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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. 2021/53966
REPORTABLE
17/07/23

In the application between:

MOTOR CITY AUTO SPARES (PTY) LTD

First Applicant

MARDAN VAAL PROPERTIES CC
(Registration No, [...])

Second Applicant

and

THE SHERIFF VANDERBIJLPARK

First Respondent

THE STANDARD BANK OF SOUTH AFRICA
(Judgment Creditor)

Second Respondent

DIKGOSI HOLDINGS (PTY) LTD
(Registration No,[...])

Third Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Fourth Respondent

Sale in execution- validity- tacit term that electronic funds transfer, is payment in terms of conditions of sale, payment to reflect on next day. Implementation of conditions of sale, unreasonable, impractical, inconsistent - Sheriff performs juristic act, overlooked public policy of sale in execution.

JUDGMENT

MAHOMED, AJ

INTRODUCTION

1. In this matter, the applicants seek an order declaring invalid and setting aside the second sale in execution, of immovable property sold, to the third respondent, in terms of R46(10). In the alternative, the applicants pray that the sale be declared void due to fulfilment of the resolutive condition, the applicant paid the deposit and commission in terms of the conditions of sale. The property was initially sold to the first applicant for R3,9 million, however the first respondent, the Sheriff for Vanderbijlpark, ("the sheriff") cancelled that sale because the applicants failed to pay the deposit and commission on the day. The sheriff resold the property described as "Holding 39 Windsor on Vaal AH, under deed of transfer number T27071/1993", in the Gauteng Province, to the third respondent. The third respondent contends that it paid "on the day" and therefore the property was validly and lawfully sold to the third respondent.

2. The issue to be determined is whether the conditions of sale were implemented fairly and within the meaning and ethos of the Rule.
3. The evidence is that both bidders complied with the conditions of sale however the sheriff implemented the conditions of sale differently so as to prefer the third respondent over the applicants, without any valid reason. The further evidence is that the property was sold to the third respondent at reserved price for R3 million, R950 000 less than the applicants offered at the first sale as a result of the unfair implementation of the conditions of sale.

BACKGROUND

4. Previously, the applicants applied for an interim interdict on an urgent basis for an order to “prevent the transfer of the property,”. That application was struck for lack of urgency. It was submitted that the applicants have done nothing further in that application.
5. Advocate Van Wyk appeared for the applicants and submitted that the interim interdict was brought to prevent the transfer of the property, pending the outcome of this application. Counsel contended that the matter is academic since the property was transferred to the third

applicants in November 2022. The applicants seek the order in the notice of motion.¹

THE PARTIES

6. The first applicant is **MOTOR CITY AUTO SPARES (PTY) LTD**, which conducts its business in the Selby area in Johannesburg.
7. The second Applicant is **MARDAN VAAL PROPERTIES CC**, which operates its business on the same premises and who is the judgment debtor in whose name the property in execution was registered. For convenience both 1st and 2nd applicants will be referred to as “the applicant”.
8. The first respondent is the **SHERIFF FOR THE DISTRICT OF VANDERBIJLPARK**, (“the sheriff”) a statutory body, responsible, inter alia, for attachment and sales in execution of immovable property.
9. The second respondent is **STANDARD BANK OF SOUTH AFRICA**, (“the bank”) the judgment creditor.

¹ Caselines 74-2

10. The third respondent is **DIKGOSI HOLDINGS (PTY) LTD**, (“the purchaser”) a company with its registered office in Parktown North Johannesburg.
11. The fourth respondent is the **REGISTRAR OF DEEDS PRETORIA**, (“the registrar”) responsible for the registration of immovable property and is not represented in these proceedings.

THE FACTS

12. The immovable property was sold pursuant to a judgment debt and in terms of R46 and R46A of the Uniform Rules of the Superior Courts Act 10 of 2013.
13. In terms of the Rule both the sheriff and the bank, finalised the conditions of sale of the property. The sale was held on 17 September 2021 and a reserve price of R3 million was set.
14. The conditions were duly advertised and available at the sheriff's office for inspection or reference. It was contended that the conditions of sale substantially complied with form 21 of the schedule.

15. The relevant conditions² provided, inter alia,

“2.7 if the sheriff suspects that a bidder is unable to pay either the deposit or the balance of the purchase price referred to in clause 4, the sheriff may refuse to accept the bid of such bidder. All bids will be accepted provisionally until the bidder satisfies the sheriff that such bidder is able to pay the deposit and the sheriff’s commission.

2.8 on refusal a bid under circumstances referred to in clause 2.7, the property may immediately be put up for auction again.

4. PAYMENT OF THE PURCHASE PRICE

4.1 The purchaser shall pay to the sheriff a deposit of 10% of the purchase price in cash, by bank guaranteed cheque or by way of an electronic funds transfer, immediately on the fall of the hammer or in any customary manner and provide proof thereof to the satisfaction of the sheriff.

4.2 The deposit will be deposited immediately by the sheriff into a trust account held in terms of section 22 of the Sheriff’s Act of 1986.

4.3 Should the purchaser fail to pay the deposit on completion of the sale, then the sale shall be null and void and the Sheriff may immediately put the property for auction again.

THE APPLICANTS’ SUBMISSIONS

16. Mr Van Wyk submitted that on 17 September 2021, the applicants had duly registered to participate in the sale and:

² Caselines 074-86

- 16.1. At 08h51 sent the sheriff the proxy and proof of payment of the registration fee. The applicants appointed one Codie Jacobs to bid on their behalf at the sale.
- 16.2. At 10h20 the applicants bid was accepted, at the fall of the hammer at a price of R3 950 000. Thereafter the sheriff invited Jacobs to his office where the sheriff again requested the proxy form.
- 16.3. At 10h30 another proxy form was handed over to the sheriff,
- 16.4. At 10h34 the sheriff presented Jacobs with the amount of R451 000 to be paid as deposit and his commission, a reference number, and his banking details.
- 16.5. Thereafter upon the sheriff's inquiry for payment Jacobs advised him that the payment was being processed and presented the sheriff with WhatsApp texts of his request for payment.
- 16.6. At 11h00, 40 minutes after the fall of the hammer the sheriff cancelled the sale to the applicant, he contended the applicants payment was not received.
- 16.7. He advised Jacobs that he could no longer participate in the bidding in the same capacity, and he would only be allowed to bid

in his personal capacity at the second sale. The sheriff commenced to resell the property at 11h00.

16.8. The property was sold to the third respondent at the reserve price of R3 million, the only bid on the second sale.

17. At 11h22 Jacobs presented the applicant's proof of payment.³
18. Mr van Wyk submitted that the applicants complied with the conditions of sale and conceded that payment reflected in the sheriff's bank account on the next day. He submitted however that when a payment is made by electronic funds transfer, it is common knowledge and a generally accepted practise that payment, would reflect in the payees account only on the next day. Payment by electronic funds transfer was an option in the conditions of sale.
19. Counsel argued that the sheriff had no reasonable basis to cancel the sale. There were no grounds on which he could suspect that the applicant was unable to pay the deposit or the balance of the sale price in terms of the conditions of sale.
20. Counsel for the applicants submitted that a proof of payment was presented to the first respondent within 42 minutes of the fall of the

³ Caselines 74-76

hammer. He argued that that cannot be viewed as “a delay which would have led to suspicion that the applicant was unable to pay the deposit and commission.”

21. Counsel submitted that the resolute condition was fulfilled and that a valid agreement and sale, had been concluded. The sheriff was not entitled to cancel and resell the property.
22. By contrast, counsel argued, the sheriff accepted proof of payment⁴ from the third respondent “after the fall of the hammer” at 14h30, almost two and a half hours after the fall of the hammer at the second sale and for R950 000 less than was offered by the applicants.
23. Counsel submitted this must demonstrate that the sheriff “preferred” the third respondent over the applicants. He submitted that the sheriff had treated the two bidders differently. The sheriff failed to fairly implement the conditions of sale.
24. It was contended that this sale can never make any economic sense and was unfair. Mr van Wyk submitted that this absurdity cannot be countenanced in our law and at a public auction.

⁴ Caselines 79-24

25. It was further submitted that there was nothing different in the behaviour of both bidders for them to be treated differently by the sheriff.
26. Counsel referred the court to the judgment in **CHIKALA AND OTHERS v TOVANITRADING 269 CC AND OTHERS**,⁵ wherein Tuchten J, set out the ethos of sales in execution and stated that:

“the interests of the execution debtor must be considered, as the debtor is being deprived of his property against his will.”

27. Furthermore, the court stated:

“the policy of the law is that the best price that the process can achieve should be realised.”

28. It was submitted that in casu the best price was not achieved. Notwithstanding that the applicant offered R950 000 above reserve price, the property was sold at a second sale to the third respondent at reserve price of R3 million.
29. Mr Van Wyk submitted that the sheriff had no reason to believe that the applicant was unable to pay the deposit and his commission. It was submitted that in months leading up to the auction, the debtor had been trying to negotiate a private sale with the judgment creditor, when it

⁵ 2017 JOL 51231 (GP) para 41

offered more for the property, however no agreement could be reached then.

30. Advocate Hollander appeared for the second defendant and submitted that the sheriff was entitled to cancel the first sale and resell the property. He acted in terms of the conditions of sale, which conditions were never in dispute.
31. Counsel submitted that the applicants did not pay the deposit and commission on the fall of the hammer as the conditions provided. Counsel informed the court that the sheriff read out the conditions before the sale commenced.
32. It was contended that the applicants were fully aware of the conditions of sale and that they ought to have ensured that their payment was available for immediate payment to the sheriff.
33. Mr Hollander submitted that immediacy of payment is crucial and that it must mean payment within 5 or 10 minutes of the fall of the hammer.
34. Counsel submitted that the property was sold validly and lawfully to the third respondent which performed in terms of the conditions of sale when its payment was received by the sheriff on the day.

- 34.1. Counsel proffered that there was nothing unfair in the second sale, the sheriff knew the bidder.
- 34.2. He held R100 000 in his trust account on the bidder's behalf from a previous sale.
- 34.3. The third respondent's payment was made on the day and there was nothing untoward in accepting the third respondent's proof of payment. He was a known bidder.
35. Furthermore, it was submitted that the conditions of sale were substantially compliant with Form 21 of the schedule and that the applicants do not dispute the conditions of sale.
36. Mr Hollander referred the court to the **CHIKALA** judgment supra, and submitted Tuchten J interpreted correctly,⁶

“the meaning of the phrase “on completion of the sale” means on the fall of the hammer. It is at that moment that a sale by auction is concluded. ...

I see no absurdity if the phrase is given its literal meaning. A public auction makes it possible for commercial chancers, speculators who lack the financial means to make good on their bids, to bid for a property in the hope that after a successful bid they can raise finance which they do not have at the fall of the hammer. Both form 21 and the conditions include provisions which are meant to reduce or eliminate the risks to the sheriff,

⁶ Caselines 94-7 para 45

and therefor those who are financially interested in the outcome of the sale , that bidder might not be good for the purchase price at the fall of the hammer. There could be no commercial absurdity at the level of interpretation if the phrase were to require the purchaser to immediately on the fall of the hammer make payment of the deposit to the sheriff. ... But even if that interpretation is wrong, I do not think that the condition can contemplate a delay in paying the deposit any longer than the actual business day of the sale.⁷

37. Counsel proffered that the conditions of sale in casu are exactly those in form 21 and provided for payment by cash, bank guaranteed cheque or an electronic transfer payment. All that the applicants had to do was to click a button on internet banking and comply with the conditions of sale. When no payment was received the Sheriff in terms of the conditions was entitled to cancel and immediately resell the property.
38. Mr Hollander referred to the Chikala judgment, wherein Tuchten J ⁸ referred to the judgment of the majority in **SHOPRITE CHECKERS T/A MEGASAVE v KHAN AND ANOTHER** and submitted that the test for compliance requires the applicant to prove:

“that the conditions are invalid, inappropriate, unfair, or are in conflict with another law.”

39. Counsel argued that the applicants do not say that Tuchten J is incorrect. They do not challenge any aspect of the test set out above and therefore must accept that when they were unable to pay immediately on the fall of

⁷ Chikala supra para 47

⁸ Para 49

the hammer, they failed to comply with the conditions. The applicants' payment only reflected in the sheriff's account on the next day, 18 September 2021.

40. It was further submitted that at the fall of the hammer the sheriff provided the applicants' representative with his banking details and allowed him sufficient time and opportunities to comply.

40.1. As no payment was forthcoming, the sheriff was justified in suspecting that the applicants were unable to pay the deposit and the commission.

40.2. He acted in terms of clause 4.3 of the conditions of sale, he validly cancelled the sale and lawfully resold the property to the third respondent.

41. Mr Hollander argued further that the applicant's submission on judicial oversight is not the pleaded case, it appears only in the heads of argument, it was an afterthought and stands to be rejected.

41.1. Moreover, as stated by Tuchten J, where payment is not made on completion of the sale, the sale "*fails by operation of law*,"⁹ and in that instance, the sheriff does not have to approach a

⁹ Para 48

court in terms of s46(11) of the Rule for cancellation of the sale.

The sheriff may proceed to resell the property as failure to pay renders that sale null and void.

42. Mr Hollander submitted further that the applicant must make out its case in its founding papers. The court must disregard its submissions on the third respondent's payment. Counsel submitted that there is nothing in the applicant's founding papers on the time and method of payment by the third respondent or that the resolutive condition had not been complied with.

43. Counsel argued that the applicant instituted these proceedings in the face of a preexisting dispute and therefore this court is to decide the matter on the respondent's version in terms of the rule in *Plascon Evans*.¹⁰

43.1. It was argued that not even by 11h22 when Jacobs presented the proof of payment were the funds reflected in the sheriff's account.¹¹ The applicants' payment only reflected on the next day, 18 September 2021.

44. Mr Hollander submitted that the real question to be answered is, "was the applicant able to pay the deposit and commission on the day", the sheriff

¹⁰ Caselines 77-10

¹¹ Caselines 77-30 par 126.4

concluded that it was not and proceeded to invoke the powers afforded to him in the conditions of sale.

45. Counsel submitted that in the circumstances, the sheriff was not unreasonable in cancelling the sale and reselling property.
46. Advocate C Bester appeared for the third respondent and submitted that the third respondent complied with the conditions of sale and paid on the date of the sale.
47. It was submitted that the third respondent aligns itself with the approach adopted by the bank and confirmed the facts in its answering papers as regards its purchase of the property.
48. Counsel submitted that the sale is perfected and cannot after registration and transfer be impugned, where the sale is valid in all respects. The registration and transfer were affected in November 2022.
49. Mr Bester submitted that the sale was concluded at 10h29 and by 10h45 payment had still not reflected in the first respondent's account and therefor the first respondent was entitled to cancel the sale and resell the property.
50. Counsel submitted that the sheriff acted in terms of the conditions of sale and that, "*all bids were accepted provisionally until the bidder satisfies the*

*sheriff that such bidder can pay the deposit and commission.*¹² The refusal of a bid, entitles the sheriff to resell the property.

51. It was further submitted that the Sheriff had allowed the applicant's representative more than one and a half hours to pay the deposit.¹³ Due to its own fault it failed to make payment timeously and the sale was cancelled in terms of the conditions of sale. The applicant cannot allege it complied because it did not.
52. The applicants conducted themselves in a manner that gave rise to a doubt as to their ability to pay the deposit. Jacobs failed to bid at the second sale.
53. Counsel submitted that the judgment in **Chikala** is clear and correct, the sheriff acted lawfully and validly, and that this application stands to be dismissed with costs.
54. Mr Bester on a procedural point referred to the interim application and submitted that the applicants have simply abandoned the fourth respondent, which they cannot do and launched this application on the same case number, which is procedurally incorrect.

¹² Clause 2.7 conditions of sale

¹³ Caselines 86-6

55. In reply, Mr van Wyk submitted that the interim application is no longer relevant. He argued that the technical points raised were without substance as the respondents suffer no prejudice and they filed their answering papers, they cannot now raise a point of an irregular step in terms of the rules.
56. Counsel submitted that the applicants have placed in dispute the fairness of the conditions of sale and the reasonableness of the sheriff to cancel a sale without any basis for cancellation despite presentation of the proof of payment.
57. Mr van Wyk argued that the third respondent failed to annex its proof of payment to its papers which records that payment was made two and a half hours after the fall of the hammer after the second sale, annexure RA2.¹⁴ Both respondents who oppose this application should have disclosed proof of payment they rely on. They were familiar with annexure RA 2 and it only become available to him at a later date.
- 57.1. Counsel contended that it is in the interest of justice that the court permit the applicant to rely RA 2, which confirms the sheriff was unfair in the implementation of the conditions of sale and therefore the sheriff acted unreasonably and unlawfully.

¹⁴ Caselines 79-18 par 41.2

58. Counsel reiterated that applicant made payment within 42 minutes of receipt of the banking details from the sheriff¹⁵, this cannot be viewed as a delay in payment when in comparison that the sheriff accepted payment from the third respondent two and a half hours after the second sale was concluded and for almost R1million less than was offered by his clients.

58.1. Counsel proffered that it was absurd that an offer for R4 million was rejected and one for R3 million was accepted. Furthermore, Jacobs could not bid at the second sale, he was not registered in his personal capacity for the sale.

59. Counsel argued that the conditions were vague, and there were no times set for payment. This is borne out by the respondent's version,¹⁶ when the sheriff sought to define "*at the fall of the hammer to be between 5 and 10 minutes*" only on the morning of the sale.

60. Counsel submitted in casu, the conditions of sale failed to achieve the objectives of a public auction and in fact resulted in an outcome contrary to the purpose of R46 of the Uniform Rules of Court. It was submitted that the resolute condition was fulfilled and a valid sale was concluded with the applicants the sheriff had no grounds to cancel the first sale.

¹⁵ FA 16

¹⁶ Caselines 95-15 RA 29.2 in reply to AA par 71

JUDGMENT

61. I noted the preliminary points raised by Mr Hollander in this matter and agree that the applicants have pleaded somewhat inelegantly.

62. However, counsels for the respective defendants, did not argue substantial prejudice and filed comprehensive papers in answer to the applicants claim.

63. I am of the view that critical issues which are in the public interest, and which pertain to the exercise of administrative authority are before this court. It is in the interest of justice that the substance of the matter be dealt with. The applicants were previously before the court; however, they failed on urgency. A court has a discretion to regulate its processes and I am of the view that the merits must be considered.

64. In **PANGBOURNE PROPERTIES LTD v PULSE MOVING CC AND ANOTHER**,¹⁷ Wepener J, stated,

“the failure of the respondents to utilise the provisions of rule 30 regarding the setting aside of irregular proceedings strengthens my view that neither party was prejudiced by the late filing of affidavits. It is in the interest of justice that the affidavits be taken into account and that the

¹⁷ 2013 (3) SA 140 (GSJ) par 19

matter be finalised, and unnecessary additional costs be avoided. In so far as it is necessary and within my discretion to allow the late filing of the affidavits, I do so in order to hear the merits of the dispute between the parties unfettered by technicalities.

65. Furthermore, Wepner J, referred to the words of Schreiner J in **TRANS AFRICAN INSURANCE CO LTD v MALULEKA** ¹⁸

“Technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice, to interfere with the expeditious and, if possible inexpensive decision of cases on their real merits.”

66. Mr Hollander submitted that the court must determine if the conditions of sale failed to comply with the test set out in the judgement in **SHOPRITE CHECKERS**, *supra* and if not, the court must dismiss the application as the conditions of sale are in substantial compliance with form 21 of the Rule.

67. I understand the applicants to attack the substance of the conditions. In essence, they complain of unfairness in the implementation of the conditions of sale, which they claim has resulted in an absurd outcome that disregards the ethos of the rules and the public interest.

¹⁸ 1956 (2) SA 273 A at 278 F-G

68. In my view the implementation of the conditions of sale by the sheriff and the reasonableness and inconsistency in the sheriff's approach to the bids were disputed. The applicants question the practical outcomes of the conditions of sale.
69. In **CHIKALA AND OTHERS v TOVANI TRADING 269 CC AND OTHERS**,¹⁹ the court correctly refers to the Sheriff as performing a "*juristic act*." This contemplates fairness, justice, and certainty in the performance of his duties.
70. The court contextually and very importantly, in my view, stated:

"[40] In the context of 4.3 is that it is a provision in the scheme where judicial power is employed to redress an imbalance which arose because the execution debtor had been ordered by a court to pay a sum of money to the execution creditor but had failed to do so. In such a situation and at the instance of the creditor, the court, through its officer the sheriff, lays its hand on the property of the execution debtor and, against the will of the debtor but in accordance with a process prescribed by law, realises such property by public auction. The proceeds of the property when realised then applied to meet the duly proven claims not only of the execution creditor but also of other persons with interests in the property. Emphasis added.

"[41] For sound reasons of public policy, such sales have always been attended by considerable degree of public notice. This transparency is consistent with the values of openness and good Administration which lie at the core of the constitution. Not only must the process be open for the good of the public it must also have regard to the interests of the execution debtor which is to be deprived of its

¹⁹ 2017 JOL 51231 (GP)

property against his will and must thus be attended by a measure of deliberateness. ... the policy of the law is that the best price the process can achieve should be realised.”

71. The sheriff is an extension of the court in this context, that office must respect transparency and appreciate that it operates for the good of the public.
72. Counsel for the applicants submitted that the applicants complied with the conditions of sale when they opted to pay by way of electronic funds transfer as in clause 4.1 of the conditions.
73. It is noteworthy that on the morning of the sale, the sheriff sought to introduce a timeline for payment, between 5 and 10 minutes of the fall of the hammer/conclusion of the sale. To my mind given that the rule provides for a notice period, for the advertising a month ahead of the sale and the like, this announcement ought to have been made well ahead of the date of the sale.
 - 73.1. In casu Jacobs was a proxy, the sale was about to commence, even if he conveyed this timeline to the applicants, it would have been unreasonable to expect it to meet that timeline on such short notice. It is practically impossible to comply if a bidder chose “payment by electronic funds transfer.”

73.2. It cannot be fair for this material term to be communicated a few minutes before the sale is to commence. In my view the strict timelines for payment should have been included in the conditions of sale so that bidders may conduct themselves accordingly, particularly where a bidder chose to pay by electronic funds transfer.

74. In **GREENFIELD ENGINEERING WORKS (PTY) LTD**,²⁰ the court discussed the “business efficacy test” and the reading in of a “tacit term” into a contract. In this case the creditor demanded payment by cheque by return of post. The court held that it was a tacit term that the cheque should be crossed, that it should name the payee as “Greenfield Engineering Works (Pty) Ltd” and that the cheque was to be drawn payable to order. In this matter the payee was incorrectly named, and the cheque was made to bearer. The defendant’s defense of payment made was dismissed.

75. Hoexter J, in the Greenfields case identified that:

“although a reading in of a tacit term into a contract is capable of statement in simple language, its application in practice is often a matter of difficulty. Two general considerations should, however, be steadily borne in mind. Both are suggested by the fact that to some extent the test is an objective one. The first is that the test does not necessarily require that the contracting parties should consciously have directed their minds to the incidental contingency which might later supervene, and the

²⁰ 1978 (4) SA 901 N (headnote)

need to provide for it; the test does not require that the parties should actually have intended the tacit term. The second is that the test imports the standard of reasonable man. The contracting parties questioned by an officious bystander must be taken to be persons endowed with the degree of shrewdness, knowledge, and prudence reasonably to be expected of persons ordinarily engaged in conclusion of the relevant contract.”

76. The sheriff in conditions of sale which he contended substantially complied with form 21 indicated that he would accept payment by electronic funds transfer. The applicants chose that method of payment. There was compliance. There was nothing to suggest that proof of payment, effectively a cash transaction, would not suffice. I noted though, that it was accepted from the third respondent.
77. Where a bidder chose to pay by electronic funds transfer, it must be accepted and understood that payment, unless within the same bank, will reflect in the payees account on the next day. Sometimes up to three days later, depending on the banks security and risk policies.
78. That is the usual and accepted banking practise. Unless monies are paid from the same bank as the sheriff's and often by prior arrangement, the payment would reflect on the next day.
79. It can be argued that the payment is accepted “provisionally” but to my mind a provisional acceptance of payment, cannot pertain to the method

of payment which the bidder chose. It must be a provisional acceptance for other reasons, which the sheriff may have in mind.

80. If immediacy of payment meant “*to reflect in the sheriff’s bank account no later than on the business day*”, the sheriff is obliged to provide its banking details to the bidding public ahead of the sale or state in clear terms that payment must reflect in the sheriff’s bank account on the day. This is the transparency and openness that the court in the Chikala judgment must refer to. Nothing less can be expected of a “*court’s officer*”, in the performance of his duties.

80.1. I cannot think that it would pose much of a problem to do so. Then the bidding public can make the necessary arrangements with the banker to comply. To my mind that is the purpose of the notice and advertising times in the Rules, to assist the public with a clear and a fair opportunity to participate at a public sale.

80.2. I noted Mr Hollander’s submission that the third respondent was a known bidder and therefor the sheriff was confident of his ability to pay the deposit and commission on the day. If that is a cogent reason then it rules out all new buyers, which cannot be the purpose of a “public sale.”

81. Mr Hollander also contended that the sheriff held R100 000 in its trust account to the third respondent's credit, and that too provided some security to the sheriff to accept its payment, albeit a few hours after the fall of the hammer. However, Mr Van Wyk pointed out that the third respondents' proof of payment reflects the full amount for the deposit and commission. Counsel made a fair observation that the respondents never intended to rely on those funds to protect the sheriff from risks of unscrupulous buyers.
82. I am of the view that if the sheriff accepts payment by "electronic funds transfer" as set out in clause 4.1 of the conditions of sale, then it must be a tacit term of the contract that the sheriff, "*endowed with knowledge and prudence*" if he is in possession of proof of payment "on the day" expects that payment will reflect in his account on the next day.
83. In casu, if the applicants were notified ahead in the notice of sale or the conditions of sale, of the sheriff's banking details, it would be another matter. The applicants may have made the necessary arrangements ahead of the sale to ensure payment reflects on the day, as the sheriff's banking details are on hand.
84. Payment by electronic funds transfer and proof thereof can be accepted as payment "in cash". According to banking practise, such a payment is

not reversible without the consent of the payee. The sheriff is still protected.

85. On perusal of the proof of payment, the objective evidence, it was clear that time of payment was not the real issue for the sheriff. The applicants' proof was made available to the sheriff just under an hour, and he rejected their bid however the third respondent's proof of payment was acceptable a few hours after the fall of the hammer, at a substantially reduced price.

85.1. The acceptance of payment from the second bidder hours after the hammer fell, is inexplicable and patently unfair. Moreover, that sale made no business sense at R950 000 less than was offered.

85.2. It is also concerning to this court that by unreasonably refusing the applicant's bid and selling for R950 000 less than was offered at the first sale, the Sheriff failed to act in terms of the policy of the law *"to realise the best price that the process can achieve."* This must be unlawful. On objective evidence before this court his conduct was unfair and to the detriment of creditors, the debtor, and other bidders.

86. The conditions of sale as implemented, were inappropriate, in regard to payment by electronic funds transfer. They were impractical and vague. The applicants, who paid by electronic funds transfer, without prior notice of the sheriff's banking details and warned only on the morning of the sale that their payment was to reflect in the sheriff's account within 5 to 10 minutes of the fall of the hammer, could not practically comply. The timelines and critical information to ensure payment on the day were not available to them within reasonable time.
87. Mr Hollander reminded the court that they knew the conditions of sale, I agree, but they did not know that the conditions would be implemented in this fashion, on unreasonable timelines and inconsistently.
88. I find the second sale was not justified. The sheriff did not have any reason to suspect that the applicants did not have the funds to pay the deposit. There were no reasonable grounds to cancel the first sale and to resell the property.
89. Where the sheriff chose to accept payment by an electronic funds transfer, unless he has provided his banking details ahead of the sale, applying the business efficacy test, it is a tacit term that he will accept "proof of payment on the day" with "payment to reflect in his account on the next day."

90. The time for payment as argued in this matter, does not appear to me to have been the real issue for the sheriff.

I make the following order:

1. The order is granted.
2. The sale in execution held on 17 September 2021 in respect of immovable property described as:

**HOLDING 39 WINDSOR ON VAAL AH EXTENSION 1 TOWNSHIP
REGISTRATION DIVISION IQ PROVINCE OF GAUTENG, DEED OF
TRANSFER NO T27071/1993**, sold to the third respondent is declared invalid and is set aside.

3. The fourth respondent is hereby authorised and directed to:
 - 3.1. cancel the registration of the immovable property in the name of the third respondent.
 - 3.2. cancel all bonds registered over the property by the third respondent, if any.
4. The sale in execution of the immovable property to the first applicant on 17 September 2021 is declared valid and binding.

5. Each party is to do all that is necessary for the registration and transfer of the property to the first applicant.
6. The second and third respondents are to pay, the applicants' party and party cost of the application.

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 17 July 2023.

Date of hearing: 7 June 2023

Date of Judgment: 17 July 2023

Appearances:

For Applicant: Advocate J Van Wyk
wjvanwyk@me.com

Instructed by: Snail Attorneys
info@snailattorneys.co.za

For Second Respondent: Advocate L Hollander
lhollander@maisels3.co.za

cstock@maisels3.co.za

Instructed by Jason Michael Smith Inc
kerry@imsainc.com

For Third Respondent Advocate C Bester
chrisbester@group621.co.za

Instructed by Fluxmans Attorneys
kjlevitz@fluxmans.com

First and Fourth Respondents not represented.