

14/11/17 ✓



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

CASE NO:79139/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

14/11/2017

DATE

[Signature]
SIGNATURE

In the matter between:

PHETOGO GLADNESS LEMOGANG MOLATI APPLICANT

and

SHERIFF SOSHANGUVE & MORETELE	FIRST RESPONDENT
RS MOLOBI	SECOND RESPONDENT
STANDARD BANK LIMITED	THIRD RESPONDENT

JUDGMENT

RANCHOD J:

[1] This is an application in which the applicant seeks the following relief:

1. That the decision of the first respondent (Sheriff) re-auction (*sic*) **ERF 340 RENSTOWN, NO: 3 OLIVETTI STREET** to the second respondent be set aside.

2. That the second respondent be interdicted from selling or transferring ownership of **ERF 340 RENSTOWN, NO: 3 OLIVETTI STREET**.
3. That the third respondent be interdicted from transferring ownership of the property to the second respondent.
4. That the sale and/or re-auction of ERF 340 RENSTOWN, NO: 3 OLIVETTI STREET by first respondent to second respondent be declared invalid and/or illegal.
5. That the applicant be declared the successful bidder and/or purchaser of auction ERF 340 RENSTOWN, NO: 3 OLIVETTI STREET.
6. That the first, second and third respondents be declared jointly and severally liable should in case of opposition of this application (*sic*).
7. Further and/or alternative relief.

[2] The wording of prayer no. 6 as sought in the notice of motion appears to me to be clearly an error. I have no doubt that what the applicants seek is an order for costs to be paid by the three respondents jointly and severally in the event of opposition by them of the relief sought by the applicant. In any event none of the respondents³ have raised the issue of some ambiguity in order no.6.

[3] The first respondent (whom I also refer to as the sheriff) has not opposed the application while the third respondent abides the decision of the court.

[4] The applicant attended an auction on 29 September 2016 at the Soshanguve Magistrate's Court where the property referred to in the notice of

motion was put up for sale by the first respondent at the behest of the third respondent. The relevant conditions of sale of the property by the sheriff for purposes of this judgment are:

Conditions of sale in execution of immovable property.

2.4 If the Sheriff makes any mistake in selling, such mistake shall not be binding on any of the parties, but shall be rectified immediately. If the Sheriff suspects that a bidder is unable to pay either the deposit 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 both such amounts. On the refusal of a bid under such circumstances, the property may immediately again be put up for auction.

2.5 Should a bone fide error be committed by the Plaintiff's attorney or the Sheriff in respect of the execution of the Court rules either in the attachment or sale in execution of the property, this sale can be cancelled forthwith and the property be put up for auction again. Such error shall not be binding on the Sheriff or the plaintiff's attorneys, or the plaintiff and neither the purchaser of the property or any other person shall have any claim whatsoever against the aforesaid parties.

Obligations of purchaser after auction

3.1 The purchaser shall, as soon as possible after the Sheriff announces the completion of the sale by the fall of the hammer, or in any other customary manner, immediately on being requested by the Sheriff sign these conditions of sale.

3.2 If the purchaser has bought as an agent for a principal then the sale will also be subject to the following conditions.

3.2.1 The principal's address as furnished by the purchaser shall be the address as chosen by the principal as his/her address for the service of all forms, notices and documents in respect of any legal proceedings which may be instituted by virtue hereof (*domicilium citandi et executandi*).

3.2.2 If the principal is not in existence at the time of the auction the purchaser shall be the contracting party.

Conditions of payment

4.1 The purchaser shall on completion of the sale, pay a deposit of 10% of the purchase price immediately on demand by the Sheriff.

4.2 Payment shall be made in cash, by bank guaranteed cheque or by way of an electronic transfer, provided that satisfactory proof of payment is furnished immediately on demand by the Sheriff.

4.3 Should the purchaser fail to pay the deposit and the Sheriff's commission on completion of the sale, then the sale shall be null and void and the Sheriff may immediately put the property up for auction again.

[5] The applicant and the second respondent were the only two persons who bid during the auction. The applicant was the successful bidder for R274 500.00 and in accordance with a prior agreement, her mother transferred the total purchase price and the Sheriff's costs into the latter's bank account by electronic funds transfer and forwarded proof of payment to the applicant via a social media platform known as WhatsApp within 15 minutes of the fall of the hammer. The Sheriff had announced at the commencement of the auction, as part of the conditions of sale, that payment had to be made within 15 minutes of the fall of the hammer.

[6] The applicant says she advised the Sheriff to confirm with the latter's office that payment had been received. The Sheriff refused to do so and put the property up for auction again saying that the applicant did not look like somebody who has money or could afford to buy a house.

[7] The applicant asked the third respondent's representative who was at the auction to protect its interests how it was that the Sheriff could re-auction the property. The third respondent's representative could not give an answer. The applicant, apparently in desperation, decided to bid again when the re-auction commenced. She says the Sheriff informed her that she was banned from bidding because she "looked poor". An attempt by her younger brother

to bid also failed as the Sheriff prevented him from doing so as he was with the applicant.

[8] The second respondent successfully bid for the property on re-auction, for R100 000.00. Applicant says moments later, her mother arrived and provided her with a hard copy of the proof of payment which she tried to show the Sheriff. The Sheriff refused to look at it and told her arrangements will be made to refund the amount paid by the applicant.

[9] The allegations of the applicant have not been refuted by the Sheriff and I thus accept them as uncontested.

[10] The applicant approached this court on an urgent basis for the relief sought in the notice of motion. On 14 October 2016 a rule nisi was issued, returnable on 3 November 2016, calling upon the respondents to show cause why the relief sought in the notice of motion should not be made final. The second respondent entered appearance to oppose the application. On the return day the rule nisi was extended to 18 January 2017 (with costs reserved) and thereafter to 27 February 2017 when it lapsed as apparently no further extension was sought pending the determination of the application for final relief.

[11] Second respondent's attitude was that as the rule nisi had not been revived there was no application to be determined before the court. However, during the hearing of the matter I was informed by the parties that lapsing of

the rule nisi was not in issue any longer and that the matter was to be finalised on its merits.

[12] Counsel for the second respondent submitted that as the applicant sought to have the decision of the Sheriff to re-auction the property set aside it brought the matter within the purview of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). I agree and nor was it contended otherwise by the applicant. *In Todd v Firststrand Bank Ltd and Others (20373/10, 1467/12) [2012] ZAWCHC 7 (9 February 2012)* Binns –Ward J said-

33. Any impugment 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 noncompliance 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. *Harnacker v Minister of the Interior* 1965 (1) SA 372 (C) at 381C).

[13] In this matter before me it is the *decision* of the first respondent that is challenged and not a failure to comply with an applicable legislative provision, nevertheless the same principle applies particularly when viewed from the prism of section 6 of the PAJA.

[14] Whilst the parties did not refer to any one or more of the specific grounds for judicial review set out in the PAJA, more particularly section 6 thereof, it seems to me from a reading of the papers that what the applicant contends is that the decision of the first respondent to re-auction the property on the grounds as stated by the applicant constitutes an irrational decision¹; the sheriff was biased or reasonably suspected of bias²; or the decision was for an ulterior purpose or motive³; or irrelevant considerations were taken into account or relevant considerations were not considered⁴; the action was taken in bad faith⁵ or arbitrarily or capriciously. In particular, the first respondent's conclusion that the applicant 'looked poor' or that the applicant did not look like somebody who has money or could afford to buy a house was clearly irrational based as it was on an observation of the applicant and in the face of the applicant attempting to show the sheriff the proof of payment of not just the deposit but of the entire purchase price and sheriff's costs. Even if the applicant 'looked poor' (whatever that means) it was an irrelevant consideration and the failure to entertain the proof of payment meant a relevant consideration was not taken into account. The sheriff's observation of the applicant clearly indicated bias and the decision can also be said to have been taken in bad faith.

[15] In these circumstances the Sheriff's decision to re-auction the property should be set aside. However, as far as the second respondent is concerned, he contends, in effect, that as he had innocently purchased the property at the

¹ S6(2)(f)(ii)(aa).

² S6(2)(a)(iii).

³ S6(2)(e)(ii).

⁴ S6(2)(e)(iii).

⁵ S6(2)(e)(v).

re-auction, and had in turn sold it to a third party, it would be prejudicial to him if the sale of the property to him is set aside.

[16] It is clear from the papers that the second respondent was aware of the urgent application launched by the applicant as it was served on him by Constable Thebiso Joseph Maphoroma (who was accompanied by the applicant) on 12 October 2016 advising him that the application will be made on 14 October 2016. The second respondent nevertheless sold the property to a third party on 19 October 2016. It seems to me that this was done in an attempt to frustrate the relief that the applicant sought. He in all probability must have known of the interim interdict granted on 14 October 2016 or could have known if he made enquiries about the outcome of the application yet went ahead and sold it to the third party. He thus has only himself to blame if the application succeeds and he is unable to pass transfer of the property to the third party.

[17] In all the circumstances, I am of the view that the applicant has made out a case for the relief sought. The costs reserved on 3 November 2016 should follow the result of the application.

[18] The applicant has made serious allegations against the first respondent which she has not challenged. As I said, I must accept the version of the applicant insofar as it concerns the first respondent. Even though the applicant seeks a costs order only against those respondents who oppose the

application the conduct of the first respondent calls for a costs order against the sheriff together with the second respondent.

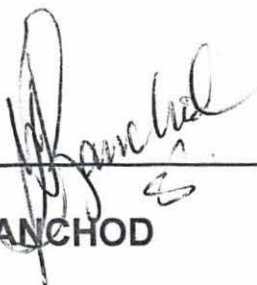
[19] I make the following order:

19.1 The decision of the first respondent to cancel the sale by auction of Erf 340, Hammanskraal (situate at 3, Olivetti Street, Renstown, Hammanskraal) to the applicant and the subsequent sale by re-auction of the said property to the second respondent is reviewed and set aside.

19.2 The re-auction and sale of Erf 340, Hammanskraal (situate at 3, Olivetti Street, Renstown, Hammanskraal) by first respondent to second respondent is declared invalid.

19.3 The applicant is declared the successful bidder and purchaser of Erf 340, Hammanskraal (situate at 3, Olivetti Street, Renstown, Hammanskraal).

19.4 The first and second respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved.



N. RANCHOD
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant : Adv. M.D Sekwakweng

Instructed by : Sixabela Incorporated

Counsel on behalf of First Respondent: No Appearance

Counsel on behalf of Second Respondent: Adv. G.R Egan

Instructed by :Chris Greyvenstein Attorneys

Counsel on behalf of Third Respondent: No Appearance

Date heard : 5 September 2017

Date delivered : 14 November 2017