REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

SIGNATURE ..... DATE 6/6/2016

CASE NO: 2009/121

In the matter between:

NEDBANK LIMITED	**APPLICANT**
and	
SHERIFF OF THE HIGH COURT, ROODEPOORT	**FIRST RESPONDENT**
AMIN NHAZLEE	**SECOND RESPONDENT**
In Re:	
NEDBANK LIMITED	**EXECUTION CREDITOR**
and	
WILLOWS BARRY LINDSAY	**FIRST EXECUTION DEBTOR**
WILLOWS KAREN	**SECOND EXECUTION DEBTOR**

JUDGMENT

REYNEKE AJ

[1] This is an application for the cancellation of a sale in execution and for an order declaring the sale null and void. The second respondent, who is the buyer of the property at the sale in execution, is opposing the application.

[2] The applicant is the original plaintiff who obtained a judgment against Mr and Mrs Willows ("the execution debtors") in 2009 in terms of which they were ordered to pay an amount of R1 010 756, 57 plus interest and costs, due in respect of their mortgage loan with the applicant, registered over the property, Erf 1125 Florida Extension Township. During May 2009 the applicant instructed the sheriff, who is the first respondent, to attach the property. In December 2011 the first respondent was instructed to arrange a sale in execution, which was done and scheduled for 20 January 2012.

[3] On 17 January 2012 the execution debtors concluded an arrangement with the applicant in terms of which the judgment amount would be settled and the sale in execution would be cancelled. Neither the first respondent nor the applicant's attorney was informed about this arrangement. The sale in execution proceeded. The first and second respondents entered into a Deed of Sale agreement whereby the second respondent bought the property for an amount of R635 000. The second respondent paid the required deposit of R63 500 and the first respondent's commission of R8 750. On learning that the sale in execution had proceeded, the execution debtors did not pay the judgment amount or amount in arrears. The property is currently empty. The applicant tenders payment of the sheriff's commission and is willing to instruct the sheriff to refund the deposit paid by the second respondent.

[4] The first issue raised as a point *in limine,* is that the applicant has no *locus standi* in this matter as the applicant is not a party to the Deeds of Sale agreement. An

issue closely aligned to this argument is: Whether the buyer has the right to contest an application for the setting aside of a sale in execution.

[5] Counsel for second respondent argued that the applicant failed to set out the necessary allegations in his founding affidavit in order to establish *locus standi.* The applicant only in its replying affidavit made the allegations that it is a party to a tripartite contract.

[6] It is trite that the applicant's case must be made out in the founding affidavit. The applicant identified itself as the judgment creditor in its founding affidavit and explained how the parties are related to each other. The applicant referred to the terms of the Deed of Sale. The reply identifies the nature of the contract. Therefore, in my view, the reply brought nothing new in this regard.

[7] The second respondent's further contention is that the applicant lacks *locus standi* because the applicant is not a party to the conditions of the Deed of Sale and that a non-party cannot claim that the conclusion of the Deed of Sale was the result of a mistake between the parties. In addition it is argued that the applicant does not have an interest in the conclusion of the conditions of sale. Counsel of behalf of the applicant argued that the applicant is a party to the Deed of Sale which constitutes a tripartite contract and that it has an interest in the conditions of sale as certain rights were created in favour of the applicant.

[8] The position of the bank as execution creditor was considered in *Sedibe and Another v United Building Society and Another 1993 (3) SA 671 (TPD.)* The Court held that the conditions of sale, penned by the bank itself, contained numerous indications that the bank will, together with the sheriff and the successful bidder at the auction, become a party to it, except if it should choose within three days from the sale to distance itself from it. There was no suggestion that the bank distanced itself. The Court held that the conditions of sale were not the conventional type of *stipulatio alteri* where benefits are created in favour of a party who was, to begin with, not a party to the contract but may acquire those benefits thereafter, upon which the other party falls out.

[9] The position of the sheriff was considered in several decisions where it was held that, in performing his functions, dispossessing property in pursuance of a sale in

execution, the sheriff does not act as the agent of anybody but as an executive of the law. When, as part of the process, the sheriff commits himself to contractual terms, he does so *suo nomine* by virtue of his statutory authority; he becomes bound to the terms of the contract in his own name. *(Paizes v Phitides* 1940 WLD 189 at 191; *Phillips v Hughes; Hughes v Maphumulo 1979 (1) SA 225 (N) at 229J-H, ABSA Bank v Morrison 2013 (5) SA 199 SG at par 11.)*

[10] The consequences of *Sedibe* in my view, generally speaking, is that unless a party, by virtue of a *stipulatio alteri*, elects not to be a party, and depending on the specific terms of the agreement which may contain clauses that can indicate the contrary, the three parties to the Deed of Sale agreement are the sheriff, the buyer and the execution creditor. In *Sedibe* it was further confirmed that that the judgment debtors are not parties to the Deed of Sale agreement.

[11] *ABSA Bank v Morrison 2013 (5) SA 199* (GSJ) has similar facts as the case *in casu*. The bank (judgment creditor) sought the same relief as in this matter, which was granted. It should be added that the matter of the *locus standi* of the execution creditor was not argued.

[12] The document incorporating the conditions of sale in this matter before me has a heading, identifying the applicant, Nedbank Limited, as the Plaintiff. It contains amongst others, the following clauses with reference to the applicant:

> "1.4 The Plaintiff or his attorney shall ... provide the Sheriff with copies of the requirements of the Municipality to obtain a Rates Clearance Certificate ....
>
> 2.2 The Plaintiff shall be entitled to cancel the sale at any stage before the auction has commenced.
>
> 4.3 The balance of the purchase price shall be paid to the Sheriff against transfer and shall be secured by a bank guarantee, to be approved by the plaintiff's attorney, which shall be furnished to the Sheriff within 21 days after the date of sale.
>
> 4.5 If the transfer of the property is not registered within 1(one) month after the date of the sale, the Purchaser shall be liable for payment of interest at

the rate of the current Nominal Annual Compounded Daily to the Plaintiff, and to any other bondholder at the rate due to them, …

5.1 … The Purchaser agrees that this undertaking relieves the Sheriff and the Plaintiff from any duty that may be imposed upon either or both of them in terms of Section 10 of the Occupational Health and Safety Act, 1993. The Purchase accordingly agrees that there is no obligation on the Sheriff or Plaintiff to furnish the said electrical installations certificate of compliance and test report.

5.2 The Purchase agrees that there is no obligation on the Sheriff or the Plaintiff to furnish an Entomologist's certificate.

6.3 The Plaintiff and the Sheriff give no warranty that the Purchase shall be able to obtain personal and/or vacant occupation of the property or that the property is unoccupied …

6.5 The Sheriff and the Plaintiff shall not be obliged to point out any boundaries, beacons or pegs in respect of the property herby sold.

7.1.1 … if that lease was concluded before the Plaintiff's mortgage bond was registered, then the property shall be sold subject to such tenancy;

7.1.2 if the lease was concluded after the Plaintiff's mortgage bond was registered, the property may be offered first subject to the lease and if the selling price does not cover the amount owing to the Plaintiff as reflected on the Warrant of Execution plus interest as per Writ, then the property may, on the election of the Plaintiff, be offered immediately thereafter free of such lease and the first sale shall be null and void and of no force or effect.

7.2 Notwithstanding any of these provisions, the Purchaser shall be solely responsible for ejecting any person … No obligation to do so shall vest in the Sheriff and/or the Plaintiff."

[13] A careful scrutiny of the above clauses shows that it created obligations and rights involving the applicant. The applicant as the creditor who will receive the final benefit obtained by means of the sale in auction has an interest in the conditions of sale and it has to protect itself, It is the execution creditor who sets the sale of

execution in motion. The execution creditor has the right to instruct the sheriff to proceed with the sale or to withdraw the property from the sale. This Deed of Sale does not contain a *stipulatio alteri* as in *Sedibe.*

[14] Consequently it is my view that the applicant has a substantial interest in the matter, as further indicated by the terms of the Deed of Sale. As such it has *locus standi* to approach the court for relief.

[15] The Court in *ABSA v Morrison* held that the potential purchaser, not vested with the real right of ownership as registration of the property had not yet taken place, does not have the right to stop the executioner from withdrawing the sale. The Court reasoned that the failure of the applicant to withdraw the sale is an actionable breach of contract entitling the debtor to specific performance. Against that, the purchaser at the auction has an enforceable right to insist on transfer.

[16] At para 27 the court held as follows:

'A fortiori it must be a principle now infusing our law generally and the way it is applied, that property which is by agreement of the execution creditor with the debtor to be withdrawn from a sale in execution upon payment of arrears before that date cannot by reason of the principle of 'the fall of the hammer' at public auctions result in the debtor losing his house because of mistake and being limited to a damages claim for breach of contract against the execution creditor.'

[17] The sale in execution by public auction does not constitute delivery of the property. The second respondent in this matter has not vested real rights of ownership at this stage. The fact that the debtors did not pay the arrears or the judgment debt is irrelevant, as it is not the applicant's case that the agreement between the bank and the debtors has been cancelled due to non-payment. I find that the second respondent, in whom no real right rests, cannot stop the cancelling of the sale in execution.

[18] The applicant's contention is that there was a mistake, in that the applicant failed to inform the sheriff about the alleged settlement between itself and the execution debtor, rendering the conditions of the Deed of Sale to be null and void. It is further contended that the mistake led to the absence of consensus between the respective

contracting parties at the sale in execution. While this is a very interesting argument I do not deem it necessary to deal with it, for reasons as stated above.

[19] As to the matter of possible prejudice to the respondent, the applicant tenders payment of the sheriff's commission and offers to instruct the latter to refund the deposit paid by the second respondent. The second respondent will suffer no prejudice that cannot be corrected by a suitable order.

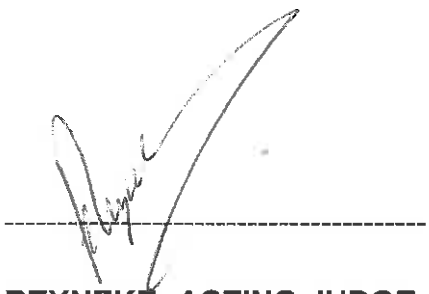
[20] The applicant is to blame for the failure to communicate the cancellation to the first respondent. Although the application was not successfully opposed, in these circumstances I think that costs should not follow the result.

[21] ORDER

1. The sale in execution held on 20 January 2012 under case number 2009/121 over Erf 1125 Florida Extension Township, Registration Division I.Q, Province of Gauteng, be cancelled;

2. The applicant to pay the amount of R8 750 to the second respondent; and

3. The applicant to pay the costs of the application, including the costs of the opposition.



REYNEKE: ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING: 20 MAY 2014

DATE OF JUDGMENT: 6 JUNE 2014