

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd v Universal Pulse Trading and Others (2011 (5) SA 80 (WCC)) [2011] ZAWCHC 260; 20806/2010 (8 June 2011)

[2011] ZAWCHC 260

COURT

Western Cape High Court, Cape Town

BEFORE

S Olivier

CASE / FILE NUMBER

20806/2010

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20806/2010

In the matter between

ABSA BANKApplicant

and

UNIVERSAL PULSE TRADING1st Respondent

ANEEN ESTELLE MOSCA2nd Respondent

THE SHERIFF OF THE HIGH COURT,

MALMESBDRY3rd Respondent

GABRIeL JACOBS VENTER4th Respondent

IVUBU INVESTMENTS (PTY) LTD5th Respondent

For the Applicant

Adv. J.W. Jonker

Attorney Heyns and Partners

For the 1st to 3rd Respondent

No appearance

For the 4th Respondent

Adv. L. Zazeraj

Attorney Brits & Mat thee Attorneys

For the 5th Respondent

Adv. A.B. Rossouw SC

Attorney Jaco Roos Attorneys

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20806/2010

In the matter between:

ABSA BANK LIMITEDApplicant

UNIVERSAL PULSE TRADING FIGURES 45

(PROPRIETARY) LIMITEDFirst Respondent

ANLEEN ESTELLE MOSCASecond Respondent

THE SHERIFF, HIGH COURT, MALMESBURYThird Respondent

GABRIEL JACOBUS VENTERFourth Respondent

IVUBU INVESTMENTS (PROPRIETARY) LIMITEDFifth Respondent

Judgment handed down on 8 June 2011

S Olivier AJ

1. This is an application where the applicant seeks the cancellation of a sale in execution of immovable property by the third respondent, the Sheriff of the High Court, Malmesbury, to the fourth respondent, Mr Venter. The sale in execution was without reserve.
2. The applicant had instituted action and obtained default judgment on 25 February 2010 against the first and second respondents for payment of the amount of R3 176 585,57 and declaring their immovable property executable.
3. In compliance with Uniform Rule of Court 46(4)(b), 1 the sheriff was given written instructions to proceed with the sale. The sheriff, pursuant to the provisions of rule 46 of the Uniform Rules of Court, scheduled the sale in execution of the property for 10h00 on 29 July 2010.
4. Prior to the designated date for the sale in execution, the applicant and fifth respondent concluded a deed of sale in terms of which the property was sold to the fifth respondent for an amount of R1,6 million.

5. Due to a miscommunication within the offices of the applicant's, the sale in execution was not cancelled and it duly commenced at 10h00 on 29 July 2010. The applicant had, in fact, also instructed an attorney (Mr Roothman) to represent the applicant at the auction and mandated him to bid up to an amount of R1,366 million. After the commencement of the auction Mr Roothman in fact made a bid of R1 million. At that stage he was phoned by a representative of the applicant (Ms Kiewiet) and instructed to cancel the sale. Mr Roothman realized that he could not do so and suggested that Ms Kiewiet rather instruct the sheriff herself and handed the phone to the sheriff. The sheriff informed Ms Kiewiet that the bidding had already commenced and that he had received a bid and therefore the auction had to proceed. Ms Kiewiet thereafter instructed Mr Roothman to keep on bidding in terms of his mandate.

The final bid was granted in favour of the fourth respondent.

6. The applicant, before me, contended that the sheriff's failure to cancel the auction, when instructed to do so, was a "reviewable irregularity". It was contended that, by proceeding with the auction, the sheriff acted without authority, rendering the sale in execution "irregular and void".
7. I was referred to *Svfreets Bank Ltd and Others v Sheriff of the Supreme Court. Durban Central, and Another: Schoerie N. Q. v Svfreets Bank Ltd and Others*². There Combrinck J held as follows³

"Rule 46(10) in peremptory language provides as follows: 'Immovable property attached in execution shall be sold by the sheriff by public auction.'

The term 'public auction' is not defined in either the Uniform Rules of Court or the Supreme Court Act 59 of 1959. It follows, accordingly, that it must be taken that the draftsman of the rules had in mind the type of public auction well known to our common law. Rule 46(12) provides that a sale by public auction under the rules shall be without reserve upon conditions framed in accordance with rule 46(8), and, furthermore, that the property shall be sold to the highest bidder. And indeed, clause 2 of the conditions of sale of the instance provides that the property be sold to 'the highest bidder without reserve'. It appears to be trite that a sale by public auction without reserve is completed upon 'the fall of the hammer' (see *De Villiers v Parys Town Council* 1910 APD 55 at 58; *Clark v CP Perks and Son* 1965 (3) SA 397 (E) at 400E; *Nicolau v Navarone Investments (Pty) Ltd* 1971 (3) SA 883 (W) at 886"

8. As Combrink J pointed out in the *Svfreets Bank* case⁴

'When the sheriff attaches and sells the property in execution he does not act as an agent of the judgment creditor or the

judgment

debtor but does so as an executive of the law."

9. Combrink J continued⁵

"The authority of the sheriff in relation to the sale in execution of immovable properties is created and defined by rule 46 of the Uniform Rules of Court and he must remain strictly within the limits of his authority. Accordingly, when immovable property is sold by the sheriff in terms of Rule 46, he becomes a party to the contract suo nomine and he is bound to perform his obligations thereunder, which includes the giving of transfer of the property to the purchaser, which when effected is considered done as validly and as effectually 'as if he were the owner of the property' (vide rule 46(13) and see, too, Sedibe's case supra at 67D)."

10. As Combrink J had earlier pointed out, the term "public auction" is the type of public auction well known to our common law.

11. What then is the position of the sheriff, where bidding has already commenced, when he is instructed to terminate the auction? It seems to me that the answer is found in the common law - as there is no provision to be found either in the Uniform Rule of Court 46, or in the conditions of sale.⁶

12. Under the rubric "sales without reserve" Silke, De Villiers and Macintosh, *The Law of Agency in South Africa*, 3rd edition, comments as follows⁷

"As to withdrawal of goods from sale, this can be done at any time before the sale; or in a sale with a reserve well after bidding has begun; but not in a sale without reserve, once the article has been put up⁸ And vice versa, the bidder may withdraw in a sale with a reserve, but not, it seems, in a sale without reserve.,⁹

13. It is also appropriate to refer to Hackwill, *Mackeurtan Sale of Goods in South Africa*, 5th edition where the learned author opines as follows¹⁰ under the rubric "auctions without reserve"

"Where the sale is without reserve, the putting up of the article is the offer; each bid is an acceptance. The agreement of sale thus concluded is subject to a condition that if a higher bid be not made within a reasonable time, the sale shall be effective. The condition is negative and suspensive, failing if a higher bid be made, and being fulfilled if no higher bid be forthcoming. And the knocking down or fall of the hammer is merely a declaration by the seller's agent (the auctioneer) that the suspensive condition is fulfilled and that the contract is complete.

Pendente conditione no one is bound by the contract, but the bidder cannot withdraw his bid or the auctioneer the article, without consent, because as soon as a sale subject to a suspensive condition is agreed upon, neither party must, pending its fulfilment or otherwise, do anything obstructive of its potential fulfilment, under penalty of the other being entitled to regard the condition as fulfilled against him."

14. Hackwill continues to point out that in *Shandel v Jacobs and Another* 1949(1) SA 320 (N) the court accepted that when a bid is made bona fide to the auctioneer, the advertised conditions of sale create a contractual relationship between the bidder and the auctioneer (or his principal if disclosed) to sell according to those conditions, whether "without reserve" to the highest bidder or as the case may be. In *Shandel*, Carlisle J referred to *Estate Francis v Land Sales fPtv) Ltd and Others* 1940 NPD 441 at 457 where Broome J said:

"An auction is a form of competitive bargaining with the object of a contract of sale resulting carried out in accordance with certain rules. These rules are the conditions of sale. They are framed by the seller to represent that the terms upon which he is prepared to submit his property to competition. They are, so to speak, the rules of the game and they bind all the players."

15. As Carlisle J points out, the players are the seller, the auctioneer and the bidders. Carlisle J refers to *Watiow v Harrison* 1920 ER 925 where Martin, B, pointed out that:

"The name of the auctioneer only is published and where the sale is announced by them to be without reserve that, according to all the cases of law and equity, meant that the property should be sold to the highest bidder whether the sum bid be equivalent to the real value or not. His judgment goes on to say that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve."

16. The inescapable conclusion, in my view, is that it was no longer open to the sheriff to stop the auction.
17. Mr Jonker, who appeared for the applicant, sought to rely on the fact that the highest (and only) bid made when the instruction was given was that of the applicant. The only contract that was in esse at that moment was that of the applicant, albeit that it was subject to the suspensive condition that there be no higher bid. This argument (which Mr Zazeraj contended was not sustained by the facts), if correct, would be tantamount to the applicant being entitled either to withdraw its bid or, at will, to stop the bidding process. This submission would run contrary to the principles of an auction without a reserve. It would also negate the rights of the other bidders present who were willing, and in my view entitled to make a higher bid, as indeed happened.
18. In my view the sheriff was quite correct in refusing to accede to the request directed at him by the applicant.
19. As Innes CJ pointed out in *Neuaebauer & Co Ltd v Hermann* 1920 3 AD 564 at 574, in an unreserved auction the seller is bound to allow the article to go to the highest bidder. The highest bidder, in the instant matter, was the fourth respondent and it had concluded a written sale agreement pursuant to being awarded the bid.

20. The application, accordingly, falls to be dismissed on this ground. There is a further ground which was also not touched upon by counsel. It is this: All parties were in agreement that the sheriff was not acting as the agent of the applicant, as one would normally understand it in a common law auction. They were at pains to point out that the sheriff was acting, as I have pointed out above, "as an executive of the law".
21. Both Mr Jonker and Mr Rossouw suggested that the sale, in the instant matter, was only concluded with the fourth respondent after the instruction had been issued, and was therefore void (or at least "reviewable"). This submission, in my view, does not hold water in view of the position at common law, set out above. Once the bidding process had commenced in an auction without a reserve, as was the case here, it is no longer possible to withdraw therefrom.
22. As Ntshangase J pointed out in *Hiralal v Niacker and Another* 2009
(1) SA 636 (D&CLD) at paragraph [11], the sheriff does not act as an agent of the execution creditor, but does so as an executive of the law. Ntshangase stated¹¹ "Rule 46(4) provides for the execution creditor to issue written instructions to the sheriff to proceed with a sale. Once that instruction is carried out or discharged, the force of the instruction is spent. What remains for the execution creditor is

only the right to receive proceeds of the sale in execution. Nothing empowers him to withdraw such executed instruction, and the sheriff therefore did not act in breach of rule 46(4)."
23. It is no doubt for this reason that Mr Jonker categorised the conduct of the sheriff as a "reviewable irregularity".
24. It is difficult to contemplate how, absent a written instruction (as would be required by rule 46(4)(b)) cancelling the instruction to proceed with the sale in execution, it was open to the applicant to seek to stop the sale. Ntshangase J found that there can be no withdrawal once the sale has been concluded. More obscure is the nature of the "reviewable irregularity" committed by the sheriff. In my view no case for a reviewable irregularity was made out - if anything it would have been irregular had the sheriff merely acceded to the oral request to halt the auction. None of the traditional (at common law) or statutory (in terms of the Promotion of Access to Justice Act, Act 3 of 2000) grounds of review were advanced in the application. On this basis too, the application must fail.
25. In the premises the interim interdict falls to be discharged and the application to be dismissed with costs, which costs are to include costs which previously stood over or were reserved. Sven Oliver, AJ

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25. In the premises the interim interdict falls to be discharged and the application to be dismissed with costs, which costs are to include costs which previously stood over or were reserved.

Sven Oliver, AJ

1 The relevant provisions of rule 46 are as follows: "46. Execution - immovables... (4)(a) After attachment, any sale in execution shall take place in the district in which the attached property is situate and be conducted by the sheriff of such district who first attached the property:... (b) Upon receipt of written instructions from the execution creditor to proceed with such sale, the sheriff shall ascertain and record what bonds or other encumbrances are registered against the property together with the names and addresses of the person in whose favour such bonds and encumbrances are so registered and shall thereupon notify the execution creditor accordingly.... (7)(a) The sheriff conducting the sale shall appoint a day and place for the sale of such property,

such day being, except by special leave of a magistrate, not less than one month after service of the notice of attachment and shall forthwith inform all other sheriffs appointed in the district of such day and place.

- (b) The execution creditor shall, after consultation with the sheriff conducting the sale, 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 conducting the sale, and he or she shall furnish the said sheriff with as many copies of the notice as the latter may require.
- (c) The execution creditor shall publish the notice once in a newspaper circulating in the district in which the immovable property is situated and in the Government Gazette not less than five days and not more than fifteen days before the date of the sale and provide the sheriff conducting the sale, by hand or by facsimile, with one photocopy of each of the notices.... (8)(a)(i) The conditions of sale shall, not less than twenty days prior to the date of the sale, be prepared by the execution creditor corresponding substantially with Form 21 of the First Schedule, and the said conditions shall be submitted to the sheriff conducting the sale to settle them, (ii) The execution creditor shall thereafter supply the said sheriff with two copies of the conditions of sale, one of which shall lie for inspection by interested parties at his or her office and the sheriff conducting

the sale shall forthwith furnish a copy of the conditions of sale to all other sheriffs appointed in that district....

- (10) Immovable property attached in execution shall be sold by the sheriff by public auction. (11) (a) If the purchaser fails to carry out any of his or her obligations under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser, and the property may again be put up for sale....
- (12) Subject to the provisions of sub-rule (5) the sale shall be without reserve and upon the conditions stipulated under sub-rule (8), and the property shall be sold to the highest bidder
- (13) The sheriff conducting the sale shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him or her shall be as valid and effectual as if he or she were the owner of the property"

1

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(12) Subject to the provisions of sub-rule (5) the sale shall be without reserve and upon the conditions stipulated under sub-rule (8), and the property shall be sold to the highest bidder

(13) The sheriff conducting the sale shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him or her shall be as valid and effectual as if he or she were the owner of the property"

21997(1)SA 764 (D)

3at

770) - 771B

4at 773E-F, with reference to *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T) and *Weekes and Another v Amalgamated Agencies Ltd* 1920 AD 218 at 225)

5At 773I - 774B

6No one referred me to the position at common law and at the conclusion of the hearing I invited counsel for all the parties, should they so wish, to make further written representations to me.

7At page 208

86 Citing *Mackeurtan* (*Mackeurtan's Sale of Goods in South Africa*. 4,h edition, Cape Town 1972, page 80).

9Citing *Mackeurtan*, at page 80, 81-82, and also *Norman's Purchase and Sale*. 4th edition, 1972, at 413, 416

10at 242-243

11At paragraph [10]

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