IN THE HIGH COURT OF SOUTH AFRICA
(DURBAN AND COAST LOCAL DIVISION)

Case No. 13807/2007

S RAMGOBIN	1st Applicant
A GANAPATHIE	2nd Applicant
A GANAPATHIE	3rd Applicant

versus

ABSA BANK LIMITED	1st Respondent
RH LOTTER	2nd Respondent
PJ SWART	3rd Respondent
THE SHERIFF OF THE HIGH COURT, PINETOWN	4th Respondent
THE REGISTRAR OF DEEDS, PIETERMARITZBURG	5th Respondent

RESERVED JUDGMENT

Delivered on

NTSHANGASE, J

[1] On 14 December 2007 a *rule nisi* issued which called upon the respondents to show cause why an order should not be granted in

the following terms :

1.1 that the sale and subsequent transfer of the immovable property described as –

> "Remainder of ERF 23 Queensburgh Registration Division FT, Province of KwaZulu-Natal, in extent 3233 (three thousand two hundred and thirty three) square metres, held by Deed of Transfer T 15132/06" [1]

should not be set aside;

1.2 that the second and third respondents be interdicted and restrained from hypotheticating, alienating, encumbering, mortgaging or in any other way disposing of the immovable property;

1.3 that the costs of this application be borne by the second and third respondents or any other party opposing the application on the attorney and client scale.

[2] The applicants rely on the provisions of Rule 46(7)(b) of the Uniform Rules of Court which, stated fully read –

> *"The execution creditor shall, after consultation with the Sheriff, prepare a notice of sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the Sheriff, and he shall furnish the Sheriff with as many copies of the notice as the latter may require."*

---

1 "ERF 23" appears to be a typographical error in the order. It should read : "ERF 2039"

[3] The relief sought in the notice of motion as per 1.1 above is opposed by the second and third respondents. The first, fourth and fifth respondents do not oppose the application; they abide the decision of the court. Accordingly when I refer hereafter in this judgment to respondents, the reference is to the second and third respondents.

[4] The main thrust of the respondents' argument in opposition lies upon a reliance on section 70 of the Magistrates' Courts Act 32 of 1944 which reads -

> *"A sale in execution by the Messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect."*

Both counsel argued the matter with reference to various authorities including *Messenger of the Court, Durban v Pillay,* [2] with Ms Naidoo for respondents arguing that in terms of these provisions the fact of delivery or transfer is conclusive; prior to delivery or transfer the sale may be impeached, thereafter it is unassailable and Mr Harrison on behalf of the applicant arguing that because the description of the property was inadequate and was consequently sold at reduced value the sale stands to be set aside.

2 1952 (3) SA 678 (A)

THE BACKGROUND

[5] The immovable property was owned and registered in the names of all three applicants. The first respondent had a bond over the property in respect of monies lent and advanced to the applicants and the balance owing as per certificate of balance from the first respondent was R538, 286.00.

5.1 The applicants fell into arrears with payments and legal action was instituted by the first respondent against the applicants during or about June 2007. After the first applicant failed to honour an undertaking made to resolve the matter as agreed with the first respondent, the latter took judgment against the applicants by default on 10 July 2007.

5.2 On 24 July 2007 the first applicant made an offer to the first respondent's attorney Andre Theunis Kitching ("Kitching") to pay R10 000.00 which offer was conveyed to and accepted by the first respondent. When the first respondent again failed to honour its undertaking, instruction was given to the Sheriff to attach the immovable property. The notice of attachment was served on the first applicant on 2 August 2007 as shown in annexure "A" to the affidavit of Kitching. According to Kitching his offices telephoned the first applicant on 14 August 2007 and told her that the full arrears were due as the property had then been attached.

5.3 When no offer to settle the arrears was made by the applicants, the first respondent instructed for a sale date to be appointed. The Sheriff appointed 17 October 2007 at 10h00 as the date and time of the sale.

5.4 On 6 September 2007 the first applicant telephoned the offices of Kitching to offer to pay R25 000.00 by 15 September 2007 and the balance of the arrears at the end of October 2007. The first respondent agreed to suspend further action. When no payment had been made by 25 September 2007, the offices of Kitching telephoned the first applicant to convey that the sale would proceed as no payment had been made. The Sheriff was requested to appoint a later sale date after the first applicant had communicated to advise on her efforts to obtain money to pay. The 14th November 2007 was then appointed as the later sale date. The first applicant was told that the date could be extended further if she paid the full arrears which stood at R57 000.00 then. On 13 November 2007 the first applicant telephoned to state that she could only pay R30 000.00. After Kitching had taken instructions from the first respondent it was agreed that if she paid R30 000.00 prior to 14th November 2007 the sale would be stayed. When no such payment was received, the sale proceeded on 14 November 2007. The property was transferred into the names of the second and third respondents on 30 November 2007.

THE NOTICE OF SALE IN EXECUTION

[6] The basis of the applicant's reliance on Rule 46(7)(b) in respect of the relief sought is that the description of the property as advertised for sale was inadequate by reason of its omission of certain improvements on the land including a swimming pool and –

"a second house under brick and tile which has its entrance on Clark Road" comprising –

a) 3 bedrooms with the main bedroom having en suite and all bedrooms consisting of bics;
b) fully fitted kitchen;
c) bathroom and toilet;
d) dining room;
e) lounge;
f) 2 x sundecks
g) 1 x porch.

[7] The second respondent's answer to this as well as the first applicant's reply thereto are noteworthy. First the second respondent's response :

"The allegations as contained herein are noted; however no mention is made to the fact (sic) that the property is only zoned for one dwelling and that there is illegal structures (sic) on the property which would have to be demolished if the plans are not approved. The photos that I have inspected at Sky Properties show that the pool is green and not maintained. I was also informed that the pool is not granite."

The first applicant's reply thereto is as follows :

"Once again I reiterate that there are no illegal structures on the property and it is convenience (sic) for the second respondent not to have annexed any photographs in respect of the "green pool."

[8] It is evident from the second respondent's response that he does not deny that the swimming pool and the second house were not reflected on the notice of sale; he also states that the first applicant makes no mention of the fact that the property is zoned for one dwelling and that there are illegal structures on the property. Although the applicant in reply denies that there are illegal structures on the property, she does not challenge the averment that the property is zoned for one dwelling. It is important in regard to what I shall now consider, that is, whether or not the second dwelling was an approved structure on the property.

[9] The first applicant's reply constitutes no more than a bare denial of the fact that the second dwelling is an illegal structure on the land. In his supplementary affidavit the second respondent states that he made enquiries as to whether the plans for the second house, annexure "E" to applicant's founding affidavit, was approved. He states that he was furnished with a file/record : copy of a letter addressed to "Mr J S Dukhan of Home Design Centre by the Head : Development Planning, Environment & Management", the relevant portion of which reads :

"Provide a diagram from a Land Surveyor indication (sic) the exclusion of the road reserve over the property and indicate the correct site area (the present area includes the road reserves, which should be excluded).

Should no such documents being (sic) received before 31 January 2007, this application will be considered abandoned."

This is an extract from annexure "HRL5" to the second and third respondents' answering affidavit, which is a letter dated 15 December 2006 in which the "Head : Development Planning, Environment & Management" stated a number of requirements to be complied with.

[10] Significantly the heading of the letter, annexure "HRL5" refers to a proposed second dwelling. The heading reads :

"CONSENT ; REMAINDER OF ERF 2039
QUEENSBURGH : 73 DALE ROAD :
PROPOSED SECOND DWELLING"

Annexure "HRL4", a "Record of Town Planning Application" also refers to a second dwelling where it reads :

"PROPOSAL : CONSENT SECOND DWELLING"

Whatever consent was sought in respect of the second dwelling is not reflected on annexure "HRL4". It is fair to conclude that it was an approval of a proposed second dwelling that was sought as is evident from annexure "HRL5". That application was "abandoned" on "31/1/07" according to the Record of Town

Planning application, annexure "HRL4". I find therefore that there can be no dispute of fact that the application did not relate to a structure "ancillary" to the second dwelling as contended in the affidavit of the first applicant, and that the application related to a "proposed second dwelling" which application was on 31 January 2007 abandoned apparently by reason of failure to submit the documents required in annexure "HRL5." The respondents concede the illegality in respect of the "ancillary" unit, the carport which is strangely depicted on the "approved" plans alongside what is reflected as legal structures. The effect of the reflection of the illegal structure on the "approved" plan is that the plan no longer conclusively reflects what is and what is not a legal structure. Although Mr Harrison argued that plans in terms of by-laws can be submitted in respect of "as built" structures, that does not resolve the question in the light of annexures "HRL4" and "HRL5".

[11] The respondents' contention that the second dwelling is an illegal structure appears to me to be justified. That being so, there was justification for omitting reference to the second dwelling in the notice of sale in execution. In that regard Ms Naidoo argued, properly in my view, that to advertise the second dwelling would have been misleading to the public. Indeed it is so because the continued existence of the second dwelling and its benefit to the purchaser hung upon the uncertain fate of the application for approval being granted. If not approved it would have to be demolished. It was not improper to omit the second dwelling

house from the notice of sale.

[12] The notice of sale reflected the following description –

"Remainder of ERF 2039 Queensburgh, Registration Division FT, Province of KwaZulu-Natal, in extent 3233 (three thousand two hundred and thirty three) square metres, held by Deed of Transfer No. T15132/06. The property is improved, without anything warranted by :-

a) *Dwelling under brick and tile consisting of*
b) entrance hall
c) 4 x bedrooms
d) *lounge*
e) *dining room*
f) *kitchen*
g) *scullery*
h) 2 x bathrooms laundry
i) laundry

The physical address is 73 Dale Road, Queensburgh, KwaZulu-Natal."

[13] There was no acceptable reason for omitting reference to the swimming pool in the notice of sale. Although the second respondent suggested that the pool was not maintained, no evidence was tendered to show that it had structural defects. To the extent that there was a failure to refer to it as an improvement on the property the notice of sale was defective.

[14] The respondents "verily believe that the property would have fetched a price far in excess of that paid by the second and third respondents had the property been properly described." This however is not supported by the history of applicants' attempts to sell the property. The applicants do not say why their own previous attempts to sell the property which, it is fair to assume, would have been fully described, failed to attract higher prices from people who were in the market for a property with more than one house with separate road access and entrances. The applicants seem to suggest that the forced sale in execution would have achieved what their own endeavours had failed to achieve. In her affidavit the first applicant admits the second respondent's averment that she (the first applicant) had given a mandate for multi-listing of the property with 19 estate agents. They also failed to secure a sale. According to the first applicant she herself also attempted to sell the property for R1 900 000 in the open market. Needless to say that she failed in her attempt. Then there was, according to first applicant, the incredible discovery of a willing buyer with a private offer of R1 570 000 at about 08h00, some 2 hours before the sale in execution scheduled for 10h00 on 14 November 2007 - an offer "which was beyond (her) to accept as she had given the property agent a sole mandate and was unable to void same." I say "incredible" because it appears to me to be most improbable that she would have let go a potential purchaser without directing him or her to where the sale in execution was to be held in 2 hours' time. It also appears strange that although the applicants were represented at the sale in execution by Shanmugam, no attempt was

made to alert him about the existence of the potential buyer for Shanmugam to disclose the prospects of selling the property for R1 570 000 to the judgment creditor, the first respondent.

[15] It is inescapable to conclude that even if the applicants were found to have been prejudiced by the sale of the property for no more than R801 000 at the sale in execution, the cause of such prejudice would lie elsewhere than in the failure to describe the property adequately in the notice of sale.

[16] Having found that there was justification for the exclusion of the second dwelling house from the notice of sale what remains to be considered is whether or not the omission to reflect the swimming pool on the notice of sale as an improvement falls short of providing a short description of the property within the contemplation of Rule 46(7)(b).

[17] The requirements of Rule 46(7)(b) are peremptory and "(d)isobedience to its directions may cause the debtor to be despoiled without corresponding reduction of his liabilities and satisfaction of his creditors", (see *Messenger of the Magistrate's Court, Durban supra);* [3] and in regard to the Rule's requirement of a short description it was, in *Kaleni v Transkei Development Corporation and Others,* [4] stated :

"The notice of sale and advertisement should contain a reasonable description of buildings and other improvements on the property (see Cummins v Bartlett N O) and Another ….[5] *for the obvious purpose of attracting bidders so as to obtain as high a price as possible."*

3 At 684 A
4 1997 (4) SA 789
5 1991 (4) SA 135 (E) at 141 D

[18] I have said that in this matter the notice of sale was defective to the extent of not reflecting the swimming pool as an improvement feature on the land. The present matter is distinguishable from the case of the *Messenger of the Magistrate's Court, Durban supra* in that in that case the only description of the property was no more than the following :

"Sub-division No. 6 of Lot 42 of Lot 107 of Mid-Wentworth of the Farm Wentworth No. 860, situate in the County of Durban, Province of Natal, in extent 1 rood 3.37 perches"

In the present case a substantial description of the material improvements on the land was furnished. Accordingly I am of the view that the advertisement was sufficiently compliant to attract bidders. Not any omission irrespective of materiality would, in my view, invalidate a notice of sale and a subsequent sale in execution to which it relates. What Rule 46(7)(b) does require is a description sufficiently reasonable to attract bidders. There is no requirement in the Rule for a full description. I do not find the omission to reflect the swimming pool on the notice of sale to constitute a material defect in the notice of sale. I am of the view that the notice of sale contained a short description of the property as contemplated in Rule 46(7)(b) of the Uniform Rules of Court, and contentions to the contrary must fail.

SECTION 70 OF THE MAGISTRATES' COURTS ACT

[19] In my view a similar conclusion is to be reached with reference to

section 70 of the Magistrates' Courts Act in regard to which I propose to treat the matter briefly in what follows.

[20] Mr Harrison correctly pointed to the fact that section 70 is a provision which applies specifically to the Magistrates' Courts. I am of the view that Ms Naidoo recognised this fact as well, but I think her submissions with reference thereto are made for treatment of this matter by analogy to what obtains in the Magistrates' Courts in so far as it may be necessary to censure a preparation of an inadequate notice of sale which fails to deal with the main characteristics of a property to be sold in execution in such manner as might be sufficient to attract the interest of potential buyers by omission to include, as is the contention in the present case, buildings or other improvements on the land in question. I do not think it is wrong to deal with the present matter by analogy to what obtains in a Magistrate's Court in terms of the provisions of section 70 of the Act for, I consider it to be equitable to take cognizance of the rights of innocent third parties in the process of a sale and transfer or delivery of the purchased property at a sale in execution. In that regard *Spoelstra J* in *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* [6] stated :

"Waar eksekusiestappe gedoen word en dit nog nie volvoer is nie, is daar geen twyfel dat die hof in gepaste gevalle ter wille van geregtigheid daarmee kan inmeng nie. Waar die eksekusie proses alreeds volvoer is, is die posisie egter anders, ander persone se regte kom ook op die spel. Die hof sal dan slegs daarmee inmeng as daar ń hersienbare onreëlmatigheid in die proses was wat die

6 1997 (2) SA 411 (T) at 413 I

skuldenaar benadeel het, met ander woorde waar die proses nie ooreenkomstig die toepaslike voorskrifte uitgevoer was nie."

[21] To the extent that it was, with reference to *Brummer supra* contended for by Mr Harrison that the issue of bad faith is irrelavnt with reference to section 170 of the Act, I am in respectful disagreement as such a proposition would fly in the face of the provisions of section 70 which expressly refer to "good faith".

[22] Although section 70 specifically refers to Magistrates' Courts I am of the view that the considerations which would underlie an enactment of the nature of section 70 would be to accord protection to one who, in a sale in execution, acquires property as a purchaser in good faith and without knowledge of any defect in the processing of the sale in execution. It is necessary that such protection be accorded otherwise it would undermine the authority of sales under process of the court and operate against the interests of debtors as well as creditors. I find no reason why, in the absence of legislative provisions of the nature of section 70 and also in the absence of legislative provisions prohibiting it, such considerations should not apply in cases which arise from the processing of sales in execution to enforce judgments of this court.

[23] The rules which qualify the inviolability of such sales would, to my mind, in this court serve as efficiently as they do in the Magistrate's Courts.

[24] Now applying, by analogy the provisions of section 70 of the Act to the present case, it is evident that for the sale to be impugned there must be evidence of bad faith and notice of defect on the part of the purchaser. In *Sookdeyi and Others v Sahadeo and Others* [7] *Van den Heever JA* stated :

"Had the section not contained the words "in good faith and without notice of any defects," a sale in execution by the Messenger would after delivery or transfer have been absolutely unassailable. These words, however leave the purchaser open to attack where the judgment creditor can show that his acquisition was tainted with bad faith or with knowledge of any defect…."

[25] There is, in the present case no evidence that the respondents' acquisition was tainted with bad faith. It has however been submitted that when the respondents took transfer of the property on 30 November 2007 they had knowledge of a defect and the institution of these proceedings to impugn the sale in execution. There is no evidence that the respondents had knowledge of any defect before the sale. In *Modelay v Zeeman and Others* [8] the Court upheld the following in the judgment of *Miller J :*

"*There must be bad faith or notice of any defect at the time of the purchase; that is the relevant and decisive time. If it is not shown that at that time the purchaser was in bad faith or had notice of any defect, then, whatever the rights of an aggrieved party may be*

7 1952 (4) SA 568 (A) at 572 E
8 1968 (4) SA 639 (A)

in the interregnum between the sale and the registration of transfer, after transfer he cannot impeach the sale in execution as against the purchaser for the simple reason that sec.70 says that the sale is not liable to be impeached."

[26] In all the circumstances I am satisfied that the application cannot succeed and the rule falls to be discharged.

ORDER

(i) The application is dismissed.

(ii) The second and third respondents are to pay the costs.

____

NTSHANGASE J

ORDER AMENDED ON 25 JULY 2008
BY CONSENT :

(i) The application is dismissed.

(ii) The applicants are to pay the second and third respondents costs.

____

NTSHANGASE J

Date of Judgment : 21 July 2008

Counsel for Applicants : Advocate G M Harrison

Instructed by : RHM Attorneys
Applicants' Attorneys
191 Prince Street
South Beach
DURBAN

Attorneys for 1st Respondent : GDLK Attorneys
1st Respondent's Attorneys
c/o King Couriers
Messenger King
1st Floor, Grinrod Mews
106 Victoria Embankment
DURBAN

Counsel for 2nd and 3rd
Respondents Attorneys : Advocate M Naidoo

Instructed by : Raneshan Naidoo & Assocates
2nd & 3rd Respondents
Attorneys
2 Kingsmead Way
Kingsmead Cricket Ground
DURBAN