✓15/11/2017

IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

CASE NUMBER 1350/2016

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

15 / 11 / 2017
DATE

SIGNATURE

THE SHERIFF OF THE HIGH COURT, FOR THE DISTRICT LYDENBURG — APPLICANT

And

MT PROSPER TRADING (PTY) LTD — 1ST RESPONDENT
THOMAS THIMOTHY NGOBENI — 2ND RESPONDENT

In re:

FIRSTRAND BANK LTD — 1ST EXECUTION CREDITOR

And

MOKGETHOA RICHARD MASHIANE — 2ND EXECUTION CREDITOR

JUDGMENT

LEGODI J.

[1] On 11 September 2017 an application in terms of Rule 46(11) was laid before me during the unopposed motion roll. The rule aforesaid provides that if the purchaser fails to carry out any of his or her obligations under the conditions of sale, the sale may be cancelled by a Judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser and the property may again be put up for sale.

[2] Applications of this nature are ordinarily brought in chambers through the Registrar as cancellation can be dealt summarily once the Judge is provided with the sheriff's report and due notices is given to purchaser. I however prefer such applications to be brought in an open court and if unopposed on the unopposed motion roll. It is safe to do so to ensure that a decision on the application is not taken in the absence of the purchaser who might be at court to make representations or to oppose the application, for example, in the case of unrepresented purchaser who might be around court by virtue of the notice given to him.

[3] When this matter was laid before me on 11September 2017, I was particularly worried whether conditions of sale in Form 21 of the Uniform Rules of Court and guidelines set out therein have been heeded to by the sheriff. By way of background, on 31 May 2017, the sheriff at a public auction sold a certain immovable property situated and described as Portion 68 of Erf 1206 Lydenburg Township to a company known as MT Prosper Trading (Pty) Ltd (the purchaser) with one Mr Thomas Thimothy Ngobeni who acted as a surety for a purchaser in the sale of the property.

[4] The property in question was sold for R410 000.00 and the purchaser paid 10% of the purchase price to the tune of R41 000.00 plus the sheriff's commission in the amount of R12 285.78. This court is now been asked to cancel the agreement in that the purchaser failed to pay the balance of the purchase price in accordance with the terms and conditions of the agreement. The sheriff also ask for permission to put the property on sale again and then in paragraphs 2-4 of the relief sought is stated:

"3 *That the first and second respondent (purchasers), be declared responsible for any loss sustained by reason of their default, which loss may be recovered from the first and second respondents on application of any aggrieved creditor;*

4 *That the first and second respondents be ordered to pay the wasted costs of the execution creditor occasioned by the setting aside of the sale in execution and arranging a new sale, including the transferring attorneys 'wasted costs for the transfer as well as the costs of this application.*

5 *That the deposit paid by the respondents as outlined in paragraph 4 of the conditions of sale be retained by the sheriff in trust until such time that the property has been sold to a third party and the execution creditor's damages have been quantified and judgment has been granted in respect thereof."*

[5] This seems to be a standard relief which is sought in the application under Rule 46(11) (a) and sometimes can subject to abuse. It is not clear what is meant by '*any costs sustained' by reason of their default-on application of any aggrieved creditor'*. Secondly, why should a deposit be retained pending 'application of any aggrieved creditor' and at what stage and by whom a determination is to be made that there will be no such 'application of any aggrieved creditor' for the purpose of releasing the deposit.

[6] The sheriff is not representing 'any aggrieved creditor'. He or she conducted the sale on the instruction of one creditor being First Rand Bank Ltd in the present case. He or she cannot hold back on the deposit for some unknown 'aggrieved creditor'. His main concern is to protect the rights of the judgment creditor by selling the property in question. To ask for a court order regarding any 'aggrieved creditor' without cause is to stretch the essence of the application under Rule 46 too far. Paragraph [3] of the prayers as quoted above cannot be granted. For this order to be granted, the sheriff must have provided this court with the names or particulars of '*any aggrieved creditor whose names or other particulars must appear on sheriff's distribution account*[1]. The names alone on the sheriff's distribution account without

[1] Rule 46(11)(b)

more would also not be sufficient. One would expect more information and the basis of their interest in the auction. Otherwise it would be pre-mature to make an order for any loss as contemplated in sub-rule (11) (b) without the sheriff's distribution account and names of 'any aggrieved creditor' appearing on such an account.

[7] Paragraph 4 of the prayer also poses a problem. '*Including the transferring attorney's wasted costs for the transfer as well as the costs of this application*' seems to be a step ahead of other things which must happen before one incurs wasted costs for transfer. For example, which transfer costs are they? If any, why should transfer costs be incurred before the balance of the purchase price is paid? This has become a routine relief in applications of this nature without more particulars been provided. Without scrutiny it can become the subject of an abuse. Of course the judgment creditor should be entitled to any wasted costs directly occasioned by the default and cancellation. For example, wasted costs of publication of the failed sale in execution.

[8] Keeping the deposit in the sheriff's trust account until re-sale in my view can also become subject of another abuse. Firstly, it can take a long time before resale takes place. Secondly, once cancellation is sanctioned by the court and an order is made for the resale of the property, the sheriff and or the judgment creditor's attorney should be able to quantify costs liable to be deducted from the deposit. The purchaser cannot be liable for every costs of resale. Such costs are costs in the normal course. The costs the purchaser should be liable are wasted occasioned by the cancellation. So, the purchaser in the instant case cannot be made to pay costs of the publication for the resale when he or she has paid those wasted costs occasioned by the cancellation.

[9] I now turn to another issue which worries this court all the time in applications of this nature. Form 21 of the Uniform Rules deals with conditions of sale in "Execution of Immovable Property". Such a sale is subject to conditions set out in Form 21 *inter alia*, clause 4 thereof reads as follows:

"...If the auctioner suspects that a bidder is unable to pay either the deposit referred 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 the bidder shall have satisfied him that he is in a position to pay such amounts."

[10] It is clear from this clause that there is an obligation on part of the sheriff to ensure or be satisfied that the purchaser is capable of paying both the deposit and the balance. This is intended to conclude an agreement with a person who has proof that he or she has the means to pay the purchase price and or a deposit in accordance with the agreement. Put differently, it is intended to avoid conclusion of sale in execution with a bidder who has no ability to pay the deposit and the balance of the purchase price.

[11] Subrule (4) (b) of Rule 46 obliges the sheriff upon receipt of a written instructions from the execution creditor to proceed with such sale to ascertain and record what bonds, or other encumbrances are registered against the property together with the names and addresses of the persons in whose favour such bonds and encumbrances are so registered and shall thereupon notify the execution creditor accordingly. Sub-rule (5) (a) of Rule 46 provides that no immovable property which is subject to any preference to that of the execution creditor shall be sold in execution unless the execution creditor has caused notice, in writing ,of the intended sale to be served by registered post upon preference creditor, if his address is known and, if the property is rateable, upon the local authority concerned calling upon them to stipulate within ten days of date to be stated, a reasonable reserve price or to agree in writing to a sale without reserve; and has provided proof to the sheriff that the preferent creditor has so stipulated or agreed.

[12] This requirement is important for the purpose of determining whether in the first place the sale in execution in the instant case was valid and if not who was to be blamed. If for example the sheriff do not heed to the provisions of sub-rule 4 referred to above, the sale in execution would have been void from the start and the question may arise whether the purchaser is liable to pay any costs resulting from non-compliance with the conditions of sale l execution as contemplated in sub-rules (4) (b) and (5) (a) of rule 46.

[13] It is therefore expected that when an application under Rule 46(11) (a) is launched, it must be reported that there has been compliance with every relevant provisions of the rule and Form 21 of the Rules referred to earlier in this judgment. In

the present case, there is no indication whether or not the sheriff attended to compliance with sub-rule (4). This lack of information necessitates the postponement of this application and to direct the sheriff to file a supplementary affidavit.

[14] Just before I conclude, I wish to revert briefly to an issue which was discussed earlier in this judgment. The sheriff having been asked to appraise the court as to how he complied with clause 4 of Form 21 quoted in paragraph [9] above, responded as follows:

"3.1 *Prior to the auction, the respondent had to register as a bidder at my office. In accordance with the Consumer Protection Act 68 of 2008, the respondents must provide a deposit of "Good Will" in an amount of R10 000.00 and furnish me with the required documents for FICA compliance in order to register as a bidder. The respondents would not have been able to bid at the auction if the required amount was not paid and if I did not receive the required documents. I confirm that the respondent did indeed pay the required R10 000.00 when it registered as a bidder and that they furnished me with the required documents.*

3.2 *On the day of the sale the respondent paid the required 10% of the purchase price immediately after the sale as well as the required sheriff's commission. My return of service as attached to the sheriff's report and marked as Annexure "AC4".*

3.3 *I submit that I also had a discussion with the 2nd respondent on the day of the auction who advised me that he is in the business of buying and selling properties and that he has bought many properties on sheriff's auctions before. The respondent therefore readily made me believe that he is familiar with the process and requirements of a sheriff's auction which in turn means that he should be aware of the fact that he is to pay the balance of the purchase price within 21 days.*

3.4 *I therefore had no reason to suspect that the respondents were unable to pay either the deposit or the balance of the purchase price on the date the sale was conducted and I therefore had no reason to refuse the respondents' bit."*

[15] As a start, the sheriff's report as indicated in paragraph 2 of the supplementary affidavit deposed to on 19 September 2017 is said to be found "at page 4 of the paginated bundle". However what appears on page 4 of the paginated papers is the last page of the "Notice of Motion in terms of Rule 46 (11)". The report infact appears on pages 5 to 10 of the paginated papers but unhelpful for reasons already mentioned in paragraph [6] of this judgment. The "required documents for FICA compliance" as indicated in paragraph 3 of the supplementary affidavit quoted in paragraph [14] above are not explained. Secondly, it is not explained which "such documents" were furnished and there is no explanation why the documents cannot be added to these proceedings. It is not explained in paragraph 3.3 of the affidavit quoted above which sheriff is been referred to therein. One wonders what has happened to the requirements to want guarantee for example, from the bank confirming that a particular bidder qualifies for a particular amount of loan. This has helped in the past and served to avoid many cancellations which we are now seeing in our courts under Rule 46(11). This can easily be avoided by obtaining such confirmations by those who wish to participate in public auction bidding. The application cannot be granted at this stage unless the applicant provide more information dealing with the costs raised in preceding paragraphs.

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

16.1 The application is hereby postponed sine-die to enable applicant to provide for more information dealing with all concerns raised in this judgment and regarding full compliance with the provisions of the Rule and Form 21 as articulated in the preceding paragraphs.

M F LEGODI
JUDGE OF THE HIGH COURT

DATE OF HEARING: DATE OF JUDGMENT:	16 OCTOBER 2017 15 NOVEMBER 2017
FOR THE APPLICANT:	SEYMORE DU TOIT & BASSON ATT 14 MURRAY STREET NELSPRUIT TEL: 013 752 4459 REF: Mirelle van der Hoven/FM0155
FOR THE RESPONDENT:	NO APPEARANCE