THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 497/12**

Reportable

In the matter between:

Elizora Olivier Todd	**Appellant**
and	
First Rand Bank Ltd	**First Respondent**
The Sheriff of the High Court, Malmesbury	**Second Respondent**
Frederick Jacobus van Zyl	**Third Respondent**
Timothy Oliver Price	**Fourth Respondent**
Daniel Pierre Fourie	**Fifth Respondent**
Ms Joan Booysen	**Sixth Respondent**
Standard Bank of South Africa Ltd	**Seventh Respondent**

Neutral citation: ***Todd v First Rand Bank*** **(497/11) [2013] ZASCA 61(14 May 2013)**

Coram: Lewis and Ponnan JJA and Willis AJA

Heard: **14 May 2013**

Delivered: **24 May 2013**

Summary: Where non-compliance with a requirement of Rule 46 of the Uniform Rules of Court is not material, does not defeat the purpose of the requirement and does not prejudice the judgment debtor a sale in execution is not invalid solely by reason of the non-compliance.

ORDER

On appeal from Western Cape High Court, Cape Town (Binns-Ward J sitting as court of first instance)

The appeal is dismissed with costs.

JUDGMENT

LEWIS JA (PONNAN and WILLIS JJA concurring)

[1] This appeal concerns the validity of a sale of a house in execution of a judgment debt. The only issue to be determined is whether the failure to comply with one of the requirements for such sales vitiated the sale which should accordingly be set aside. Sales of immovable property in execution of judgments are governed by rule 46 of the Uniform Rules of Court. Non-compliance in this matter, which was admitted, was in respect of rule 46(7)(*e*) which requires that: 'Not less than 10 days prior to the date of the sale, the sheriff conducting the sale shall affix one copy of the notice on the notice-board of the magistrate's court of the district in which the property is situate, . . . and one copy at or as near as may be to the place where the said sale is actually to take place.' A copy was not affixed at or near the property to be sold in execution. All other requirements of the rule were met.

[2] The appellant, Ms Elizora Todd, formerly a co-owner of the property, brought an application in the Western Cape High Court for an order that the sale be set aside. Binns-Ward J held that the failure by the Deputy Sheriff to affix the notice at or as near as may be to the property did not go to the root of the matter and did not invalidate the sale by auction that took place. The appeal against the decision lies with the leave of this court.

[3] On appeal Todd argues that the high court erred in finding that the common law does not require strict compliance, but that if this is not so, the common law ought to be developed to require strict compliance with rule 46 in order to promote the spirit, purport and objects of sections 25(1) and 34 of the Constitution. This argument was raised for the first time on appeal. I shall deal with the questions whether the common law requires strict compliance with the requirements of rule 46 and (briefly) whether the common law should be developed along the lines suggested by Todd after relating the facts giving rise to the application in the high court.

[4] Todd was a co-owner, together with her estranged husband, of Erf 2755, Malmesbury, a residential property. They had bought it from Todd's father, Mr Gert Olivier, borrowing funds from the respondent, First Rand Bank Ltd, for this purpose. The bank registered a mortgage bond over the property as security for the debt owed to it. Todd and her husband failed to pay the bank what they owed under the mortgage bond. At the time when it took judgment against them they owed close to R400 000, having failed to pay more than 30 monthly instalments. The property was declared executable on 22 January 2007, and judgment was given in the sum of R1 296 782 plus interest and costs.

[5] For about four years the bank did not sell the property in execution, agreeing on several occasions to accept payment offers by Olivier, a retired attorney, who occupied the house. Indeed it is Olivier who deposed to the founding and replying affidavits in the application. At least six sales in execution were arranged between July 2009 and January 2010. All were cancelled by the bank as a result of settlement negotiations between it and Olivier. Olivier did not make the payments agreed. He did, however, agree that the property could be advertised for sale on the bank's 'Quicksell' programme which facilitated the sale of properties declared executable. No sale resulted from offering the property for sale in this way even though the

house was marketed by the bank for six months. The bank eventually decided to sell the property at a public auction and took the steps necessary to do so.

[6] The Deputy Sheriff for Malmesbury followed all procedures bar one. He did not affix the sale notice at or near the property. He did, however, on 6 October 2010, take the notice advertising the sale scheduled for 16 August to the house, intending to affix it there. He was met by Olivier to whom he explained that he needed to affix it to the property. Olivier took the notice from him. Thinking that personal service was better than affixing the notice to the property (and thus not comprehending that the notice was to the public and not to the occupier or owner who already had notice), he did not do anything further. Olivier at some stage advised his attorney that the notice had not been affixed.

[7] On 11 October, some five days after receiving the notice, Olivier's attorney called the Deputy Sheriff and told him that the notice had not been affixed. On the same day the Deputy Sheriff put up another notice on a board outside the house indicating that a sale in execution would be held on 16 August. That notice was, of course, out of time, and in any event did not contain the particulars required about the property to be sold. In any event it was removed shortly after being erected and the culprit was not identified.

[8] The sale by auction took place on 16 August 2010. There were few people present. The third respondent, Mr Frederick van Zyl, and his wife bought the property for R860 000. The municipal valuation at the time was R1 723 000. The parties do not agree that that is the market value of the property but it is clear that it was worth substantially more than the price agreed and paid.

[9] At the hearing of the application by Todd to set the sale aside, on 20 September 2010, the high court granted an order by agreement between Todd and the bank that the bank would instruct the Deputy Sheriff not to proceed with the

transfer of the property to Van Zyl. Despite this, and apparently because of some confusion in the office of the conveyancing attorneys, transfer was effected to Van Zyl and his wife on 1 October 2010. It is not disputed that the Van Zyls had knowledge of the allegation that the sale was invalid before transfer to them was effected.

[10] The Deputy Sheriff launched an application in the Western Cape High Court to have the transfer set aside. Van Zyl and his wife opposed that application, but took the view that the question of the sale's validity ought first to be determined since if it were decided that the sale in execution were valid the application for retransfer of the property would fall away. He accordingly sought to join the bank in opposing Todd's application, on the same ground as did the bank, and this was permitted.

The common law on compliance with rule 46

[11] Our courts have adopted a strict approach to compliance with the prescribed formalities for a sale in execution, following passages in the Roman Dutch authorities. These are extensively set out in the recent decision of this court in *Menqa & another v Markom & others*[1] and I do not propose to repeat what is said there. In particular this court referred to Matthaeus II's *De Auctionibus*[2] where the writer concluded that (in the words of Cloete JA)[3] 'although all the requisite formalities must be strictly and precisely complied with, the proceedings are not vitiated by non-compliance with an insignificant formality which does not go to the root of the matter.'

Cloete JA continued:

'Examples given of the latter type of formalities include where the official did not properly record a description of movable goods attached or for how much each article was sold, where the advertisements were put up on three and not four market days and where the King's standard was not displayed at the immovable property to be sold. In these and similar

[1] *Menqa & another v Markom & others* 2008 (2) SA 120 paras 31-42.
[2] *De Auctionibus Libri Duo*: see the full citation in *Menqa* para 31 fn 32. See also *Joosub v JI Case SA (Pty) Ltd* 1992 (2) SA 665 (N) at 670A-672F and the authorities cited there.
[3] Para 31.

cases, says Mattheus, the sale remains for value because the authorities do not have regard to trivialities and it would be contrary to good faith to split hairs over every small legal subtlety.'

[12] As this court pointed out in *Menqa*, because legislation (and I would add the rules of court) regulate the requirements that must be met for a valid sale in execution, resort to the Roman Dutch authorities is not always helpful. What is helpful, however, is the basic principle that non-fulfilment of a requirement will not vitiate a sale in execution if it does not 'go to the root of the matter'. That raises the question whether the non-compliance with rule 46(7)(*e*) did go to the root of the matter – that is, in my view, whether it defeated the object or purpose of the subrule and caused prejudice to Todd. The enquiry entails a consideration of the reason for the formality, the extent of the non-compliance and the prejudice or potential prejudice to interested parties, especially the judgment debtor.[4]

[13] The high court in this matter concluded that the 'affixment provision' in the subrule might 'fairly be regarded as what has been termed "a slight formality". There is nothing in the evidence to suggest that non-compliance with the requirement could be said to have gone "to the root of the matter".' Todd argued that rule 46(7)(*e*) embodies important formalities: the notice to be affixed at or near the property advertises the sale of the property and informs the public of its nature. The purpose is to ensure that the proper and fair value of the property is realized.

[14] That may be so. But affixing the notice at or near the property to be sold is but one of the requirements and one must examine whether, *in this case*, it was material in achieving that purpose. The sale must also be advertised in the *Government Gazette* and in a newspaper circulating in the district in which the property is situate. The advertisement, which must set out all the particulars of the property, must also be placed on a notice board in the magistrate's court in the district ten days before the sale is scheduled to take place. These requirements were met.

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[4] *Menqa* para 46.

[15] The high court held that the evidence suggested that the affixing of the notice at or near the property, in this case, would not have had any material effect. The property, in a small town in the Western Cape, had been marketed on the bank's Quicksell programme for some six months and had elicited no interest. Olivier, who occupied the property, had for a substantial period delayed the sale. The bank and Van Zyl, who was qualified as an estate agent and who had previously speculated in property in the area, maintained that there were no other interested buyers; and that placing the notice on a board outside the property would have served no purpose since it was in a quiet area where there was little pedestrian or other traffic.

[16] The bank relied also on the statement in *Botha & another v Absa Bank Ltd & another*[5] where the court held that such a notice did not have to be visible to people on the street where the property was situate. In that case the notice was affixed at an office which could not be seen from the street. The court said:

'The rule is complied with when a copy of the notice where the actual sale is to take place is displayed, without further ado. The rule places no obligation on the . . . [bank] to satisfy the idle curiosity of pedestrians on the sidewalk . . .'.

[17] Todd relied on *Messenger of the Magistrate's Court, Durban v Pillay*[6] in which this court held that the provisions of rule 40 (the predecessor to rule 46) were peremptory, and that where the advertisement did not set out the details of the property to be sold the sale should be set aside. Van den Heever JA said:[7]

'The provisions of rule 40(6) were conceived in the interests of the judgment debtor and the judgment creditor. Disobedience to its directions may cause the debtor to be despoiled without a corresponding reduction of his liabilities and satisfaction of his creditors.'

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[5] *Botha & another v Absa Bank Ltd & another* [2002] 1 All SA 579 (SE) para 11.
[6] *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A).
[7] At 684A-B.

[18] Todd argued that we do not know what the effect of not affixing the notice was. The argument ignores the probabilities and the evidence of the bank and of Van Zyl. It also ignores the fact that the property was marketed for a long period before then; that Olivier, who knew it had to be affixed at or near the property, took the notice from the Deputy Sheriff; that when Olivier did alert the Deputy Sheriff that there was no notice affixed, the latter put up another notice (albeit a deficient one) which disappeared shortly afterwards; that the property is in a quiet area and that it was unlikely that passers-by would have paid any attention to it; and that it was known in the area that Olivier would frustrate the sale. That evidence was not disputed in a reply by Olivier and must be accepted as correct. I consider that the high court thus correctly found that the non-compliance did not defeat the object of the rule.

The development of the common law

[19] Todd argued before this court that if the common law is such as to permit a sale in execution despite non-compliance with a subrule of rule 46 then the law ought to be developed to require strict compliance. The rationale for such development is that s 25(1) of the Constitution precludes the arbitrary deprivation of property. Deprivation by virtue of a sale in execution would not be arbitrary if there was strict compliance, it was argued. The other right allegedly implicated is that of access to courts, entrenched in s 34 of the Constitution. The argument is that that right includes the lawful execution of orders and judicial oversight of the process of execution, and that the judgment of the high court, in effect condoning non-compliance with one of the steps required for a sale in execution to take place, denies the right.

[20] The constitutional argument was raised for the first time on appeal. It has not been possible for the respondents to adduce evidence that would show that Todd's constitutional rights have not been infringed. In any event, it is difficult to see how constitutional rights could be infringed in this case. If anything, it is the Van Zyls' right

to possession of the property that has been infringed by Olivier. The judgment in execution was lawful. The sale was advertised and properly conducted. Todd and Olivier had ample notice of the proposed sale. Todd had been in default for over four years. Olivier had the benefit of occupation for far longer than he should have done, at the expense of the bank and, latterly of Van Zyl. Requiring the reversal of all the steps leading to the sale and the transfer of the property to the Van Zyls would be a costly exercise in futility and unfairness.

[21] I can see no reason to change the common law. The proposed requirement, that there be strict compliance with every requirement of rule 46 for a sale in execution to be valid, would limit the ability of a court to ensure that the interests of justice and fairness are served. The common law allows a court to condone non-compliance only where it does not go to the root of the matter. As I have said, that entails an enquiry whether the failure to observe a requirement defeats the purpose of the rule or subrule and that prejudice would be suffered by the debtor if absolute compliance were not required. That test gives the court the discretion to determine what effect the non-compliance has had – whether it prejudices the judgment debtor, or whether the judgment creditor (who may not be responsible for the failure to observe a formality, as was the case here) will be prejudiced by an order that the sale is invalid. A requirement of absolute strict compliance could operate harshly against both debtors and creditors and might have unjust consequences.

[22] That does not mean that creditors and court officials should not comply with the requirements of rule 46, nor that any or every failure to comply should be treated with leniency. As Binns-Ward J said in the high court:

‘This judgment should not be misread to afford a warrant to anyone to not comply punctiliously with all the requirements of the rules of court. This application was refused only because of the relative slightness of the formality involved and the lack of materiality . . . in the peculiar context.’

The high court accordingly correctly refused the application and the appeal must be dismissed.

[23] There is one final matter that requires mention. The high court characterised the Deputy Sheriff's action as administrative in nature and said that the rules for judicial review were pertinent. That is not so. A sale in execution is a procedure executed by an official of the court in terms of the Uniform Rules of Court. It is not an administrative action and is not subject to review as such. If the official fails to comply with the rules, and the non-compliance does go to the root of the matter, the sale in execution (or any other court process similarly affected) will be invalid. Review proceedings are not required to set it aside. So too, the invalid act does not stand and have legal consequences until it is set aside.

Costs

[24] Todd argued that costs should not follow the cause if the appeal did not succeed. She had in good faith attempted to argue on appeal that the high court had erred in refusing the application and if not, that the common law should be developed in accordance with the injunction in s 39(2) of the Constitution to give effect to the spirit, objects and purport of the constitution. The respondents, however, argued that the litigation was between private parties, and had not been cast as a constitutional matter until the appeal was argued.

[25] In my view there was no justification for Todd's arguments on appeal. Throughout the course of the litigation Todd has sought to evade the consequences of her own default in repaying the loan to the bank. Her father, Olivier, has remained the occupier of the house despite the repeated attempts by the bank to sell the property in execution of the debt. And the issue on appeal is not of general significance to judgment debtors or creditors. The validity of the sale in execution turns on the peculiar facts of the case and no new principle of general application has been decided. Accordingly the respondents are entitled to costs.

[26] For these reasons the appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

APPEARANCES:

For appellant:	S Wilson (with him I De Vos)
Instructed by:	Seri Law Clinic
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