

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2019/21474

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

DATE

SIGNATURE

In the matter between:

THE SHERIFF, RANDBURG WEST

First Applicant

and

DYNA-EDGE TRADING AND PROJECTS CC

First Respondent

PHOSA GROCIOSUS LEBELO

Second Respondent

IN RE:

FIRST RAND BANK LTD

Execution Creditor

and

STETSON HOMATENI HAUFENI HAUFIKU

Execution Debtor

JUDGMENT

DU PLESSIS AJ:

- [1] The applicant applies for the cancellation of a sale in execution on the basis that the respondents have failed to comply with an obligation in terms of the conditions of sale. The application is brought in terms of Rule 46 (11) of the rules of this Court.
- [2] The respondents launched a counter-application for the transfer of the property to be effected, as on their version they have complied with all their obligations in terms of the conditions of sale.
- [3] The sheriff's report states that a sale in execution was concluded on 19 January 2021 in terms whereof the immovable property known as Section 71 as shown on Sectional Plan no. SS 775/1996 in the scheme known as Avonaire Village, Noordhang Extension 21 Township and situated at 71 Avonaire Village, 274 Bellairs Drive, Northriding, Randburg ("the property") was sold to the respondents for the sum of R565 000.00.
- [4] The sale in execution was held pursuant to an order granted by this court on 6 February 2020 in terms whereof, *inter alia*, the property was declared specially executable and was subject to the conditions of sale that were read out at the auction and thereafter signed by the second respondent personally and by her on behalf of the first respondent.
- [5] In terms of the conditions of sale, the respondents had to:
- 5.1. pay a deposit of 10% of the purchase price in cash, by bank guarantee or by way of electronic funds transfer on the fall of the hammer;
 - 5.2. pay the balance against transfer which should be secured by a guarantee issued by a financial institution furnished to the sheriff within 21 days after the date of sale;
 - 5.3. pay the sheriff's commission immediately on demand;

5.4. pay, within 10 days of being requested to do so by the appointed conveyancer:

5.4.1. all amounts due to the municipality servicing the property for municipal service fees, surcharge on fees, property rates and other municipal taxes, levies and duties that may be due to a municipality;

5.4.2. where applicable, all levies due to a body corporate or amounts due to a home owners or other association which renders services to the property; and

5.4.3. the costs of transfer, including conveyancing fees, transfer duty or VAT, Deeds Office levies and any other amount necessary for the passing of transfer to the purchaser.

[6] Clause 10.2 provides that in the event of the transfer being delayed due to the purchaser failing to comply with the payment provisions within the stipulated time frames, the respondents would be liable for interest at the variable rate of 10.95% nominal per annum compounded daily, on the purchase price as from the date of the delay.

[7] It is common cause that, save for the obligations referred to in paragraphs 5.4.1 and 5.4.2, the respondents have timeously complied with their obligations as set out above. The applicant initially complained about the fact that the purchase price was only paid about a month after the 21-day period had expired, but this point was not persisted with after it was pointed out that there was only an obligation to pay the balance of the purchase price on transfer and not before.

[8] What gave rise to the present application was a letter addressed to the respondents by the appointed conveyancer on 13 August 2021. In terms of this letter the conveyancer alerted the respondents to the fact that they had failed to pay the levy clearance figures which had repeatedly lapsed and that the extended rates were also outstanding. An updated statement of account

was attached and demand was made for this amount to be paid within 10 days. If the respondents failed to do so, the conveyancers would proceed in terms of Rule 46 (11) to cancel the sale.

[9] A copy of the levy statement that was provided to the respondents is annexed to the answering affidavit as "AA8". That shows that the amount payable was R138 322.93. This was the sum that the respondents had to pay within 10 days from the letter of 13 August 2021.

[10] It is common cause that the respondents failed to pay this amount timeously. They engaged in negotiations with the conveyancers in terms whereof certain proposals were made regarding the settlement of the outstanding levies and rates and taxes. On 16 November 2021 they reached an agreement with the conveyancers in terms whereof an amount of R138 676.58 was paid in respect of both levies and rates and taxes.

[11] This late payment resulted in the transfer of the property being delayed. On 17 January 2022 the conveyancers demanded the sum of R48 634.96 from the respondents in respect of interest charges, which were levied in terms of clause 10.2 referred to above.

[12] The respondents have, since then, refused to pay such interest on the basis that the clause provides that interest will accrue if the delay is as a result of the conduct of the purchaser. The respondents deny that any delay was caused by their conduct and blamed the delay on the negligent conduct of the conveyancers, who provided them with incorrect figures in respect of the outstanding levies and rates and taxes.

[13] This stance by the respondents does not take account of clause 6.3 of the conditions of sale, which clearly provides that the amounts indicated as owing were estimates only and that neither the sheriff nor the execution creditor warranted the accuracy of the estimates. It further provides that the purchaser would not be able to avoid its obligations in terms of the agreement arising from the fact that the amounts actually owed are greater than the estimates. The actual amounts must be paid by the purchaser in terms of clause 6.2, i.e. within 10 days from being requested to do so by the appointed conveyancers.

- [14] The respondents' refusal to pay the interest caused the transfer process to come to a standstill and directly led to the present application. In argument before me Adv Coleman, who appeared for the respondents, indicated that the interest was incorrectly calculated. This was, however, never the stance adopted by the respondents in their affidavits. They have at all times refused to pay the interest on the basis that any delay was not caused by them. The calculation of the interest is therefore not relevant in this application and I do not have to make any finding thereon.
- [15] Adv Coleman also relied on the provisions of clause 10.1 of the conditions of sale, which provides that the purchaser shall be entitled to obtain transfer forthwith upon payment of the whole purchase price and compliance with clauses 4, 5 and 6. He argued that because the respondents have complied with those provisions the sheriff should pass transfer and cannot cancel the sale as a result of the non-payment of the interest. That should, according to the argument, be claimed separately.
- [16] In my view this argument cannot be correct. Compliance with the relevant clauses must mean timeous compliance, as there is a penalty to be paid in the form of interest if compliance was not timeous. As the respondents failed to comply timeously with the obligation to pay the levies and rates and taxes, interest became payable and payment thereof is also an obligation on them in terms of the conditions of sale.
- [17] The fact that the sheriff and/or conveyancers may have accepted the late performance by the respondents does not result in them being precluded from relying thereon for purposes of this application. In any event, cancellation for a wrong reason does not invalidate the cancellation, provided the innocent party is subsequently able to prove a valid ground.¹ The refusal to pay the interest is a failure to carry out an obligation due by the respondents under the conditions of sale. That falls squarely within the ambit of Rule 46 (11), the provisions whereof have been incorporated in the conditions of sale in clause 17.1.

¹ *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at para 28.

[18] It follows that the application must succeed and that the sale in execution should be cancelled. Although Rule 46 (11) seems to confer a discretion on the court to cancel the sale, such discretion is limited once it is shown that the purchaser has failed to comply with its obligations in terms of the conditions of sale. In this matter there is no reason to exercise a discretion against the cancellation of the sale in execution as there is prejudice to both the execution creditor and execution debtor if the current impasse persists.

[19] The respondents have applied for condonation for the late filing of their answering affidavit and their replying affidavit in the counter-application. Nothing much turns on this as the matter was argued before me on the basis of all the affidavits that were filed. In light of the proposed order no separate cost order is necessary.

[20] I pause to mention that the draft order is in accordance with the provisions of this court's practice manual.

[21] In the premises I make an order in terms of the draft marked "X".

DU PLESSIS AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DATE OF HEARING: 29 January 2024

DATE OF JUDGMENT: 2 February 2024

COUNSEL FOR APPLICANTS: Adv R Peterson

INSTRUCTED BY: Glover Kannieappan Incorporated

COUNSEL FOR RESPONDENTS: Adv E Coleman

INSTRUCTED BY: Strydom M and Associates

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