THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 490/05

In the matter between:

DREAM SUPREME PROPERTIES 11CC Appellant

and

NEDCOR BANK LIMITED First Respondent

TANJA MICHELLE KIRKHAM Second Respondent

CHRISTOS COSTAS Third Respondent

Before:	**STREICHER, FARLAM, MTHIYANE, MLAMBO JJA & MALAN AJA**
Heard:	**16 NOVEMBER 2006**
Delivered:	**13 MARCH 2007**
Summary:	**Doctrine of notice – does not apply to attachment of property belonging to judgment debtor but sold by judgment debtor prior to attachment.**
Neutral citation:	**This judgment may be referred to as Dream Supreme Properties 11CC v Nedcor Bank [2007] SCA 8 (RSA).**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] The Cape High Court dismissed an application by the appellant, alleged to be a prior purchaser of a property, for the setting aside of an attachment of the property; the setting aside of the sale in execution of the property to the second respondent; and for an order directing the third respondent to transfer the property to the appellant. An application for leave to appeal was dismissed by the court a quo but a further application to this court for leave to appeal was referred for oral argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959. In the event the parties addressed us as if the matter was on appeal, it being common cause that should it be held that the court below correctly dismissed the initial application, leave to appeal should be refused.

[2] The third respondent is the owner of the property being Sections 6, 13 and 64 in a sectional title scheme known as Glen Waters situated at Camps Bay, City of Cape Town. The property consists of an apartment and two garages. According to Mrs Theodosiou, the mother in law of the third respondent, who is a member of the appellant and the deponent to the appellant's founding affidavit, the property was purchased by the third respondent during or about 1993 and has since then been used as a holiday home by his family and relatives.

[3] The Johannesburg High Court, on 8 June 2000, granted judgment by default against the third respondent for payment of the sum of R1 144 409, 21 plus interest and costs. On 1 March 2001 Standard Bank Financial Nominees (Pty) Ltd also obtained judgment against the third respondent for the payment of R720 441,18.

[4] Mrs Theodosiou states that the third respondent confided in her during 2001 that he was in financial difficulties and that he wanted to sell the property since he could no longer afford it. As she did not want their family to lose the use of the property she proposed to the third respondent that he should sell the property to her daughter ie to his wife to whom she undertook to provide the necessary funds. She adds: 'Since I did not want to exploit his financial difficulties, I proposed to the third respondent that we conduct the sale through an estate agent and that he obtains advice as to the fair and reasonable market value of the property.' The third respondent did so. In a letter dated 26 November 2001 an estate agent responded: 'Under existing market conditions, it is our opinion that your property should be marketed at R900 000 to expect offers between R850 000 and R880 000.'

[5] According to Mrs Theodosiou a written agreement of sale was, pursuant to her advice, concluded between the third respondent and his wife Mrs Elizabeth Costas. In this regard she relies on a document in terms of which the third respondent on 15 November 2001 sold the property to 'Mrs Elizabeth Costas or such nominees appointed within 30 days' for a purchase price of R860 000. It provides for the payment of a deposit of R210 000 in cash upon signature and for the payment of the balance of R650 000 upon registration of transfer of the property into the name of the purchaser. The third respondent agreed to pay 'agent sales commission in an amount of 7.5% including VAT of the purchase price . . . on the date of signature'. On 4 December 2001 Mrs Costas nominated the appellant as the purchaser. Mrs Theodosiou and Mrs Drakopoulos' members' interest in the appellant was registered on 29 January 2002 and they immediately thereafter 'ratified and adopted the sale'.

[6] The first respondent became aware of the aforesaid transaction and its attorneys, in a letter to the third respondent's attorneys advised them of the judgment against the third respondent and of the first respondent's intention to attach the property. The first respondent thereafter caused a writ of execution against immovable property to be issued by the registrar of the court a quo and on 14 March 2002 the property was attached in execution. Pursuant to the attachment the sheriff arranged for the sale to take place on 12 November 2002. On 6 September 2002 Standard Bank Financial Nominees (Pty) Ltd also attached the property in execution of the judgment it had obtained against the third respondent.

[7] Notwithstanding the provision in 'the agreement of sale' that the deposit had to be paid upon signature (15 November 2001), such deposit was only paid in October 2002 by way of a payment of R100 000 on 14 October 2002 and a payment of R200 000 on 16 October 2002. Mrs Theodosiou instructed the third respondent's attorneys to apply an amount of R10 000, which they were holding in trust on her behalf, in payment of the balance of the deposit. The third respondent never requested payment of the costs incidental to the transfer and it was only in the founding affidavit in the application to the court a quo that the appellant tendered payment of these costs.

[8] The appellant's attorneys, on 1 November 2002, advised the first respondent's attorneys that the appellant had purchased the property, that Mrs Theodosiou was intent on pursuing the sale, that she had paid certain amounts to give effect to the transfer of the property and that such payments were obviously refundable to her in the event of the sale in execution proceeding. On 4 November 2002 the appellant's attorneys again wrote to first respondent's attorneys. They recorded that Standard Bank

Financial Nominees (Pty) Ltd had also attached the property in terms of a warrant of execution for a debt of R720 041,18 and that the property had in terms of an agreement of lease dated 21 May 2002 been leased to JE Conroy. On 7 November 2002 the appellant's attorneys wrote yet another letter to the first respondents' attorneys. They demanded the postponement or withdrawal of the sale in execution alternatively the acceptance of a settlement proposal and stated:

> 'Unless we receive [your agreement to any of the proposals] at our office, by the time appointed, we will have no alternative but to approach the court for urgent relief preventing the sale in execution . . .'

[9] The appellants' attorneys also wrote to the sheriff. They said that the property had been purchased by the appellant, that the appellant had performed fully in terms of the agreement, that the sale of the property could for that reason not proceed, that the prospective purchaser should be advised that a pre-existing sale had been concluded, that any attempt to obtain transfer would be resisted and that an application would be brought to set aside the sale. The first respondent's attorneys responded that the sale would proceed as the first respondent was of the view that the property's value exceeded the 'current purchase price'.

[10] The second respondent purchased the property, subject to the lease, at the sale in execution for a purchase price of R1 175 000. It is this sale that the appellant sought to have set aside in the court a quo. It alleges in the founding affidavit that in the light of the first respondent's knowledge of 'the agreement of sale' between the appellant and the third respondent the second respondent's right to obtain transfer cannot prevail against the appellant's earlier right to transfer.

[11] The first respondent contends in its answering affidavit that the 'agreement of sale' amounts to nothing more than a sham. In this regard the first respondent refers to the fact that in terms of the agreement of sale commission in an amount R64 500 was payable to an estate agent who was not instrumental in causing the sale, states that the sale was done in an effort to prejudice the third respondent's creditors and to dissipate the third respondent's assets at a stage when judgment had been granted against the third respondent and that the value of the property was well in excess of R860 000. For these reasons the first respondent applied for the agreement of sale to be set aside.

[12] It is not in dispute that the second respondent did not know of the agreement of sale when she purchased the property at the sale in execution. She only became aware of the alleged sale when the application in the court a quo was instituted. She contends that even if the alleged sale by the third respondent was bona fide, whatever rights the appellant may have had to the transfer of the property terminated on the sale of the property to her at the sale in execution. She contends, furthermore, that the appellant waived whatever rights it might have had to interfere with the transfer of the property by the sheriff pursuant to the sale in execution. She also denies that the agreement of sale was a bona fide transaction.

[13] The court a quo referred to the maxim *'qui prior est tempore potior est jure'* ('the priority rule') ie the rule that a prior personal right is stronger than a later personal right but stated that the rule was subject to equities and that the competing personal right must have been created by the same person. It considered that the equities were against the appellant in that the agreement of sale was not a bona fide agreement to sell but that it was entered into in order to frustrate a later sale and also in that the appellant

failed to stop the later sale. For this reason there was in the view of the court a quo no reason to extend the priority rule to this case where the two competing personal rights had been created by different persons namely the third respondent and the sheriff. In regard to the doctrine of notice which is to the effect that a real right[1] acquired with knowledge of an existing personal right may have to yield to the personal right[2] the court a quo held that it appeared that the appellant acquiesced in the execution sale and allowed it to proceed, that the inescapable inference from the papers was that in an attempt to shield the property from judgment creditors there was some degree of collusion which places doubt on the genuineness of the sale and that undue hardship will be caused to the second respondent as the bona fide purchaser of the property, if effect was not given to the sale in execution. For these reasons the court a quo held that the prior personal right should not prevail over the subsequently acquired real right.

[14] By attaching the property in execution the first respondent acquired a real right, known as a *pignus judiciale*, to the property. That real right entitled the first respondent, subject to certain qualifications, to proceed with the sale in execution and to an entitlement to the proceeds of the sale of the property. However, relying on the doctrine of notice the appellant submits that in the light of the fact that the attachment took place with the knowledge on the part of the first respondent that the appellant had purchased the property from the third respondent and had acquired a personal right against the third respondent for the delivery of the property against performance by the appellant of its obligations, the appellant was entitled to have the attachment set aside. In this regard the appellant relies heavily on *Hassam v Shaboodien* 1996 (2) 720 (C) in which Friedman JP with whom Traverso J concurred disagreed with the following conclusion

[1]By attaching the property the first respondent acquired a real right to the property (see para [14] below).
[2]Lubbe 'A doctrine in search of a theory: reflections on the so-called doctrine of notice in South African Law' (1997) *Acta Juridica* 246 p 247.

reached by Nestadt J in *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) at 641G-H:

> 'I am unpersuaded that either in principle or on authority there is any warrant for extending the rule or applying the principle, that knowledge of a prior personal right in respect of property will destroy the validity of a subsequently acquired real right in it, to the case of a judgment creditor levying execution against the property of his debtor. My conclusion is that such creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such debtor to the ownership or possession of such property which right arose prior to the attachment of even the judgment creditor's cause of action and of which the judgment creditor had notice when the attachment was made.'

[15] In *Reynders* the applicant applied for the setting aside of an attachment by Rand Bank of a property which in terms of a prior court order had to be transferred by her ex-husband to her minor children, custody of whom had been awarded to her. Nestadt J referred to 'the basic principle of our law that a real right generally prevails against a personal right (even if it is prior in time) where they are in competition with each other in relation to an asset of a common debtor'[3] and noted that 'it was clear that the rule . . . is not of general application where the holder of the real right had, before he acquired it, knowledge of such personal right'.[4] He accepted that the basis of the principle was that 'it is a species of fraud to attempt to acquire a *res* which is known to have been promised to another'.[5] In this regard he referred to *De Jager v Sisana* 1930 AD 71 at 74 where Curlewis JA referred to the fact that it had been laid down in various decisions of the courts that a purchaser of property 'who buys with the knowledge of the rights of a third party to or in such property, is bound thereby, and that it would be a species of fraud on his part if he attempted

[3] *Reynders* 634F-G.
[4] *Reynders* 636C.
[5] *Reynders* 637A.

to defeat such third party's rights'. He also referred, amongst others, to *Ridler v Gartner* 1920 TPD 249 at 259-260 where it was said by Wessels J that there 'must be an element of deceit, an element of chicanery in the transaction before the Court will set it aside on the ground of knowledge'.[6]

[16] Nestadt J was, however, of the view that the conduct of a purchaser with knowledge of the prior sale of the property to another could not be equated with that of a judgment creditor who attached the property in execution of the judgment debt. In the case of a double sale, so he reasoned, the purchaser and the seller voluntarily enter into a type of fraudulent conspiracy the result of which is to deprive the first purchaser of his contractual claim to the property. In the case of an attachment there is no question of the debtor and the creditor acting fraudulently or dishonestly. He added that the debtor presumably cannot avoid it and the creditor 'has or might have no option in order to obtain payment of its debt but to execute against the property'.[7] For these reasons Nestadt J failed to see how Rand Bank's (the creditor's) knowledge could avail Reynders (the third party with a prior personal right).

[17] At the time when *Reynders* was decided there were two earlier judgments in which the court came to a different conclusion. In *Meyer v Botha and Hergenroder* 1882 Kotze 47 Meyer attached movable property which belonged to Botha but which had been pledged by notarial deed to a bank but had not been delivered to the bank. Meyer was aware of the pledge to the bank and advanced money to Botha notwithstanding such knowledge. Kotze CJ held that the right of the bank prevailed. In this regard he referred to the fact that it was quite clear 'that knowledge, or notice, of the existence of a pledge places a person, who purchases or

[6] *Reynders* 637E.
[7] *Reynders* 637H.

otherwise obtains possession of the property pledged, in no better position than the debtor and pledgor himself'. However, the same judge subsequently, in *Van Niekerk v Fortuin* 1913 CPD 457, held in respect of an application for an order for the attachment of immovable property belonging to the judgment debtor but previously donated to a third party:

'It seems to me that the plaintiff being a judgment creditor, and the property being still registered in the name of the defendant, *prima facie* the plaintiff has the right to ask that the property shall be seized in execution unless the party interested can show that there are special circumstances why such an order should not be granted. Here there was an alleged donation prior to the debt, and there is nothing to lead me to consider that it was not bona fide; but under the circumstances of the case that does not seem sufficient to deprive the judgement creditor of his right to seize the property in execution.'

[18] It should be added that in terms of the uniform rules not even a real right such as a pledge precludes attachment of a property subject to that real right. Rule 45 (10) provides that property subject to a real right of any third person is sold subject to the rights of such third person unless he otherwise agrees.

[19] The only other case, pre *Reynders*, to which we were referred as authority for the proposition that a judgment creditor may not attach a property in relation to which, to his knowledge, a third party has a personal right, is *Hodgson v Emery* (1902) 23 NLR 360. Hodgson had attached a horse in execution of a judgment debt against a third party after having been advised by letter that the horse, which belonged to the judgment debtor, had been sold by the debtor to Mrs Emery. The court held:

'It is true that Hodgson was not a purchaser, but can he be in a better position than a purchaser? If good faith is required in the second purchaser, surely it should also be required in the case of an execution creditor.

So long as the property remained in the possession of the vendor, the plaintiff would have been entitled to specific performance and it seems contrary to right principle that Hodgson should be allowed to defeat that right with Mr Emery's letter in his possession.'

[20] Some academic writers criticised the *Reynders* judgment and expressed the view that it was wrong. Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 4 ed p 277 said:[8]

'Waar C weet van die bestaan van B se vorderingsreg, maar nietemin beslaglegging verkry, is sy optrede nie minder regskrenkend of minder verwytbaar as in die geval waar hy met volle kennis die saak wat reeds aan B verkoop is, van A koop en transport ontvang nie. Daar die effek van die kennisleer by `n dubbele verkoping is dat die tweede koper wat transport verkry het, se eiendomsreg eventueel moet swig voor die vorderingsreg van die eerste koper, is dit anomalies dat `n vonnisskuldeiser wat, met kennis van die bestaan van `n vroeëre vorderingsreg ten opsigte van `n saak, op daardie saak beslag gelê het en slegs `n beperkte saaklike reg aldus verkry het, in `n sterker posisie verkeer as die eienaar in die eerste geval.'

[21] Muller 'Die Kennisleer: Waarom die Dubbele Standaarde' 1979 *De Jure* p 284 said at p 288:

'[I]ndien `n tweede koper bedrieglik handel indien hy `n kontrak aangaan in stryd met die eerste koper se persoonlike reg waarvan hy bewus is, kan ek moeilik insien hoe die skuldeiser eerbaar kan handel indien hy beslag lê op die eiendom wat hy weet reeds verkoop is aan `n derde persoon. Sal dit enige verskil maak indien die skuldeiser se beslagleggingsbevel gebaseer is op `n vonnisskuld wat spruit uit `n koopkontrak met die skuldenaar wat aangegaan is nadat die skuldenaar die saak reeds verkoop het aan `n derde?'

[22] In *Kazazis v Georghiades* 1979 (3) SA 886 (T) at 893 Spoelstra AJ with reference to the passage from *De Jager v Sisana* and certain common-law authorities, stated that the inference of fraud is drawn from the mere

[8]Repeated in 6ed p 275.

fact of knowledge on the part of the second purchaser of the prior purchaser's right. No purpose or motive that the subsequent purchaser intended to frustrate the first purchaser's right need be proved. In *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) 893 (A) at 910E-G Van Heerden JA agreed and stated: 'Bedrog word dus uit blote kennis regtens gekonstrueer.' Nestadt J, in so far as he held that a type of fraudulent conspiracy is a requirement for the operation of the doctrine of notice, was therefore authoritatively held to have been wrong.

[23] In *Hassam v Shaboodien* 1996 (2) SA 720 (C) at 728D-F Friedman JP, referring to the abovementioned authorities, disagreed with the conclusion reached by Nestadt J. In line with the criticism of the academic writers and the judgment in *Hodgson v Emery* he added that there did not appear to be any justification for the limitation on the doctrine of notice suggested by *Reynders* and for excluding a sale in execution from its operation. In dealing with the argument that when a judgment creditor causes a judgment debtor's property to be attached and sold in execution, he is doing something that the law allows him to do, Friedman JP said:

> 'It is correct that the law allows a judgment creditor to attach the judgment debtor's property and to have it sold in execution. *Non constat*, however, that the judgment creditor is entitled to do so if his action in so doing amounts to what the law regards as a species of fraud.'

[24] However, it does not follow that because an inference of fraud on the part of a second purchaser is drawn from the mere fact of knowledge of a prior sale that an inference of fraud likewise has to be drawn from such knowledge on the part of an execution creditor who attaches property which his debtor has sold in execution of a judgment. In terms of the common law such an execution creditor could, with some exceptions,

attach the assets of which his debtor was the owner in order to obtain satisfaction of his debt.[9] Effect is given to that right in s 36 of the Supreme Court Act 59 of 1959 read with rule 45 of the Uniform Rules. Rule 45 provides that a party in whose favour any judgment of the court has been pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof, provided, subject to certain exceptions, that no such process may be issued against the immovable property of any person until execution has been levied in respect of his movable property and the Registrar is satisfied that the debtor does not have sufficient movable property to satisfy the writ. Section 45 of the Act provides that the sheriff should execute all writs of the court directed to him. There are certain statutory exceptions to this general right of an execution creditor to execute against the assets of his debtor.[10] One such statutory exception is contained in s 39 of the Act. It provides that the sheriff may not seize in execution the items listed in the section such as bedding and wearing apparel, tools to a certain value, food or drink to a specified extent, professional books to a certain value and certain arms and ammunition. Not surprisingly no mention is made of property subject to a personal right of which the judgment creditor is aware.

[25] The third respondent sold the property to the appellant but has not transferred it. He is still the owner of the property and it is still an asset in his estate to which creditors are entitled to look for the satisfaction of their claims. Should he be sequestrated the property will fall into his insolvent estate and the trustee, on the instructions of the creditors, would be entitled to either enforce the agreement of sale or to cancel it and resell the property.

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[9]The *South African Tattersall's Subscription Rooms v Myers Brothers* 1905 TS 769 at 771; Van Zyl *The Judicial Practice of South Africa* Vol 1 4 ed p 266.
[10]Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed (1997) p 774-775.

[26] It follows that unlike the purchase of a property with knowledge of a prior sale, the first respondent did what, according to the Uniform Rules, he was entitled to do. There can be no question of regarding his actions as a species of fraud. To extend the doctrine of notice to situations such as the present would open the door to unscrupulous debtors to fabricate personal rights which would be difficult for a creditor to expose for what they are. It will discourage prospective purchasers from taking part in sales in execution where a claim to a prior personal right is made by a third party. Very few such prospective purchasers would be prepared to investigate the validity of such a claim by a third party and even less will be prepared to involve themselves in litigation against such a third party. In the result, to extend the doctrine of notice to situations such as the present will create, to the detriment of the creditor as well as the debtor, uncertainty as to the title obtained at a sale in execution and so reduce the effectiveness of such a sale, the purpose of which is to obtain satisfaction of a judgment debt.

[27] For these reasons I am of the view that the doctrine of notice should not be applied to the present situation and thus that knowledge on the part of the first respondent of the sale of the property to the appellant did not affect the validity of the subsequent attachment and sale in execution thereof. The court a quo, therefore, correctly dismissed the appellant’s application.

[28] The application for leave to appeal is dismissed with costs.

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P E STREICHER
JUDGE OF APPEAL

CONCUR:

MTHIYANE JA)

MLAMBO JA)

MALAN AJA)

FARLAM JA

[29] I have had the advantage of reading the judgment prepared by Streicher JA in this matter. As I am of the view that the application for leave to appeal should be allowed and the appeal in so far as it is related to the first respondent upheld it is necessary for me to state my reasons for coming to this conclusion.

[30] I do not think that the court below was correct in holding that the agreement of sale in terms of which the appellant purchased the property from the third respondent was not a *bona fide* agreement because it was entered into in order to ensure that the family would not lose the use of the property. Nor do I think that it can be said that the appellant acquiesced in the execution sale because it did not apply to court to stop it before it took place. It had communicated its attitude to the first respondent's representatives before the execution sale took place and there was no basis for finding that its attitude had changed thereafter. As far as the price at

which the appellant brought the property is concerned, there is no basis for holding that it was not an appropriate price when the contract upon which the appellant relies was concluded.

[31] In view of the fact, however, that the execution sale took place pursuant to two writs of execution, the second of which was issued by the registrar pursuant to a judgment obtained by Standard Bank Financial Nominees (Pty) Ltd (which unlike the other judgment creditor, the first respondent, was not aware of the sale to the appellant when it caused the property to be attached), I do not think that any legal basis exists for setting aside the sale in execution or for ordering the third respondent to transfer the property to the appellant against payment of the purchase price set forth in the agreement of sale between them and the costs of transfer. As I see the matter the execution sale was valid because of the fact that it took place pursuant to the writ issued to the Standard Bank Financial Nominees (Pty) Ltd and the second respondent is accordingly entitled to have the property transferred to her, against payment of the price realized at the execution sale and the transfer costs. This means that the only question to be considered is whether the appellant was entitled to an order setting aside the attachment of the property at the instance of the first respondent.

[32] As appears from my colleague's judgment the question presently under consideration was answered in the negative by Nestadt J in *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) and in the affirmative by Friedman JP (with whom Traverso J concurred) in *Hassam v Shaboodien* 1996 (2) SA 720 (C).

[33] The reasoning in the *Reynders* case, appears from the following passage of the judgment (at 637 F-H):

'I do not think that the argument of counsel for the applicant founded on the double sales analogy is a good one. I think, with respect to the eminent author, that the statement of *Wille* [*Principles of South African Law,* 6 ed, at 169], to which I have referred, is too widely worded and should not be applied without qualification. In my view the situation of someone purchasing or taking delivery of an article which he knows has been sold to a third party cannot be equated with that of a judgment creditor. In the case of a second sale, the seller and the *mala fide* second purchaser having knowledge, whether at the time he purchases or when he takes delivery, voluntarily enter into a type of fraudulent conspiracy, the necessary and inevitable result whereof is to deprive the first purchaser of his contractual claim to the property. In the case of an attachment, whilst the consequences to the first purchaser might be the same, there is no question of the debtor and judgment creditor in any way acting fraudulently or dishonestly.'

[34] It was pointed out in the *Hassam* case (at 726 J – 727 C) that it is not necessary, in a double sale case, to prove 'a type of fraudulent conspiracy'. All that has to be proved is knowledge of the prior sale. As was said by Van Heerden JA in the majority judgment in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) at 910 G-H:

'Dit blyk dus dat om van bedrog of *mala fides* binne die raamwerk van die kennisleer te praat – altans vir sover dit 'n verkoop in stryd met 'n voorkoopsreg aangaan – oorbodig is en moontlik verwarring kan skep. Die juiste siening na my mening is dat vanweë die kennisleer aan 'n persoonlike reg beperkte saaklike werking verleen word.'

[35] It follows, in my view, that the main consideration on which the *Reynders* judgment was based has been shown to be erroneous.

[36] The judgment in the *Reynders* case was trenchantly criticised by Van der Merwe and Olivier. *Die Onregmatige Daad in die Suid-Afrikaanse Reg,*

6 ed, at 274-276. After the passage quoted by my colleague at para [20] of his judgment, the learned authors said (at 275-6):

'Aangesien op die gebied van die privaatreg beweeg word, kan die *ratio* vir die kennisleer in ieder geval nooit bestraffing van bedrieglike of oneerlike optrede wees nie, *maar wel die beskerming van vroeër gevestigde vorderingsregte teen skuldige inbreukmaking daarop.* Soos die regter self toegee, is die benadeling van die draer van die eersgevestigde vorderingsreg steeds dieselfde hetsy lewering ingevolge 'n tweede verkoping hetsy beslaglegging ter afdwinging van 'n latere vorderingsreg plaasvind. Daarom gaan ook die volgende stelling van die regter nie op nie:

"I would pause here to stress that different considerations might well apply in a case where the judgment creditor and judgment debtor fraudulently conspire to defeat the prior personal right of a third party to claim property of the debtor by, for example, the fabrication of an indebtedness."

Of A en C nou "fraudulently conspire" om B se reg te verkort dan wel of C in opsetlike miskenning van B se reg sy eie regsposisie probeer verstewig, gaan dit telkens om *'n skuldige inbreukmaking op B se vorderingsreg en is aanwending van die beginsels van die kennisleer gepas.* Dus kan die benadering van ons howe in 'n geval soos die onderhawige nie onderskryf word nie. Dit verteenwoordig 'n onhoudbare beperking op die aanwendingsterrein van die kennisleer en is 'n negering van grondbeginsels.' (The italics are mine.)

This criticism of the reasoning in the *Reynders* case was expressly approved by Friedman JP in the *Hassam* case at 728 D – E.

[37] In my view it is important to stress that it is not suggested that the third respondent is insolvent and that if the execution effected at the instance of the first respondent is set aside it will not be able to recover what it is owed by the third respondent. If he were to be sequestrated then, clearly, the appellant would not be able to claim transfer of the property: see, eg, *Harris v Buissine's Trustee* (1840) 2 Menz 105. It follows that the main consequence of dismissing the appellant's appeal in so far as it relates to the first respondent would be to hold that the appellant's as yet

unregistered *ius in personam ad rem acquirendam*[11] would be able to be defeated by a party who had prior knowledge of it, with the result that it would lose the 'beperkte saaklike werking' against those with knowledge of the right (*cf* the *Amalgamated South African Bakeries* case at 910 H). I do not think that such a decision would be legally sound. I do not agree that such a conclusion is a necessary inference from Rule 45 of the Uniform Rules: in any event the common law on the point cannot be overridden by a rule of court.

[38] Furthermore I do not think it is correct to regard this as a case where the court is called upon to *extend* the doctrine of notice to cases of execution where the execution creditor had knowledge of the right. In my view it is more accurate to say that what the first respondent is asking the court to do is to create an exception and to *exclude* its operation in such cases. I am not sure that this court has the power to uphold such an exclusion but even if it has I do not think that the case in favour thereof has been made out. The mere fact that some persons may fraudulently claim rights which would enjoy 'beperkte saaklike werking' where the judgment creditor had been told about them in advance cannot justify depriving someone of such rights where there is no fraud and he or she genuinely possesses such rights.

[39] For these reasons I am of the view that the following order should be made:

1. The applicant is granted leave to appeal against the order of the court *a quo* in so far as it relates to the first respondent.
2. The appeal in so far as it relates to the first respondent is allowed.

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[11]For a recent historic and comparative discussion of the *ius ad rem* doctrine see R Michaels, *Sachzuordnung durch Kaufvertrag*, Berlin, 2002.

3. The first respondent is ordered to pay one half of the applicant's costs on the application for leave to appeal.
4. The applicant is ordered to pay the costs on the application for leave to appeal of the second respondent.
5. The order of the court *a quo* is altered to read:

   '1. The attachment of the property described in paragraph 7.1 of the applicant's founding affidavit at the instance of the first respondent is set aside.

   2. The first respondent is ordered to pay one half of the applicant's costs.

   3. The relief sought by the applicant in prayers 2 and 3 of its notice of motion is refused,

   4. The applicant is ordered to pay the costs of the second respondent.'

IG FARLAM

JUDGE OF APPEAL