REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2022/025839

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

18 October 2024

DATE SIGNATURE

In the matter between:

NEDBANK LIMITED	Applicant
And	
WILLIAM ALFRED COETZEE	First Respondent
THE SHERIFF OF MEYERTON	Second Respondent
CONRAD MAHLOKO	Third Respondent

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date for hand-down is deemed to be 18 October 2024.

JUDGMENT

Myburgh AJ

Introduction

1. This is an application for the setting aside of a sale in execution of certain immovable property which was sold by the second respondent ("the sheriff") by way of public auction on 24 August 2023 and ancillary relief. Cut to its essence, the applicant's complaint is that its representative attempted to make a bid prior to the fall of the hammer but that the Sheriff failed to recognise the bid and instead sold the property to the third respondent. The applicant accordingly contends that the sale to the third respondent was unlawful and hence that it falls to be set aside. The application was opposed on the merits only by the third respondent. The sheriff, as was to be expected, elected to abide the decision on the merits but delivered a report in the form of an affidavit.

2. Aside from its defence on the facts, the third respondent proffered a number of defences, including an argument to the effect that the application ought to have taken the form of a review. For reasons which will become apparent, I do not consider it necessary to deal with those arguments and will accordingly refrain from doing so.

Facts

3. As to the facts, the applicant's complaints as set out in its founding affidavit were more wide ranging. However, what the dispute came down to in argument before me was whether, on the available evidence, I could and should find that the applicant's representative (Mr Johnson) had timeously made or sought to make a bid which was not recognised. Alternatively, whether the property had by that time already been knocked down to the third respondent.[1]

[1] The fact that Mr Johnson had at some point raised his hand was not in issue.

4. The evidence contained in the applicant's founding affidavit[2] was to the effect that Mr Johnson had raised his hand to make a bid timeously but that the sheriff "*simply brought down the hammer and closed the bid on the property*" and also that the other attendees (said to be about 10 to 15 men) had started shouting at Mr Johnson and disrupting the proceedings immediately after he raised his hand. The applicant's evidence was furthermore that Mr Johnson had introduced himself to the sheriff prior to the commencement of the auction , that the sheriff had requested an instruction as to whether the property was to be auctioned either with or without a lease and that Mr Johnson had requested an opportunity to ascertain the position from one or more of his fellow employees, that he had left the room for that purpose and that he had returned either shortly before or simultaneously with the making of the opening bid (i.e. the bid which was made by the third respondent).

5. The applicant also filed an affidavit deposed to by another attendee at the sale, Mr Shovlin. The evidence contained in that affidavit was consistent with the applicant's version regarding the proceedings generally and the somewhat disruptive conduct of other attendees. On the issue of Mr Johnson's attempt to place a bid Mr Shovlin testified that *"There was a lot of noise from the attendees after the bid was called, but I heard Mr Johnson saying something – given the noise, I could not hear what he said.*" He also stated that the third respondent had, "*hastily jumped in front of the sheriff ...proclaiming that the house was sold and belonged to him".* Further, that the sheriff had not confirmed whether there were additional bids and he did not hear the sheriff bring the hammer down.

6. His evidence was furthermore to the effect that representatives of the bank had sought to raise a dispute regarding the sale of the property to the third respondent and the group of attendees who had been behaving disruptively became increasingly aggressive. He also testified that the situation had become chaotic to the extent that he became fearful and decided to leave the venue. Prior to

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[2] The affidavit was deposed to by one of the applicant's officials, Ms Ramthol and supported by a confirmatory affidavit deposed to by Mr Johnson.

finally departing, he gave his details to one of the applicant's representatives as he thought that "*the property would not be sold under these conditions*".

7. The sheriff testified that he had been notified that the applicant would be represented at the sale (which he considered not to be unusual). Further, that the applicant's representatives had "*filled out the relevant register*" prior to the commencement of the auction, but they (applicant's representatives) had not introduced themselves to him prior to the commencement of the auction. He also stated that he enquired of those present (whom he says numbered about 15 in all) whether anyone was aware whether the property was subject to a lease and received no answer to that question. Furthermore, he stated that, "*I then asked the attendees whether the representative of the applicant was present and if they knew whether the property was subject to a lease*" and received no response. In this regard his version differed materially from that of the applicant.

8. On the issue of Mr Johnson's attempt to place a bid, the sheriff's evidence was that he announced the third respondent's bid and there were no competing bids. He then knocked the bid down saying, "*going once, going twice, and sold to buyer number*". Thereafter, he asked the third respondent for his number. He furthermore stated that he saw Mr Johnson (whom he described simply as "*a gentleman*") put his hand up as he uttered the word "*sold*" and told him that it was too late as the property had already been knocked down.

9. He also stated that he thereafter asked the third respondent whether he would agree to the property being re-auctioned and the third respondent was not agreeable to that. Although the sheriff agrees that some of the attendees were noisy at times, he disputes the assertion that the proceedings were, at any time, either out of control or chaotic.

10. The third respondent's evidence was consistent with that of the sheriff. On the crucial issue, his evidence was that Mr Johnson (who was unknown to him) had put up his hand after the property had been knocked down and as the sheriff was announcing that it had been sold to him.

11. Ms Acker, who appeared for the applicant argued that I could and should, on the evidence, find in favour of her client. Mr Manala, who appeared for the third respondent argued that I should and could not.

The law

12. The applicant, as the party seeking relief, bore the onus. Also, in the absence of a referral to oral evidence (which was not sought), the evidence falls to be assessed by application of the so called *Plascon Evans*[3] rule. The effect of that rule is, in essence, that the matter falls to be determined according to the respondents' version save to the extent that its version can be said to be so implausible, bearing in mind the common cause facts, that it can safely be disregarded.

Application to the facts

13. In my view I cannot, bearing in mind the incidence of the onus and the effect of the rule referred to above, find that Mr Johnson in fact raised his hand timeously. While it is so that the sheriff's evidence as to whether he in fact spoke to Mr Johnson prior to commencing the auction or in relation to the existence (or otherwise) does, to my mind, seem implausible. In my view, none of the respondents' evidence on what I have identified as the crucial issue can be said to be inherently implausible.

14. On the contrary, there is so little difference between the applicant's version and that of the respondents. Accordingly, I do not think that a finding in the applicant's favour would be justified even on the application of the *Plascon Evans* rule – i.e. the onus would not be discharged. That said, it is not necessary for me to reach a firm view on that issue given that the rule does apply and its application, in my view, precludes a finding in favour of the applicant.

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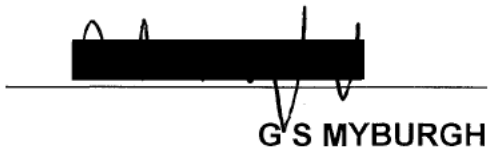
[3] *Plascon Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623

15. For these reasons I make the following order:

Order

1. The application is dismissed with costs.
2. The costs of counsel will be taxable according to scale B.



G S MYBURGH

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

For the Applicant:	Adv. L Acker instructed by Kim Warren Attorneys
For the Respondents:	Adv. ME Manala instructed by Paul Friedman & Associates
Date of Hearing:	23 July 2024
Date of Judgment:	18 October 2024