



**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: <b>NO</b>
(2)	OF INTEREST TO OTHER JUDGES: <b>NO</b>
(3)	REVISED:

**Date:**

**Signature:**

**Case No. 2021/53966**

**In the application for leave to appeal:**

**MOTOR CITY AUTO SPARES (PTY) LTD**  
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First Applicant (a

**MARDAN VAAL PROPERTIES CC**  
Applicant

Second

**(Registration No, 1993/002114/23)**

and

**THE SHERIFF VANDERBIJLPARK**

First Respondent

**THE STANDARD BANK OF SOUTH AFRICA**  
Respondent

Second

**(Judgment Creditor)**

**DIKGOSI HOLDINGS (PTY ) LTD**  
Respondent

Third

**(Registration No, 2009/006632/07)**

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**JUDGMENT – LEAVE TO APPEAL**

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**MAHOMED AJ**

1. This is an application for leave to appeal in terms of s17(1)(a) alternatively s17(1)(a)(ii) of the Superior Courts Act 10 of 2013, (“the Act”) against a judgment I handed down on 17 July 2023. The third respondent, *a quo* seeks leave to appeal and submits it has reasonable prospects of success, that another court would arrive at a different finding. Alternatively, that there is a compelling reason, as my judgment is in conflict with the judgment in **CHIKALALA AND OHERS V TOVANI TRADING 269 CC AND OTHERS**,<sup>1</sup> the only other judgment in regard to payment of a deposit to the sheriff in a public sale of immovable property, in compliance with conditions of sale found in form 21 of Rule 46 of the Uniform Rules of Court. Appellants raise several other grounds of appeal on the merits. The application is opposed.
2. Advocate C Bester, appeared for the appellant/ third respondent and submitted that the judge in Chikalala correctly interpreted the conditions of sale, when he held that payment cannot be delayed beyond the day of

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<sup>1</sup> [2017] JOL 51231 (GP)

the sale. In casu the payment although made on the day of the sale, only reflected on the next day.

3. Counsel argued that at paragraph 77 of my judgment<sup>2</sup>, wherein is stated,

*“where a bidder chose to pay by electronic funds transfer, it must be accepted and understood that payment, unless within the same bank, will reflect in the payees account on the next day sometimes up to 3 days later depending on the banks security and risk policies”, is at variance with the judgment in Chikalala, and that the court was offering “a life line”, to the respondents, applicants a quo.*

4. Mr Bester proffered that I did not state that Tuchten J was wrong and therefor this creates uncertainty for practitioners, the two judgments cannot be reconciled therefore it would be appropriate that another court clarify this conflict and s17(1)(a(ii) of the Act allows for leave to be granted in this instance.
5. Mr Van Wyk appeared for the respondent and submitted that the judgement is correct, is not in conflict with the judgment in Chikalala, rather it compliments that judgment. He argued that the payment was made on the day by electronic funds transfer, the payment button was clicked on the day, proof thereof was produced 42 minutes after the fall of the hammer, there were no grounds upon which the sheriff could have concluded that the applicant could not pay the deposit and his commission and was at risk. The play is between the words “payment on

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<sup>2</sup> Caselines 000-27

the day” and “reflecting in sheriffs account” and that the sheriff was opportunistic when he relied on “payment not reflected on the day.” Counsel submitted as is usual banking practise payment was “reflected” on the next day. He submitted that the sheriff accepted the same method of payment in the second sale when it was argued, albeit in reply, that the buyers were treated differently, regarding the time allowed for payment, the second sale was unlawful. The second sale resulted in an absurdity, as the property was sold for R950,000 cheaper in the second sale and where the proof of payment was presented only two hours after the fall of the hammer.

6. In my judgement at paragraph 80,<sup>3</sup> I stated that payment would “reflect” on the next day unless the conditions included the relevant banking details when a purchaser would then be fully informed to ensure that payment reflects on the same day. I am of the view that the obligation to pay was discharged on the day as the proof of payment demonstrated.
  
7. I referred to the judgement by Hoexter J, in the Greenfields case at paragraph 75 of the judgement<sup>4</sup> and found that on the facts before me, it would make business sense to expect payment to reflect on the next day and that a reading in of a tacit term in the contract, was appropriate, as the first respondent had aligned itself with the usual banking practise when it accepted payment by electronic funds transfer (EFT).

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<sup>3</sup> Caselines 000-28 p26 para 80 -

<sup>4</sup> Caslines 000-26 p24-5 para 75

8. Counsel further argued that a tacit term must be specifically pleaded, it was not open for the court to read in a tacit term. I explained the reading in of a tacit term in paragraphs 80 to 84<sup>5</sup> of the judgment, applying the business efficacy test.
9. The judgment was further criticised as I permitted a new cause of action “*the unfair treatment of the buyers,*” to be pleaded in the replying affidavit, it was argued the appellants/respondents a quo, did not have an opportunity to plead to this new cause of action. It was proffered that the applicant’s case was based only on “whether the conditions of sale substantially complied with form 21 and whether the sheriff complied with the conditions.” The applicant failed to make out its case in the founding papers and there was no obligation on the respondents to address this point. It was submitted that the *audi alterum partem* rule must be applied and that the appellants are prejudiced, the court ought not to have permitted this nor should it have dealt with this point in its findings.
- 9.1. I noted in the founding papers<sup>6</sup> that the applicants requested the first respondent, the sheriff to forward, proof of payment by the 3<sup>rd</sup> respondent and nothing was forthcoming. Mr Van Wyk in reply to the court’s question advised that the proof was only available later and to my mind it was material to the policy and ethos of the rule regarding “*sheriff’s mandate is to conduct a sale*

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<sup>5</sup> Caselines 000-29 para 84-84

<sup>6</sup> Caselines 074-19 para 37.2

*in the best interests of both debtor and creditor and to realise the highest price for the property.”* I allowed counsel to rely on the document, being the objective evidence to prove the sheriff’s unfair treatment of the two buyers, the respondents would have had to argue against the objective evidence, see **DAWOOD v MAHOMED**.<sup>7</sup> Mr van Wyk correctly argued that the appellant failed to use its remedies for a strike out of the paragraph, the R30 procedure, or to apply for leave to file a further affidavit. Mr Bester argued that the new cause of action “the unfair treatment” was central to my judgment, I disagree, in my judgment I highlighted the impracticality in the implementation of the conditions of sale and I did not disagree with the Chikalala judgment but took the view that the banking details must be included in the conditions of sale so the buyer is provided with all necessary information to effectively participate in the sale and perhaps succeed.

10. The appellant argued that in paragraph 73 of the judgment, the court was wrong in expecting the sheriff to inform parties about the law and when payment must be made. Counsel focused on the last line of the paragraph, but if read in context it will be noted that the appellants on their version, at the hearing of this matter, arrived on the morning of the sale and sought to explain that “at the fall of the hammer, meant within 10

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<sup>7</sup> 1979 (2) SA 361 (D), headnote.

or 15 minutes of the sale". I am of the view this is a new term and material, the appellants only offered an explanation on the morning of the sale, because it obviously was unclear. If the sheriff seeks to impose the strict time lines, again the public must be informed ahead to comply. It is not unusual for buyers to be represented by proxy, as was the case in casu. Mr Bester submitted that the conditions of sale were never in dispute, the respondent knew of the conditions of sale, and the sheriff read them out on the morning of the sale, he further submitted that there was no evidence before me that the conditions of sale were inappropriate, unfair, or invalid. Mr van Wyk argued that the implementation of those conditions was unfair, and not within the ethos of the Rule. It led to an absurdity where the second sale realised a lower price, and the sheriff unfairly "accommodated" the second buyer when he produced a proof of payment some two hours after the fall of the hammer, as evidenced in annexure RA2<sup>8</sup> to the replying affidavit.

11. In my judgment I inadvertently referred to "administrative act," but if read within context of paragraphs 69 and 70 of my judgment, I meant to refer to the sheriff as an extension of a court, a judicial authority in the context of sales in execution, nothing turns on it.
12. I note the appellant interprets my finding in regard to the payment by the debtor "on the day" differently and counsels submissions that the area of

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<sup>8</sup> Caselines 079-24

practise is common and widespread throughout all jurisdictions and practitioners would benefit from another court's clarity on "payment on the day" , the condition in Rule 46, "*payment to the satisfaction of the sheriff*". And given the dearth of judgments in line with current banking practises. I am of the view that it is in the interest of justice that leave be granted.

Accordingly, I make the following order:

1. Leave to appeal is granted to the Full Court of the Gauteng Division, Johannesburg.
2. Costs to be in the appeal.

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**MAHOMED AJ**

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal



representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be \_\_\_\_\_.

**Date of Hearing:**                   **3 November 2023**

**Date of Judgment:**            **\_ January 2024**

**APPEARANCES:**

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