing of this relief, I would still have difficulties in granting such an order based on the facts laid before me. The case cited in prayer 6 should be seen in context of Rule 46(11)(b). The sub-rule does not entitle the Sheriff to claim for costs as contemplated in the notice of motion. However, in the above mentioned case, Holmes J as he then was. held otherwise and in doing so, he relied on the practice in the Natal, which permitted allocation of the deposit towards payment of costs. This, in my view, cannot stand in the light of certain rights enshrined in the Constitution, for example, the right to property in terms of section 25 of the Constitution. Had it not have been for my finding with regard to non-compliance with the provisions of rule 46 (11) (b) I would have found that the Sheriff has made no case to justify the retention of the deposit.

COSTS

[28] This application has been brought on the opposed motion roll because of the practice directive by this court which directs that in case where the purchaser opposes the application for cancellation of the sale in execution, the matter must be enrolled on the opposed motion roll. Rule 46(11) as I see it, was never intended to result into a formal application to be brought on notice. Whether the application is brought by the aggrieved creditor in terms of the Rule 46(11)(b) or by the Sheriff in terms of Rule 46(11)(a), the matter must still be 'disposed of in chambers".

[30] The scheme of Rule 46(11) appears to ensure that the request in terms of Rule 46(11) is dealt with speedily and without incurring unnecessary costs. It therefore appears that enrolling such matters on the motion roll when opposed could defeat the object of Rule 46(11). However, in the present case, the question is whether the Sheriff should be entitled to the costs of the application. The Sheriff decided to include in the application relief quoted in paragraph 1 of this judgment, instead of just simply asking for cancellation and resale in execution.

[31] The purchaser in this case does not oppose the cancellation and resale. What concerns the purchaser is the other reliefs referred to in paragraph 1 of this judgment. The Sheriff must have known his other reliefs were doomed in the absence of compliance with the provisions of sub-rule (11)(b) of Rule 46 and there was no need to pursue the relief. For this reason, the Sheriff should be found not to be entitled to the costs of the present application.

[32] Consequently an order is hereby made as follows:

32.1 The sale in execution that took place on November 2014 is hereby cancelled;

32.2 The resale in execution is hereby authorized;

32.3 No order as to costs is made.

.....

M F LEGODI
JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT:	FINDLAY & NIEMEYER INC. 1027 Francis Baard Street, Hatfield, PRETORIA Tel: 012 342 9164 Ref: Mr M Coetzee/SS/F3665
ATTORNEYS FOR THE RESPONDENTS:	NCHUPETSANG ATTORNEYS Office 810, 8th Floor, Khotso House 62 Marshall Street Marshalltown, JOHANNESBURG Tel: 011 492 3632 Ref: Ms N Nchupetsang