



**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN  
(EXERCISING ITS ADMIRALTY JURISDICTION)**

CASE NO: A24/2022

In the matter between:

**ELGIN BROWN & HAMER PROPRIETARY LIMITED**

**APPLICANT**

and

**THE SHERIFF and/or DULY APPOINTED DEPUTY,  
OF THE HIGH COURT: DURBAN COASTAL**

**FIRST RESPONDENT**

**NEETASH BRIJLAL**

**SECOND RESPONDENT**

**FURNACE FABRICA SA PROPRIETARY LIMITED**

**THIRD RESPONDENT**

**SANDOCK AUSTRAL SHIPYARDS (PTY) LTD**

**FOURTH RESPONDENT**

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**ORDER**

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**The following order is granted: -**

1. **The sale in execution of the floating crane: Imvubu held on 10 May 2022 under CCMA Case Number KNDB7777/2021 is declared void and invalid, and set aside.**
2. **It is declared that the applicant is not liable for any wasted costs which may have been incurred in respect of the said sale.**
3. **The third respondent is directed forthwith to restore the said floating crane: Imvubu to the possession of the applicant.**
4. **The costs of this application shall be paid by the second and third respondents, jointly and severally, the one paying the other to be absolved.**

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## JUDGMENT

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### OLSEN J

[1] This application comes before the court exercising its admiralty jurisdiction because

it involves, *inter alia*, a claim to possession of a floating crane, a “ship” as defined in the Admiralty Jurisdiction Regulation Act, 105 of 1983. The applicant is or was the owner of the floating crane: Imvubu which was sold in execution on 10 May 2022. The first respondent is the Sheriff under whose office the sale was conducted.

[2] The second respondent was formerly an employee of the applicant. He obtained a “default award” against the applicant from the CCMA for payment of an amount of R658 862.83. The sale in execution of the Imvubu was at the instance of the second respondent for recovery of the amount of the award.

[3] The third respondent bought the Imvubu at the sale. After the sale it was removed to the quay abutting premises leased by the fourth respondent. The fourth respondent has taken no part in these proceedings.

[4] The application was launched as an urgent one. The urgent relief was aimed principally at preventing the release to the second respondent of the proceeds of the sale, and preventing the first respondent from taking any steps to register transfer of ownership of the Imvubu to the third respondent. Urgent relief was also sought to interdict the third and fourth respondents from dealing in any way with the floating crane. I was informed from the bar that undertakings with regard to the interim relief had been given pending the determination of the application.

[5] The principal relief sought was an order setting aside the sale in execution. Consequential orders were also sought, that the purchase price should be repaid to the third respondent, that the second respondent pay the wasted costs incurred by the first respondent in connection with the sale, and that the vessel be returned to the possession of the applicant.

[6] Under the heading "Background Information", the founding affidavit described how the applicant had got into difficulty as regards its liquidity as a result of the Covid-19 pandemic and the consequent global lockdown. It had found it necessary to make an offer of compromise to creditors, the details of which were apparently regarded as unnecessary for the purposes of the present application. The affidavit asserted that the second respondent had agreed to participate in a distribution under the terms of the compromise. Notwithstanding this the Imvubu was attached on or about 4 March 2022 as a result of which Mr Mthethwa, the deponent to the applicant's affidavits and its managing director, contacted the second respondent to confirm that he was participating in the compromise and would not be proceeding with the execution process upon which he had embarked. According to Mr Mthethwa the second respondent said that he would instruct his attorneys to withdraw the attachment. The second respondent denies that any such undertaking was given by him or that his claim under the award from the

CCMA was submitted to participate in the compromise. To the extent that the relief sought by the applicant rests upon these exchanges, it cannot be granted. The disputes of fact in connection with the issue are material and cannot be resolved without oral evidence.

[7] Nevertheless, according to Mr Mthethwa it came as something of a surprise to the applicant to learn that a sale in execution had taken place on 10 May 2022, and that the Imvubu had been sold for approximately R800 000, a price considerably below the value of the vessel, and also below the price at which the applicant had earlier sold the vessel to a third party. Mr Mthethwa had not seen any advertisement of the sale and he states that he would have applied to interdict the sale if he had received prior notice that it was due to take place, upon the basis that the second respondent had bound himself to participate in the compromise.

[8] In the founding affidavit it is contended that during the night of 11 May 2022 or the early morning of 12 May 2022 “someone unknown to the applicant came by vessel to the applicant’s premises and towed away the floating crane. This was done without the applicant’s knowledge and was only established by the applicant on 12 May 2022”. It is asserted that at the time the applicant was in peaceful and undisturbed possession of the Imvubu and that the applicant was entitled to spoliatory relief, in the way of the immediate return of the vessel.

[9] This claim to spoliatory relief is hotly contested on the papers. There are substantial material disputes of fact. In short the third respondent asserts that the vessel was removed to the quay adjacent to the fourth respondent’s premises openly and with the knowledge of the applicant’s employees and the authority of the first respondent. I do not propose to furnish an account of these factual disputes in this judgment. When the topic of spoliatory relief arose in argument I understood counsel for the applicant to accept the proposition that, unfortunately for the applicant, success on the basis of spoliation could only be achieved upon a resolution of the relevant factual disputes favourable to the applicant, something which could not be achieved on paper. Counsel

did not address me on the subject of how it might be possible to resolve those material disputes without going to oral evidence.

[10] I should deal at this stage with another contention of the applicant, raised to address the contingency that its attack upon the validity of the process of execution (a subject to which I must still turn) is unsuccessful. It is a claim which rests upon the proposition that the third respondent cannot assert that the sale, and consequently its right to possession of the Imvubu, is unimpeachable in terms of s 70 of the Magistrates' Courts Act, 32 of 1944, until and unless the third respondent has acquired ownership of the vessel. The Imvubu is a vessel registered in terms of the Ship Registration Act, 58 of 1998. The applicant contends that ownership of a registered vessel can only pass by following the procedures with regard to registration set out in the Ship Registration Act, something that has not been done.

[11] Putting aside the fact that, in the case of movable property such as the vessel, the operation of s 70 turns on delivery, and not on transfer of ownership, in my view the applicant's reliance on the Ship Registration Act is misplaced. Section 31(7) of that Act is to the effect that the transfer of a share in a ship is governed by Schedule 1 to the Act. Schedule 1 is headed "Private Law Provisions for Registered Ships". Item 3 of Schedule 1 is to the effect that a ship or a share in a ship is transferred by registration of a bill of sale made in the prescribed form. That is what the applicant says has not happened. But the provisions of Item 3 are expressed to be "subject to item 4". Item 4(1) of the Schedule reads as follows.

'Where any interest in a ship or a share in a ship is transmitted to a person by any lawful means other than by a transfer in terms of item 3 and the ship continues to be entitled to be registered, that person must make a declaration of transmission in the prescribed form and must lodge that declaration, together with the evidence of the transmission that may be prescribed, with the Registrar within 14 days of that transmission taking place or within the further period that the Registrar may allow in special circumstances.'

Item 4(2) is to the effect that subject to other considerations not relevant hereto, the Registrar must “thereupon enter in the Register the name of that person as owner of the ship or share.”

[12] The “transmission” of the vessel *Imvubu* to the third respondent was, subject to the validity of the sale in execution, achieved by “lawful means”. If the sale was valid the third respondent acquired ownership of the vessel and is entitled to secure the registration of its rights as owner. This understanding of Schedule 1 accords with the view expressed by G Hofmeyr, *Admiralty Jurisdiction Law and Practice in South Africa* 2<sup>ed</sup> (2012) Note 38 at 26 - 27, that “while registration in a ship’s register constitutes acceptable evidence of ownership, registration is not conclusive proof of ownership”. (See also the two judgments referred to in that note.)

[13] I turn then to the applicant’s attack upon the process of execution as the basis for an order that the sale in execution should be set aside.

[14] Section 143(5) of the Labour Relations Act, 66 of 1995 is to the effect that

‘an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate’s Court.’

The applicant’s first line of attack is that the attachment of the vessel made on 4 March 2022 was invalid because the first respondent had purported to exercise the power of attachment in execution not under the Magistrates’ Courts Act, but “in accordance with the provisions of the Supreme Court Act 59 of 1959, as amended.” The words just quoted appear on the notice of attachment immediately below the upper portion of the document which identifies the parties. However in my view the applicant takes too narrow a view of the document, which must be considered as a whole. In this Division we are still accustomed to receiving returns of service with the endorsement just quoted above. Nothing is made of it. Speaking for myself I disregard it on the assumption that the Sheriffs utilise software for the production of returns which does not permit them to

alter certain portions of the form. Of course here the incorrect form was used as, presumably when the Sheriffs act under the authority of the Magistrates' Courts, the inserted words reflect that fact. Nevertheless, inserted across the top of the notice of attachment are the words "Commission for Conciliation, Mediation and Arbitration, KwaZulu-Natal, Durban". Furthermore there is reference in the notice of attachment to a requirement that security in terms of Rule 38 must be furnished, and that is quite obviously a reference to the Magistrates' Courts Rules. I conclude accordingly that the first respondent was indeed acting in terms of the provisions of the Magistrates' Courts Act and Rules, as required by s 143(5) of the Labour Relations Act.

[15] Rule 41(19)(b) of the Magistrates' Courts Rules requires that the execution creditor shall, after consultation with the Sheriff, prepare a notice of sale. Two copies of it are to be given to the Sheriff in sufficient time to allow of one being affixed not later than 10 days before the sale at the appropriate place at court, and the other at or as near as may be to the place where the sale is going to take place. Prior to the commencement of this application the applicant obtained a copy of the notice of sale, presumably from the office of the first respondent. The notice was to the effect that the Imvubu would be sold in execution on Tuesday, 10 May 2022 "at 12h00 or so soon thereafter" at "Lower Bremen Road, Bayhead, Durban, 4057". The notice refers to the Consumer Protection Act, 68 of 2008 and evidences some attempt at compliance with the provisions of that Act and Regulations thereunder applicable to auction sales.

[16] Rule 41(19)(c) of the Magistrates' Courts Rules requires the Sheriff, when the value of the goods exceeds the monetary jurisdiction of the Small Claims Court, to instruct the execution creditor to publish the notice of sale in a newspaper circulating in the district "not later than 10 days before the date appointed for the sale". (In the notice of attachment the first respondent recorded the value of the Imvubu as R2 million.) The rule also requires the execution creditor to furnish the Sheriff with a copy of the edition of the paper in which the publication appeared not later than the day preceding the date of sale.

[17] When the founding papers were drawn the applicant had still not ascertained whether and when the sale had been advertised. The first respondent had supplied the applicant with a copy of a page of a newspaper published on 5 May 2022 but the page did not reflect the advertisement. Each of the second and third respondents, in their respective answering affidavits, put up copies of the newspaper advertisement which reproduced the notice of sale. But neither of the copies reflected the date of publication of the advertisement. However the date of publication was volunteered by the deponent to the third respondent's answering affidavit. It was 28 April 2022. That date is seven days before the date appointed for the sale (10 May 2022). Compliance with Rule 41(19)(c) of the Magistrates' Courts Rules was not achieved.

[18] The fact that publication on 28 April 2022 breached the rules was overlooked when the applicant's replying affidavit was drawn. When I drew attention to this problem in argument I suggested to counsel that it was not possible, when the issue was whether the sale had been conducted in accordance with law, simply to ignore the fact that the rules were not complied with as set out above, that being perfectly obvious given the undisputed facts. That proposition was not contradicted by counsel and I took it to be accepted.

(See: *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC) and *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC).

[19] In *Sowden v ABSA Bank Ltd and Others* 1996 (3) SA 814 (W) Heher J had to consider the effect of an advertisement for a sale in execution under the Uniform rules being one day late. The judgment debtor sought to have the sale set aside. The conclusion of Heher J is succinctly stated at 819F-G.

'The object of affording two clear weeks to publicise and prepare for the sale has not been achieved and neither the execution debtor nor the execution creditor has received the full benefit promised to him by the Rule. The defect is fatal to the validity of the sale.'



[20] In *A H Noorbhai Investments (Pty) Ltd and Others v New Republic Bank Ltd* 1998 (2) SA 575 (W) Schwartzman J had to consider a similar default, that is to say an advertisement one day late. The learned Judge sought to distinguish *Sowden's* case upon the basis that in that case there was no application to condone non-compliance with the rule relating to advertising. He put it this way at 578D-E.

'To the extent that Heher J sought to lay down an immutable rule I believe that he was clearly wrong. This is because there is nothing in Rule 46 or elsewhere in the Rules that excludes a High Court's inherent power or its power in terms of Rule 27 to condone a non-compliance with the Rule.'

I am not sure that this finding by Schwartzman J, if it is correct, should not be regarded as amounting to this: that the defect is fatal to the validity of the sale unless the court can be persuaded to condone it.

[21] I am not in this case called upon to answer the question as to whether such a default in the timing of an advertisement can be condoned *ex post facto*. Subject only to that reservation, I am in respectful agreement with the conclusion in *Sowden's* case. It appears to be consistent with the endorsement of the following passage taken from Maxwell, *Interpretation of Statutes*, 7 ed at 316, in *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683E-F.

'Where powers are ... granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the ... authority conferred, and it is therefore probable that such was the intention of the Legislature.'

It was also pointed out by Van Den Heever, JA that if the provisions of the rule are regarded as peremptory, that is in harmony with the common law which regards advertisement as the "primary formality in sales in execution". (See 684E)

[22] The applicant's principal complaint concerning the manner in which the sale was conducted arises from the fact that the auction did not take place at the advertised location. The applicant's premises are situated at the waterside in a road called Bremen Road which is accessed from the main arterial road in that area of the harbour known as Bayhead Road. The advertisement and the notice of sale records the address of the proposed sale as at "Lower Bremen Road". There is no such road. However the applicant's premises are at the end of Bremen Road (ie where it stops before the water), and one supposes that in ordinary language it might be regarded as the lower end of Bremen Road. It seems to me that this problem can be overlooked.

[23] Mr Clement Chetty, the project manager of the third respondent who attested to the latter's answering affidavit, described what happened. He says that together with between three and five other bidders and the first respondent's team he attended at the advertised place for the conduct of the auction to discover that the crane was no longer there. It was found to have been moved to a place which he described as between Eldock and Dormac dock at the harbour. He says that everyone then relocated to the dockside where the floating crane was moored because the bidders wished to inspect the crane before the auction was held. He described how some bidders went to the advertised site and had to contact the first respondent (presumably by telephone) who directed them to where the floating crane was moored adjacent to Eldock. The sale was delayed to give time for these bidders to get to the site.

[24] The first respondent delivered a notice to abide. However when all the other papers were in, the first respondent decided to deliver what he called an "explanatory affidavit" in which, relying on the confirmatory affidavit of a Ms Diane Naicker of his office, he asserted that the auction had taken place in "neighbouring premises" "also at "Lower Bremen Road as advertised".

[25] In replying to these two affidavits, which, especially in the case of the first respondent, sought to downplay the impact of the change of venue, Mr Mthethwa (speaking for the applicant) produced an aerial photograph of the area taken from

Google, showing the respective positions of Bremen Road (and the advertised site for the auction) and Eldock, together with the different and unnamed road which gives access to Eldock. This latter road is also accessed from Bayhead Road. Eldock is not a neighbour of the applicant's premises. There are three or four other premises or enterprises between the applicant's premises and Eldock. Mr Mthethwa stated that it would take some 20 minutes to walk from the applicant's premises to Eldock.

[26] It would have been open to any respondent who disputed Mr Mthethwa's analysis of the position to put in an affidavit to deal with or question the impact of the aerial photograph to which I have referred. That was not done. The aerial photograph illustrates clearly that what Mr Mthethwa says about the respective positions of the advertised site for the auction, and the site at which the auction took place, is correct.

[27] In my view a change of venue of a sale in execution from the advertised one is a gross violation of the rules governing the conduct of such a sale. It is implicit in Rule 41(19) that the place at which the auction is to be conducted must be reflected in the notice of sale, and consequently in the advertisement for the sale. It is expressly stated in Regulation 20(1)(b)(ii) of the regulations under the Consumer Protection Act (applicable in terms of s 45 of that Act to sales in execution) that an advertisement should provide sufficient information for a reasonable consumer to "be able to find the place where the auction is to be held". In my view the change of venue would on its own justify an order setting aside the sale in execution as invalid.

[28] The answer to this, according to the second and third respondents, lies in s 70 of the Magistrates' Courts Act. It reads as follows.

'A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.'

[29] In his argument counsel for the third respondent has referred to his client as "an innocent third party" and as an "arm's length purchaser" who purchased the crane in

good faith and is entitled to the protection of s 70. There does not appear to be anything in the papers which would contradict the proposition that the third respondent was an arm's length purchaser. It may safely be assumed, judging from Mr Chetty's affidavit delivered on behalf of the third respondent, that the third respondent had sight of the advertisement prior to the auction. It is Mr Chetty who disclosed when the advertisement was published, and he said that he went to the advertised site in order to bid at the sale. In my view the answer to the third respondent's reliance on s 70 of the Magistrates' Courts Act is that we are not dealing with a purchaser "without notice of any defect". The third respondent had notice of the defect in the advertisement, that it was published too late. In the case of that defect in the proceedings it may be argued that whilst Mr Chetty had knowledge of the date of the advertisement, not being familiar with the rules of court, he did not have knowledge of the fact that the date in question revealed non-compliance with the rules of court. However the situation is clearer in the case of the change of venue. He, like any other bidder, having gone to the appointed place, and then relocated with the first respondent to the site at which the auction was actually held, would not only have known that this change undermined the advertisement, but also that the change had the potential to reduce competition if an intending bidder arrived at the site to find it unattended, and therefore assumed that the sale had been cancelled. The third respondent might have argued otherwise if Mr Chetty was able to report that the first respondent had left someone at the advertised site to redirect bidders, but that was not done.

[30] On that basis I conclude that the applicant is entitled to an order setting aside the sale in execution. In my view the outcome would have been the same if I had not concluded that the third respondent had notice of the defects. Given the basis upon which I decide the issue of notice of defects, I do not propose to deal with the alternative approach in detail. It concerns the proper construction of s 70 of the Magistrates' Courts Act, given the judgments delivered in the Supreme Court of Appeal in *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA). That case concerned a warrant of execution for the attachment of a home (and a sale in execution following that) issued out of a magistrates' court prior to the judgment of the Constitutional Court in *Jaftha v*

*Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC). The court in *Menqa* held that the order made in *Jaftha* for the “reading-in” of words in s 66(1) (a) was retrospective. The writ issued by the magistrates’ court for the attachment of the home of the respondent in the appeal was issued without judicial oversight and was accordingly invalid. It was argued on behalf of the appellant, *Menqa*, that s 70 of the Act protected him, there being no suggestion that he acted in bad faith or was aware of any defect at the time of the sale in execution. Van Heerden JA (with whom three of the other Judges joined) was satisfied that the court *a quo* was correct in holding that “if one were to hold that the provisions of s 70 of the Act rendered such a sale in execution unimpeachable, this would indeed ‘defeat the whole purpose of the Constitutional Court ruling in the *Jaftha* case’.” (See para 21) The conclusion was accordingly that the sale in execution could not be saved by s 70 of the Act.

[31] Cloete JA wrote a concurring minority judgment, and was joined in that by Scott JA who concurred in both judgments. Cloete JA agreed with the conclusion that s 70 of the Magistrates’ Courts Act could not be interpreted so as to negate the *Jaftha* decision. However, he took the view that it was “desirable to analyse the meaning of the section and provide a rational basis for its interpretation.” (Para 28) This he proceeded to do in paragraphs 30 to 47 of the judgment.

[32] As regards the common law, after a thorough analysis of it and after dealing with the earlier judgments on the impact and meaning of s 70 of the Magistrates’ Courts Act, the learned Judge concluded at paragraph 46 that

‘...at common law a sale in execution was void for want of compliance with an essential formality, but that non-compliance with non-essential formalities did not have this result; and that s 70 should be interpreted as being to the same effect, save that a sale in execution in a magistrates’ court can be impugned even for want of non-essential formalities where the purchaser did not act in good faith or had notice of the non-compliance.’

[33] Cloete JA points out that there is no equivalent to s 70 of the Magistrates’ Courts Act to be found in the High Court. (See paragraph 42). I am satisfied that the defaults which I have identified in the present case are defaults concerning “essential formalities”,

and that they would in the High Court justify the conclusion that the sale in question here was invalid and void. Given the pre-constitutional cases in which s 70 has been treated as near sacrosanct, of more importance in the current situation is the proper construction of the provision in the constitutional era. In paragraph 47 of the judgment in *Menqa* Cloete JA highlighted the principle flowing from s 39(2) of the Constitution, that where a legislative provision can be interpreted in a way which “places it within constitutional bounds”, that is the meaning that should be ascribed to it. Cloete JA continued as follows.

‘Following this approach, s 70 should be interpreted as not protecting a “sale” which is void for to do so would put it in conflict with the basic principle of legality (which requires public power to be properly exercised in terms of a valid law that authorises it) and s 25(1) of the Constitution which provides that “no law may permit arbitrary deprivation of property”.’

I have not found any judgment which would bind me to a conclusion that I cannot decide this case following the analysis of the correct meaning of s 70 of the Magistrates’ Courts Act set out by Cloete JA in *Menqa* and derived from the provisions of the Constitution to which the learned Judge referred.

[34] Turning to the relief sought, it strikes me that two elements of it are questionable.

- (a) The first of these is the prayer for an order that the first respondent’s wasted costs associated with the sale in execution should be paid by the second respondent. In my view the order goes too far, as the most the applicant is entitled to ask for is an order declaring that it is not responsible for the wasted costs in question. I propose to grant that order. The question as to whether the first respondent has any claim against the second respondent for the wasted costs is a matter between those parties. I would merely make the observation that as I understand Rule 41(19)(c) of the Magistrates’ Courts Rules the first respondent ought not to have proceeded with the sale without first seeing a copy of the edition of the newspaper in which the advertisement was placed; and by implication, should not have

proceeded with the sale if he had noted, as he ought to have done, that the advertisement was not in compliance with the rules.

- (b) The applicant also asked for an order that the money paid by the third respondent to the first respondent should be refunded. A claim for such a refund flows naturally from the order that the sale in execution be set aside. I cannot conceive of how the first respondent could resist such a claim. But, nevertheless, the claim lies with the third respondent. If it is not paid, the applicant would not have *locus standi* to sue for the enforcement of the claim.

Neither the first respondent nor the third respondent has asked the court to make any order with regard to any claims they have, or may have, in the event of the sale being set aside.

**I MAKE THE FOLLOWING ORDER.**

- 1. The sale in execution of the floating crane: Imvubu held on 10 May 2022 under CCMA Case Number KNDB7777/2021 is declared void and invalid, and set aside.**
- 2. It is declared that the applicant is not liable for any wasted costs which may have been incurred in respect of the said sale.**
- 3. The third respondent is directed forthwith to restore the said floating crane: Imvubu to the possession of the applicant.**
- 4. The costs of this application shall be paid by the second and third respondents, jointly and severally, the one paying the other to be absolved.**





**APPEARANCES**

Date of Hearing: Wednesday, 10 August 2022

Date of Judgment : Thursday, 27 October 2022

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