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IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M 614/2023

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Magistrates: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

In the matter between:

M[...] M[...] R[...]

Applicant

AND

M[...] M[...] F[...]

1st Respondent

THE SHERIFF HIGH COURT, MAHIKENG

2nd Respondent

THE REGISTRAR OF DEEDS, VRYBURG

3rd Respondent

DATE OF HEARING

: 21 NOVEMBER 2024

DATE OF JUDGMENT

: 26 NOVEMBER 2024

FOR THE APPLICANT : **MR. KRUGER**
FOR THE RESPONDENT : **ADV. SMIT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10H00 on 26 November 2024.

ORDER

Resultantly, the following order is made:

- 1. The sale in execution held on 05 October 2023 in terms of which the Second Respondent sold the immovable property described as Erf 3[...] C[...] Street, Riviera Park North, Mahikeng, is set aside.**
- 2. The first respondent is prohibited from taking transfer of the immovable property described as Erf 3[...] C[...] Street, Riviera Park North, Mahikeng, in her name in terms of the sale in execution held on 05 October 2023.**
- 3. The third respondent, the Registrar of Deeds, Vryburg, is prohibited from effecting transfer of the immovable property described as Erf 3[...] C[...] Street, Riviera Park North, Mahikeng, into the name of the first respondent in terms of the sale in execution held on 05 October 2023.**

4. **The first respondent is ordered to pay the costs of this application on a party-and-party basis in terms of Scale B.**
5. **There will be no costs order against the third respondent, the Registrar of Deeds, Vryburg.**

JUDGMENT

HENDRICKS JP

Introduction

- [1] Mr. Makgothu Rudolph Mosothoane ('applicant') and Ms. Moela Flora Mosothoane ('first respondent') were married in community of property. The bonds of marriage were dissolved on 20 July 2022. Insofar as the joint assets are concerned, a settlement agreement was entered into which was made an order of court. In terms of the settlement agreement, the immovable property known as Erf 3[...] C[...] Street, Riviera Park North, Mahikeng ('the property') was 'to be sold to the highest bidder and the proceeds of same to be divided equally between the parties. The defendant (applicant) may buy the plaintiffs ('first respondents') portion of the house on an agreed amount'.
- [2] The applicant obtained a municipal valuation of the property, which was valued at **R1 545 000.00 (one million five hundred and forty-five thousand rands)**. The applicant sourced buyers for the property. A firm of attorneys who are also doing conveyancing, was approached to assist with the sale and transfer of the property. The applicant advised the first respondent that he had secured buyers for the property. Her reaction was that she is not interested in selling the property.

- [3] On 30 March 2023 a writ of attachment of the immovable property was served on the applicant. During July 2023 documents of the conditions of sale in execution of immovable property was found by the applicant lying in the front yard of the premises. The sale in execution (auction) was to be held on 05 October 2023. On this day, the applicant took leave of absence from work in anticipation of the auction which he thought would be held at the property, but to no avail. On the same day, he attended at the Office of the Sheriff to make enquiries. He was informed that the auction was held at the Sheriff's office and that the property was sold for **R1 000.00 (one thousand rands)**, to the highest bidder of the two that attended the auction. The property was sold to the attorney of record of the first respondent, acting in terms of a power of attorney on behalf of the first respondent, for the meagre amount of **R1 000.00 (one thousand rands)**, much to the dismay of the applicant.
- [4] The applicant consulted his current attorneys of record and launched this application praying for an order: 'that the sale of execution that took place on 05 October 2023 be set aside; that the first respondent be interdicted and prohibited from taking transfer of the property into her name; and cost in the event of opposition'. This application is opposed, mainly on the basis that the sale in execution (auction) of the property was properly and lawfully done, and that there is no basis in law upon which the relief sought can be granted. The attorney of record of the first respondent deposed to the answering affidavit, duly authorized to do so on behalf of the first respondent.
- [5] It is stated in the answering affidavit that the applicant is unhappy that the property was sold in auction, which is common cause. There was a plethora of *communique* between the two sets of firms of attorneys that represent the parties. There were attempts made to settle this matter, but to no avail. The applicant obtained another valuation certificate from an independent valuator who valued the said property at **R1 520 000 (one million five hundred and twenty thousand rands)**, which is R25 000 (twenty-five thousand rands) less than the municipal valuation. Despite the

difference, it is quite apparent that at the very least, the property's value is R1 520 000.00 (one million five hundred and twenty thousand rands).

- [6] The contention by the first respondent, through her attorney, is that the sale in execution of the property was advertised in the local newspaper, Mahikeng Mail, and it categorically states, although in the fine print, that the sale would be held at the Sheriff's office, with the address provided. Furthermore, there was nothing preventing the first respondent from proceeding with the auction. On 18 April 2023 the property was duly attached in the Deeds Office, Vryburg, and the conditions of sale was prepared. In further compliance, the following requirements were complied with: a notice of sale was drawn; the sale was advertised and published in the Government Gazette and the local newspaper; the notice of sale was served on the applicant on 11 September 2023 by affixing it to the main gate of the premises; the notice of sale was served on the municipality on 25 August 2023; the conditions of sale were served by affixing it to the main gate of the premises, which was locked and nobody was present; and the notice of sale was placed on the notice board in the foyer of the High Court, Mahikeng.
- [7] It almost goes without saying that when the deed of settlement was entered into, that the common intention was that both parties should benefit from the sale in execution of the immovable property. That explains why the applicant ('defendant') was given an option to buy [out] the first respondent's ('plaintiff's') portion. It can safely be concluded that it was never the common intention of both parties that either of them should unduly benefit, to the exclusion of the other, from the sale of the immovable property.
- [8] In a sale in execution the interest of the execution debtor must be considered as (s)he is being deprived of his/her property against his/her will. In an application to set aside a sale in execution, the applicant must prove that the conditions of the sale in execution are invalid, inappropriate, unfair or in conflict with the law. The best price that the sale in execution can achieve should be realised. The 'juristic act'

that the Sheriff was performing in selling the immovable property, should entail fairness and justice.

See: • **Motor City Auto Spare (Pty) Ltd and Others v The Sheriff, Vanderbylpark and Others** (2021/53966) [2023] ZAGPJHC 1407 (17 July 2023).

- **Shoprite Checkers t/a Megasave v Khan and Another** (ECJ 2004/007) [2004] ZAECHC 19 (8 July 2004)
- **Chakala and Others v Tovani Trading 269 CC and Others** (56834/15) [2017] ZAGPPHC 155 (15 March 2017)

[9] It is a logical inference and conclusion that can be drawn that the immovable property may be sold 'to the highest bidder' on an auction. There can be no further debate about this. This stems from the content of the settlement agreement between the parties. The validity of the settlement agreement is undisputed.

[10] There is however a history to this matter. On 26 September 2022, the first respondent through her attorney of record, enquired from the applicant whether he would purchase her half-share in the immovable property, alternatively that an option may be arranged. A follow up was made on 13 October 2022, as no response was received. The first respondent became aware that there was an offer to purchase in the amount of **R900 000.00 (nine hundred thousand rands)**, which was allegedly received by the applicant.

[10] Based on this, the first respondent made a proposal that the applicant should 'buy her out, at an amount of **R700 000.00 (seven hundred thousand rands)**. No response was forthcoming. The first respondent then informed the applicant that the property will be auctioned. The two potential buyers that the applicant said he had, never officially made offers to purchase for an amount in excess of **R1 500 000.00 (one million five hundred thousand rands)**. There were apparently also attempts made by the first respondent to place the immovable property in the market through

an estate agent, but without any success. It is not in dispute that in terms of the settlement agreement, either party (the applicant or the first respondent) may cause the immovable property to be auctioned, if the applicant could not 'buy out' the first respondent (at 50% of the market value).

[12] That the formalities of the sale in execution were complied with is not the issue. What is in issue is the fairness and equity of the process. On her own version, the first respondent made a proposal that the applicant should 'buy her out' at an amount of **R700 000.00 (seven hundred thousand rands)**. If this is the amount that she regarded as the fair value of a half-share of the immovable property, then the question that begs an answer is why would it be fair, just and equitable that she, through the assistance of her attorney of record, buy the said immovable property for only **R1 000.00 (one thousand rands)**, her attorney of record being one of only two bidders, **acting on her instructions in terms of a power of attorney**.

[13] It is undisputable that the first respondents' attorney of record knew that she wanted **R700 000.00 (seven hundred thousand rands)**, which is a far cry from the **R1 000.00 (one thousand rands)** that the attorney paid as the highest bidder for the immovable property worth more than **R1 500 000.00 (one million five hundred thousand rands)**. This is certainly not just nor fair at all! Sight should not be lost of the fact that the first respondent is also entitled to share equally in the **R1 000.00 (one thousand rands)**, which means that only **R 500.00 (five hundred rands)** will be the amount that the applicant may receive. So much to say about fairness. This is clearly not a case that is to be determined by the 'fall of the hammer' of the Sheriff as auctioneer.

[14] It may well be true that this is not a sale of immovable property by forced sale or in terms of the provisions of Rule 46 A, and that there need not be a reserve price set for the sale of the immovable property, as in foreclosures. However, it is important to note that the immovable property was not sold to an independent third party. The first respondent who set the process of sale in execution (auction) in motion, is the

same person that through a power of attorney empowered her attorney of record to bid on the auction for the sale of the immovable property and who, lo and behold, bought it for a meagre amount of only **R1 000.00 (one thousand rands)**. This, in my respectful view, is unfair towards the applicant.

[15] On behalf of the first respondent it is contended that no case is made out for the granting of an interdict against the first respondent to take transfer of the immovable property in her name and furthermore, that it is superfluous as a cancellation of the sale in execution axiomatically has the result that transfer cannot be effected. This is not correct. Furthermore, the third respondent, the Registrar of Deeds, Vryburg, is cited as a party. I am of the view that a case has been made out for the granting of a final interdict. The applicant in his founding affidavit dealt extensively with all the requirements of a final interdict. It is not stated that no relief is claimed against the third respondent. The transfer of the property should be prohibited. *Ex abundanti cautela*, this Court will interdict also the third respondent from effecting transfer of the immovable property into the name of the first respondent, resulting from the sale in execution on 05 October 2023, with no order as to costs.

Order

[16] Resultantly, the following order is made:

1. The sale in execution held on 05 October 2023 in terms of which the Second Respondent sold the immovable property described as Erf 3[...] C[...] Street, Riviera Park North, Mahikeng, is set aside.
2. The first respondent is prohibited from taking transfer of the immovable property described as Erf 3[...] C[...] Street, Riviera Park North, Mahikeng, in her name in terms of the sale in execution held on 05 October 2023.

3. The third respondent, the Registrar of Deeds, Vryburg, is prohibited from effecting transfer of the immovable property described as Erf 3[...] C[...] Street, Riviera Park North, Mahikeng, into the name of the first respondent in terms of the sale in execution held on 05 October 2023.
4. The first respondent is ordered to pay the costs of this application on a party-and-party basis in terms of Scale B.
5. There will be no costs order against the third respondent, the Registrar of Deeds, Vryburg.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG