

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO: 38529/2020

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

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In the matter between:

**THE SHERIFF OF THE COURT,
PRETORIA EAST**

Applicant

And

BLESSGUY ENTERPRISE (PTY) LTD

First

Respondent

TANDEKA MIRANDA KETWA

Second Respondent

In re:

STANDARD BANK OF SOUTH AFRICA LIMITED

Execution Creditor

DAISY OTCHERE-DARKO

Execution Debtor

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/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 5 October 2023.

JUDGMENT

MANAMELA AJ

INTRODUCTION

[1] This is an application whereby the applicants seek an order for the cancellation of a Conditions of sale pertaining to an execution of immovable property agreement (“Conditions of Sale”) as contemplated in terms of Rule 46(11) of the Uniform Rules of Court.

[2] The respondents opposed this application and also filed a counter-claim for the cancellation of sale and refund of the deposit and auctioneer’s charges.

[3] In terms of the amended notice of motion, the applicant seeks an order for:

(a) the cancellation of sale of the immovable property;

(b) an order that the property which was subject to a sale in execution be place for sale again;

(c) that the deposit paid by the respondent be retained by the sheriff pending quantification of loss sustained and the granting of judgment in relation thereto in terms of Rule 46(11)(b) or in relation to the distribution or refund of the deposit, provided that if no claim for loss sustained has been lodged within a period of 120 days from date of cancellation of the sale, such deposit shall be refunded to the respondent;

(d) that the respondents forfeits the commission plus VAT thereon paid to the applicant;

(e) that the respondents be held liable for the wasted costs, including the

costs of the resale in execution of the property and that the applicant may pay such costs from monies held by him in trust once the order is granted. (f) and an order for costs against the respondents.

BACKGROUND AND COMMON CAUSE FACTS

[4] On 29 June 2022, the first respondent, Bless Guy Enterprises (Pty) Ltd, entered into a Conditions of Sale agreement with the Sheriff of the High Court, Pretoria East without a reserve price for the sum of R850 000.00. The condition of in execution of the immovable property was for the sale of:

[i] Unit 43 as shown and more fully described on the Sectional Plan No. SS5710/2015 in the scheme known as ALIBERTAS MANOR, in respect of the land and building or buildings situate at Equestria Extension 226 Township, in the area of the Tshwane Metropolitan Municipality, of which Section the Floor Area, according to the said Sectional Plan, is 81 Square Metres, and

[ii] an undivided share in the common property in the scheme apportioned to the said Section in accordance with the participation quota as endorsed on the said Sectional Plan, and

[iii] an exclusive use area described as C43 (Carport) measuring 17 square metres being as such part of the common property, (“the Property”).

[5] The sale in execution was preceded by a default judgment order granted on 29 November 2021 under case number 38959/2020 relating to the property in favour of Standard Bank Limited of South Africa (as the execution creditor) against Daisy Otchero-Darko (the judgment debtor) in terms of which the applicant was authorised to sell the property in execution, without a reserve price.

[6] In accordance with the provisions of the Conditions of Sale agreement the first respondent paid a deposit for the amount of R85 000.00 into the applicant’s trust account together with the applicant’s auction commission plus VAT,

bringing the final deposit amount to R111 737.75.

- [7] The first respondent had to pay the balance of the purchase price within 21 days after date of sale.
- [8] At all material times the first respondent was represented by Ms TM Ketwa, the company secretary of the first respondent, and who is also cited as the second respondent in this matter, however no relief is sought against the second respondent.
- [9] The basis of this application as alleged by the applicant is for the cancellation of sale based on the first respondent's breach of the condition of sale, in that, it failed to pay the balance of the purchase price together with interest or to arrange for bank guarantees to be issued within the agreed time of 21 days of sale.
- [10] As a result, the applicant issued a notice of breach dated 30 August 2022, in terms of which the first respondent was granted 7 days to remedy the breach. Consequentially, the first respondent failed to meet the terms of the notice of breach and make payment, the applicant therefore proceeded with this application seeking an order for the cancellation of the sale of the immovable property in execution and an order to resell the property as provided for in Rule 46(11).
- [11] The cancellation of sale is not disputed and is common cause between the parties.

ISSUES OF DETERMINATION

The issues to be decided upon are ancillary to the relief sought, namely -

- [12] Whether the Respondent should forfeit the deposit and the applicant's commission paid for the sale of the property or whether the money should be paid back to the Respondent due to the misrepresentation made by the Applicant relating to the number of bedrooms at the subject property. Alternatively, whether the failure by the Applicant to disclose the correct size

of the property constitutes a misrepresentation.

RELEVANT TERMS OF CONDITION OF SALE

[13] The condition of sale used by the parties is substantially in line with Form 21A of the first Schedule, and the relevant terms provided that –

“The following information is furnished but not guaranteed:

MAIN BUILDING: 3XBEDROOMS, 1KITCHEN,1LOUNGE, 1BATHROOM.
The Creditor, Sheriff and/or Plaintiff’s Attorneys do not give warranties with regards to the description and/or improvements

“6.3 (a) The property is sold as represented by the Title Deeds and diagram or Sectional Plan, subject to all servitude and conditions of establishment, whichever applies to the property. Notwithstanding anything to the contrary hereinbelow contained, the property is sold free from any title conditions pertaining to the reservation of personal servitude in favour of third parties and in respect of which servitude a preferences has been waived by the holder thereof in favour of the execution creditor.

(b) The sheriff and the execution creditor shall not liable for any deficiency that may be found to exist in the property.”

APPLICABLE LAW

[14] Rule 46(11)(a) provides that -

“(i) If the purchaser fails to carry out any obligations due by the purchaser 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 attached immovable property may be put up for sale again.

(ii) the report shall be accompanied by a notice corresponding substantially with Form 21A of the First Schedule.

(iii) if the sale is cancelled, the sheriff shall inform the judgment debtor of the cancellation.

(b) Any loss sustained by reason of the purchaser's default may, on the application of any aggrieved creditor whose name appears on sheriff's distribution account, be recovered from him or her under judgement of the judge given on a written report by the sheriff, after notice in writing has been given to the purchaser that the report will be laid before the judge for the aforesaid purpose."

[15] Rule 46(13) provides that the Sheriff shall give transfer to the purchaser against payment of the purchase money and upon performance of the provisions of the Conditions of Sale and for that purpose do anything necessary to effect registration of transfer.

ANALYSIS

The cancellation of sale and resale

[16] It is trite law that basis for cancellation of sale in execution is allow the property under execution to be resold. Generally, the cancellation of sale in execution is decided in chambers. The applicant's case is that as a result of the first respondent's failure to pay the balance of the purchase price the Execution Creditors suffered loss which include the costs of the sale and interest accrued on the balance of the bond from the date of sale in execution to the cancellation of the sale in execution. This led to a notice of breach and demand for payment.

[17] On the other hand in terms of the counter-claim the first respondent's reason for cancellation is based on misrepresentation, namely that the property had a two bedrooms instead of a three bedroom. The first respondent contends that the amount paid needs to be paid back. The applicant argues that the respondent accepted the risk of purchasing the

property, will all its improvements when the conditions of sale was signed.

[18] It is evident from the answering affidavit that the first respondent's representative admittedly read the terms of the condition of sale in execution. The problem arose after signing the contract when she to view the property and found that the property is not a three bedroom, as stated in the contract. The inspection was conduction on the same date of signing the Conditions of sale in execution.

[19] In *Sheriff of the High Court Roodepoort v Amien; In re: First Rand Bank Limited v Majeke and another*¹ the court held that the legal consequences flow as a result of conditions of sale. The court held the following:

“The issue before me for determination is whether or not the applicants are entitled to cancellation of the sale based on the facts advanced. There were a series of factual and counter factual points raised by each of the parties against the other spanning a period of approximately two years. Nevertheless, this matter must be adjudicated based on the interpretation of the conditions of sale, the respective parties' conduct thereto as well as the rules and statutory obligations governing such matters.

[20] Similarly in this matter the consequences flow from the terms of sale, amongst others, that in terms of clause 6.3 of the Conditions of sale in execution the property is sold as represented by the Title Deeds and diagram, and that the Sheriff was not liable for any deficiency that may be found to exist. The Condition of sale further expressly provides that the applicant does not give any warranties on the description and improvements of the property.

[21] In *Singh v McCarthy Retail Ltd t/a McIntosh Motors*² the court dealt with the right of a party to a contract to cancel it on the account of malperformance by the other party, where the court held that the test is whether the innocent party is entitled to cancel the contract because of

¹ [2015] JOL 33055 (GJ) at paras 11-12.

² [2000]4 All SA 487 (A) ,also reported at 2000 (4) SA 795 (SCA)

malperformance by the other, in the absence of a *lex commissoria*, entails a value judgment by the Court.

[22] It is, essentially, a balancing of competing interests - that of the innocent party claiming rescission and that of the party who committed the breach³. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy.

[23] Generally, in auction sales, the purchaser is given an opportunity to inspect the property prior to the auction sale. There is no explanation why the respondents did not inspect the property prior to the sale when given an opportunity to do so.

[24] Authors Christie and Bradfield observe that⁴:

“the obligation imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be in mora, and in the last case, to be guilty of positive malperformance.”

It is trite that the legal consequences of a contract concluded as a result of a sale in execution is that it can only be cancelled by a court order upon application by the Sheriff. On the reading of the papers, and in argument, it was not disputed that, other than in respect of the provisions relating to the payment of municipal charges, the time period for the performance of each of the obligations by the respondents was

³ *Kennedy v Oasys Innovations (Pty) Ltd and Another (21826/2015) [2017] ZAGPJHC 331*

⁴ Christie, R & Bradfield G. “Christie's The Law of Contract in South Africa” 6ed. LexisNexis (2011), p515.

fixed in the conditions of sale and the respondents had, on the whole, not complied with these time periods from inception. In my view, this inconsistent, malperformance and/or noncompliance with the time limits in the conditions of sale, entitled the applicants to the remedy of cancellation.”

[25] The reasons for the cancellation of sale advanced by the applicant and the respondent are irreconcilable, in that, the applicant avers that the first respondent is in breach of the Condition of Sale agreement due to the failure to pay the balance of the purchase price, and on the other hand the first respondent submits that the sale must be cancelled due to the applicant’s misrepresentation, in that, the applicant stated that the property consists of 3 bedrooms, 1 Kitchen, 1 Lounge and 1 bathroom, instead of a two bedroom unit.

[26] The requirements of Rule 46 (7)(b)(i) are peremptory and the Rule requires that a short description be given of the attached immovable property. This requirement of a short description was dealt with in *Kaleni v Transkei Development Corporation and Others*⁵, stated:

“The notice of sale and advertisement should contain a reasonable description of buildings and other improvements on the property (see Cummins v Bartlett No) and Another.... for the obvious purpose of attracting bidders so as to obtain as high a price as possible.”

[27] Rule 46(7)(b) requires a description that is sufficient enough to attract bidders. In the facts *in casu* a description of the immovable property in the conditions of sale described the immovable property as a 3 bedroomed house, but further averred in clause 6.3 that no guarantees were given to that effect.

[28] From the answering affidavit, the first respondent, alleges that the applicant refused to conduct a joint inspection of the property, when so asked, and the

⁵ 1997 (4) SA 789 (TkS) at 719 B-C

applicant relied on the Sheriff's report, insisting that it is a three-bedroom unit.

[29] The Applicant argues that he did not misrepresent the first respondent, as the Applicant acted on the information provided by the execution creditor and that the condition of sale expressly states that the applicant does not guarantee that the description is correct.

[30] In the present case I am of the view that a substantial description of the building was furnished. The party assumes risk when he/she signs the conditions of sale. The property shall be at the risk and profit of the purchaser after the fall of the hammer and the signing of the conditions of sale and payment of the initial deposit. Meaning the immovable property was sold at the buyers' risk or profit of the property.

[31] Accordingly, I am of the view that the advertisement was sufficiently compliant to attract bidders as in accordance with Rule 46(7)(b). The inclusion of an extra bedroom on the notice of sale, in my view does not invalidate the notice of sale nor does it render it defective given that no guarantee was given.

[32] As far as breach is concerned, I found that the respondent has breached the Conditions of sale Agreement. It is trite that a breach of contract occurs generally when a party to the contract, without good cause fails to honour his/her obligations under the contract⁶.

[33] One of the duties of the seller in modern South African law is a duty to disclose and assume responsibility for all latent defects in the object of sale which render the object unfit for its intended purpose⁷. It must be noted that this responsibility exists irrespective of the seller's knowledge or ignorance of the defect, which is the same position as that in Roman law. If the seller breaches this duty of disclosure, and the *merx* later turns out to be defective, then the buyer will have certain remedies at his disposal. This is not the case in cases where Condition of sale further expressly provides that the applicant does not give any warranties on the description and improvements of the

⁶ See also, *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 475 (A)

⁷ *Banda v Van der Spuy* 2013 (4) SA 77 (SCA) at [24].

property

Remedies available to the purchaser when the duty of disclosure is breached

- [34] The remedies that are available to an aggrieved party when there is a breach of contract are the *actio redhibitoria* and the *actio quanti minoris*, which function alternatively to each other. Another possible remedy is a claim for damages, which can be instituted separately or alongside one of the aedilician actions.
- [35] The *actio redhibitoria* allows the purchaser to rescind the contract, and is aimed at restoring the parties to the financial positions prior to entering into the contract. The *actio redhibitoria* will only be available where the undisclosed defect is of a material nature, the test is objective. The enquiry is premised on whether a reasonable person having knowledge of the defect would have entered into the contract. If not, then the defect is material, and the purchaser would be entitled to rescind the contract.
- [36] In the event that the latent defect is not material, or where the purchaser has decided to keep the property despite the presence of a material defect, the purchaser may claim a reduction of the purchase price using the *actio quanti minoris*. A defect is not material if it only renders the *res vendita* partially unfit for the purpose for which it was bought. If successful having used this remedy, the purchaser will be able to claim the difference between the purchase price and the true value of the defective property.
- [37] The purchaser may also be able to claim damages in terms of the law of delict. This would be possible if the seller knew or should have known that there was a defect in the *res* and kept silent in order to induce the purchaser to contract. As it is a delictual claim, fault is required.
- [38] However, in terms of the facts *in casu*, the respondent signed a Conditions of Sale agreement in terms of clause 6.3 where it was stated that the property was sold as represented by the title deeds and diagram, and that the sheriff was not liable for any deficiency that may be found to exist.

[39] The sale in execution was not subject to any known suspensive conditions.

[40] It therefore follows that there is no fault on the part of the Applicant as he did not misrepresent the first respondent, as the Conditions of sale was explicit in stating that no guarantees were given.

[41] In the context of the present matter, it is crucial to note clause 6.3 of the Conditions of Sale, where it was specified that-

- a. "The property was sold as represented by the Title Deeds and Diagram or Sectional Plan, subject to all servitudes and conditions of establishment, which ever applies to the property...;
- b. The Sheriff and the execution creditor shall not be liable for any deficiency that may be found to exist in the property;
- c. The sheriff and the execution creditor shall not be obliged to point out any boundaries, beacons or pegs in respect of the property hereby sold".

[42] Clause 6.3 of the Conditions of Sale agreement provides that the immovable property was sold according to the title deeds and diagram or sectional plan with regards to building specifics. Therefore, no misrepresentation has occurred as the applicant provided a description found in the Title Deeds.

[43] In the conditions of sale agreement, where a brief description of the immovable property is given, it is explicitly noted that "nothing is guaranteed."

RETENTION OF DEPOSIT

[44] The First Responded seeks relief for the full payment of R 111 737.75 (One Hundred and Eleven Thousand, Seven Hundred and Thirty-Seven Rand, Seventy -Five cents), being the deposit paid at the time of the conclusion of

the Conditions of Sale agreement, together with interest as from the date they gave instructions to the sheriff to put the money in an interest-bearing account

- [45] On evaluation of the evidence, it is clear that the conditions of sale stipulates in clause 8.2 that in the event of a cancellation of the sale, the deposit paid by the purchaser will be retained in a trust by the sheriff until the property is sold to a third-party or until all the damages have been quantified and judgement has been granted in respect thereof. Similarly, in this case the applicant is entitled to retain the deposit paid in trust, until damages are quantified, if any. Any remaining balance as well as interest earned on the amount will be for the benefit of the first respondent.

COSTS

- [46] In so far as costs are concerned, the Applicant prays that the respondent be held liable for all wasted costs, including the costs of the resale in execution of the property; that the respondent forfeits the commission plus the VAT thereon paid to the Applicant and that the Applicant may pay such costs from the monies held by him in trust once the order has been granted. I find no legal basis to allow forfeiture of the amount paid.

- [47] It is trite that normally costs are awarded to the successful party. The Conditions of Sale documents explicitly provides that, in clause 8.2, in the event that the sale is cancelled, the deposit shall be retained by the Sheriff in trust until the property has been sold to a third party or until all the damages have been quantified and judgement has been granted in respect therefore, in accordance with Rule 46 (11).

- [48] I am not persuaded that the first respondent's conduct was pointless and malicious as to warrant a punitive costs order. It would not be fair under the circumstances to saddle the first respondent with the costs of the Application.

CONCLUSION

- [49] Consequently, based on evaluation of the evidence and submissions of the parties I find that the applicant could not have misrepresented facts that were

not at his disposal. The Conditions of Sale documents explicitly provides that, in clause 8.2, in the event that the sale is cancelled, the deposit shall be retained by the Sheriff in an interest bearing trust account until the property has been sold to a third party or until all the damages have been quantified and judgement has been granted in respect therefore in following with Rule 46 (11). Thus, the Purchaser has no legal standing to recover the deposit until the events set out in clause 8.2 have occurred. The Applicant has therefore not breached the conditions of sale agreement as it was provided in the conditions of sale agreement that no guarantees were given. In accordance with clause 6.3 of the Conditions of Sale state that the sheriff or executor shall not be liable for any defects that may be found. Once the hammer the property is sold *voetstoots*. Therefore, the doctrine of sanctity of contract will prevail which provides that once parties duly enter into a contract, they must honour their obligations under that contract. Thus, notwithstanding the defect, the Purchaser is bound by the conditions thereof.

[50] There claim for forfeiture the deposit paid by the first respondent is unjustifiable, without any proof of damages suffered.

[51] The respondent's counter-application has no merit in the light of the first respondent's failure to comply with the terms of of the Conditions of Sale in execution.

The following order is made:

- (a) The sale agreement is hereby cancelled.
- (b) The deposit will be held by sheriff in trust until the property has been sold to a 3rd party or until all the damages have been quantified, whatever remains will be payable to respondent subject to rule 46 (11) (b) of the Uniform rules of Court, to be paid at such a time together with commission to first respondent.
- (c) The first respondent's counter-claim is dismissed with costs.

**PN MANAMELA
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA**

APPEARANCES:

Counsel for the Applicant: Adv. CJ Welgemoed

Instructed by: Strauss Daly Attorneys

Counsel for the Respondent: Adv. WP Venter

Instructed by: Ketwa Inc Attorneys