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**IN THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA DIVISION, MIDDELBURG**

**CASE NO: 2718/2020**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE 29/01/2025

SIGNATURE

In the matter between:

**THE SHERIFF OF THE HIGH COURT FOR  
THE DISTRICT OF WITBANK**

**APPLICANT**

and

**ZONDI CHARLES MORRIS**

**RESPONDENT**

In re:

**SB GAURANTEE COMPANY (RF) LTD**

**FIRST JUDGMENT CREDITOR**

**THE STANDARD BANK OF  
SOUTH AFRICA LTD**

**SECOND JUDGMENT CREDITOR**

and

**MAHAMBA ARONY MONGEZI**

**JUDGMENT DEBTOR**

*This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be **29 JANUARY 2025** at 10:00.*

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## **JUDGMENT**

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**VELE AJ**

[1] The Sheriff of the High Court for the District of Witbank approached the court seeking an order for the setting aside of the sale of the immovable property described as Erf 2[...], W[...], E[...] 1[...], Registration Division J.S, Mpumalanga Province (the immovable property), which was bought at the public auction on 13 October 2021 by the respondent. The respondent paid the required 10% deposit and the Sheriff's commission in compliance with the conditions of sale but failed to pay the balance and other amounts essential for the transfer of the immovable property into his name within the stipulated period, or at all.

[2] The Sheriff is seeking an order in the following terms:

2.1 The cancellation of the sale agreement.

2.2 The authorisation to put the above property up for sale again.

2.3 The deposit (comprising of the 10% of the purchase price and the sheriff's commission) in the amount of R117 600.00, to be retained in the Sheriff's trust account, pending the quantification of the loss, if any, suffered by the first and second judgment creditors, granted in terms of Rule 46(11)(b) of the Uniform Rules of Court.

[3] The respondent placed the highest bid of R900 000.00, which was below the initial reserve price that was reconsidered by the court order. Despite having paid the deposit and the Sheriff's fees, he failed to comply with the further conditions.

[4] The first and second judgment creditors brought an application for an order in terms of Rule 46A, for the acceleration of the full outstanding balance, due by the judgment debtor to the second applicant in the sum of R1 654 282.82, plus interest, following the home loan agreement that he breached. Part of the order was to declare the immovable property especially executable. The said application was granted unopposed on 18 January 2021 by Bam AJ. The writ was served on the judgment debtor's wife.

[5] Subsequent to that, the judgment creditor's attorneys, instructed the Sheriff to set the date for the sale in execution. The notice of sale in execution in terms of Rule 46(7)(c) was set on 20 October 2021 and published in the Government Gazette NO. 45241 of 1 October 2021, as well as in the local newspaper, Middleburg Observer. On 1 October 2021, only two bidders participated in the auction, with the respondent putting the highest bid of R900 000.00, which was below the reserve price set at R1 000 000.00 as per the order of 18 January 2021. The respondent paid 10% deposit of R90 000.00 and a total of R27 600.00 in Sheriff's costs, into a trust account.

[6] The Sheriff then approached the court for an order in terms of Rule 46A(9)(c), (d) and (e) for the reconsideration of the reserve price. Rule 46A(9)(c), (d) and (e) reads as follows:

“(c) If the reserve price is not achieved at the sale in execution, the court must, on a reconsideration of the factors in paragraph (b) and its powers under this rule, order how execution is to proceed.

(d) Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within five days of the date of the auction, which report shall contain–

- (i) the date, time and place at which the auction sale was conducted;
- (ii) the names, identity numbers and contact detail of the persons who participated in the auction;
- (iii) the highest bid or offer made; and

(iv) any other relevant factor which may assist the court in performing its function in paragraph (c).

(e) The court may, after considering the factors in paragraph (d) and any other relevant factor, order that the property be sold to the person who made the highest offer or bid.”

[7] The first and second judgment creditors brought an application for variation of the reserve price, which was not opposed by the judgment debtor. The reserve price was varied and set at R900 000.00 as per the order by Vukeya J, on 12 August 2022. The respondent signed the conditions of sale, which provide for payment of all costs and charges necessary to effect transfer, as well as payment of all outstanding rates, taxes and any other amount due to the municipality in respect of the immovable property. Such payment became due and payable within 7 days after the judgment creditors’ attorneys’ had requested.

[8] Clause 4.4 of the conditions of sale provides for the balance of the purchase price to be paid to the Sheriff or secured by means of bank guarantee, within 21 days after the transaction. Following the variation of the reserve price, the respondent was requested to make payment of the transfer costs, interest, charges, taxes and municipal rates and taxes, which are essential to the transfer and completion of the sale in terms of clause 4.7 of the conditions of sale.

[9] Following the receipt of the request for payment, during November 2022 the respondent communicated to the judgment creditors’ attorneys, Norton Rose Fulbright South Africa (NRFSA), that the transfer was to be done to Ms LB Mdokwe, who is his fiancé, as Nedbank Limited had approved her home loan application, that was to be used as the guarantee for the balance of the purchase price and other amounts due. Upon inquiry, NRFSA was informed that the application for the home loan was terminated by Nedbank Limited. Following the termination of the mortgage bond grant, on 20 February 2023, NRFSA addressed a letter of demand to the respondent to satisfy the conditions of sale within 7 days.

[10] In reply to the letter of demand, on 2 March 2023, the respondent provided a further bond approval from SA Home-Loans, addressed to Ms LB Mdokwe that was unsigned and dated. The bond attorneys appointed by SA Home-Loans never contacted NRFSA. At the time of hearing the application, the respondent had not satisfied the conditions of sale contained in clauses 4.4, 4.6 and 4.7, as set out in Rule 46(11), as the home-loan granted to Ms Mdokwe is insufficient to satisfy the obligations as set out in the conditions of sale, especially clauses 4.4, 4.6 and 4.7.

[11] The respondent filed the notice of intention to oppose long out of time, and filed the opposing affidavit 26 days thereafter, but failed to bring the application for condonation until the date of the hearing. The application was served on the respondent on 26 October 2023, the respondent's opposing affidavit was due by no later than 9 November 2023. The respondent's notice of intention to oppose was delivered on 14 March 2024. The opposing affidavit was due on 9 April 2024, 15 days from the date of delivering the notice of intention to oppose. The respondent only delivered his answering affidavit on 8 May 2024, which was 36 days out of time. In *Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd and others*,<sup>1</sup> the court held that failure to bring a formal application for condonation means that there is no opposing affidavit for the court to consider and the application is to proceed as unopposed. The position is the same in the current case. Mr Ncongwane, the respondent's legal representative, indicated that there was nothing to add to the opposing affidavit.

[12] The general principles of contract are applicable to the conditions of sale of an immovable property sold in execution. Non-compliance with conditions of sale by the respondent (the guilty party) means he is in *mora* and entitles the Sheriff (as the innocent party) to cancel the sale, on the basis of malperformance. The common law position as set out in Christie's Law of Contract in South Africa<sup>2</sup> and the recent decision of the Gauteng Pretoria High court in *Sheriff of the High Court, Pretoria East v Blessguy Enterprise (Pty) Ltd and another*<sup>3</sup> is confirmed by Rule 46(11). Clause 4.4 of the conditions of sale places an obligation on the respondent not only to make

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<sup>1</sup> 2008 (5) SA 461 (T) para 16 and 17.

<sup>2</sup> Christie and Bradfield *Christie's Law of Contract in South Africa* 6 ed (LexisNexis, 2011) at 515.

<sup>3</sup> 2023 JDR 3930 (GP) para 24.

payment or secure it by means of a bank guarantee, but to also do so within the stipulated period of 21 days from the date of sale. A further condition as set out in clause 4.6 allows interest to be levied on the purchase price should the property not be transferred into the purchaser's name within a period of one month. What is obvious is that these two conditions were not met by the respondent within the prescribed period.

[13] A further breach of the conditions of sale is evident in the non-compliance with the sale condition as set out in clause 4.7, which provides for the payment to be made within 7 days of a demand of all costs and charges necessary to effect transfer, as well as all amounts due to the municipality.

[14] In his opposing affidavit, the respondent does not place in dispute the conditions of sale, he merely submits that he complied but failed to prove in what manner as to date. The balance of the purchase price and other payments necessary to effect the transfer remain unpaid and not disputed. It is clear that the application in his name to First National Bank Limited was rejected or unsuccessful, whilst the bank guarantees he provided, in the name of one LB Mdokwe, from Nedbank Limited was cancelled by the guarantor and the SA Home-Loans one unsigned and insufficient to cover all the amounts due. Nedbank or SA Home-Loans did not give him a guarantee that the amount was available as all he produced was the applications. In the case of Nedbank, the loan approval was revoked, whilst the copy of SA Home-Loans was never signed by the applicant, Ms Mdokwe.

[15] The conditions of sale refer to the term "bank guarantee" but do not contain its definition/meaning; its ordinary meaning will have to be applied. The bank gives its independent commitment to cover the amount due by the purchaser, in this instance the respondent's obligations and debts, which include, the balance of the purchase price, interest, municipal rates and taxes, as well as all costs incidental to the transfer. In *Casey and Another v FirstRand Bank Ltd*,<sup>4</sup> the court held that the guarantee gives rise to a contractual obligation on the part of the issuing bank to pay the beneficiary in line with the terms thereof. The respondent has failed to discharge

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<sup>4</sup> 2014 (2) SA 374 (SCA) para 12.

the onus that he has provided such a guarantee to the judgment creditors' attorneys; the applications were subject to one or other of the following, either rejected or cancelled by the bank or unsigned. In terms of the condition of sale, the guarantee is subject to approval of the judgment creditors' attorneys, there is no evidence that they have indeed approved any of the applications, as none of three qualify to be the bank guarantee as set out in the conditions of sale. Although several demands were addressed to the respondent, clause 4.7 remained unfulfilled, as to date the respondent is still in *mora*.

[16] Rule 46(13) provides that the transfer of ownership of the immovable property into purchaser's name takes effect only after the payment of purchase price. Two separate transactions are set out in Rule 46(13), namely, the sale of the property and the transfer thereof. In *Simpson v Klein NO and Others*,<sup>5</sup> it was held that ownership of immovable property sold at a sale in execution does not pass upon the conclusion of the sale, but once the transfer of the property is registered at Deeds Registry office. The position is the same in this case, as the immovable property has not been transferred.

[17] The respondent could not have sold the property to Ms Mdokwe, as he has not yet acquired the full right over the property, as the transfer has not taken effect. It is an established principle of our law that no one can transfer more power than he/she has, this is applicable to the respondent in the current case. The mere fact that he was the highest bidder and has paid the deposit does not transfer ownership, as he failed to comply with further conditions of sale to seal the deal.

[18] The onus is on the respondent to prove that he has in the circumstances complied with the conditions to expect the sale to continue.<sup>6</sup> Failing which the Sheriff is to succeed with his application for the cancellation of the sale due to non-compliance with the conditions of sale in full, as the balance of the purchase price and other payments remain outstanding, to the detriment of the first and second judgment creditor, as well as the judgment debtor since the interest continues to charge.

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<sup>5</sup> 1987 (1) SA 405 (W).

<sup>6</sup> *Pillay v Krishna* 1946 AD 946 at 958.

[19] Against the background as set out above, this Court finds that the application should succeed and makes the following order:

1. The sale of the immovable property described as Erf 2[...], W[...], E[...] 1[...], Registration Division J.S, Mpumalanga Province, held by Deed of Transfer No. T5630 (the immovable property), which took place by public auction on 13 October 2021, is cancelled.
2. The Sheriff is authorised to put the property up for sale again.
3. The deposit (comprising of the 10% of the purchase price and the Sheriff's commission) in the amount of R117 600.00, to be retained in the Sheriff's trust account, pending the quantification of the loss, if any, suffered by the first and second judgment creditors, granted in terms of Rule 46(11)(b).
4. The respondent is to pay the costs of the application on party and party scale.

**SO VELE**

ACTING JUDGE OF THE HIGH COURT  
MPUMALANGA DIVISION, MIDDELBURG

#### APPEARANCES

On behalf of the Applicant:	Advocate B. Marais
Instructed by:	Norton Rose Fulbright South Africa Inc SANDTON C/O Van De Venter & Campher Inc MIDDELBURG

On behalf of the Respondent:	Mr Ncongwane
Instructed by:	Ncongwane Incorporated MIDDELBURG

**HEARD ON: 31 OCTOBER 2024**



**DELIVERED ON:**

**29 JANUARY 2025**