

SOUTH AFRICA / JUDGMENT

Nigsa Property Investment (Pty) Ltd v Acting Sheriff for Randburg Southwest (16189/2012) [2024] ZAGPPHC 1309 (10 December 2024)

[2024] ZAGPPHC 1309**COURT**

North Gauteng High Court, Pretoria

BEFORE

Khashane La M Manamela

CASE / FILE NUMBER

16189/2012

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 16189/2012****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED.****Date:**

10 December 2024

Signature:

K. La M Manamela

In

the matter between: NIGSA
PROPERTY INVESTMENT (PTY) LTD
Applicant/purchaser
and
THE
ACTING SHERIFF FOR RANDBURG SOUTHWEST
Respondent
In

re: SHACKLETON
CREDIT MANAGEMENT (PTY) LTD
Execution Creditor
DESIREE
CHARMAINE MOODLEY
1st
Judgment Debtor
LOGANATHAN
MOODLEY
2nd
Judgment Debtor
DATE

OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 10 December 2024.

JUDGMENT

Khashane Manamela, AJ

Introduction

[1] These proceedings relate to an objection envisaged by Rule 46(14) [1] of the Uniform Rules of this Court. The applicant, as the person lodging the objection against the distribution plan ('the plan'), chose to style the objection as a formal application. The respondent in the application is the Sheriff of this Court for Randburg South West ('the sheriff'). The sheriff (occupying the position in an acting capacity at all material times) was responsible for the sale in execution in terms of Rule 46 of the Uniform Rules of an immovable property described as Erf 2[...]

Northwold Extension 4 Township, Province of Gauteng, ('the property') on 26 October 2023 to the applicant.

- [2] The applicant seeks that the Court directs the sheriff to amend the plan, primarily, to allow the applicant to receive – in its capacity as the purchaser of the property – occupational rent it paid to the sheriff for ‘occupying’ the property prior to the transfer of title to the property into the applicant’s name. It is contended that this ‘right’ is derived from the conditions of sale of the property, particularly those relating to the passing of risk, profit and loss in respect of the property to the purchaser upon taking possession or occupation of the property. The material conditions of sale are reflected in detail below.[2]
- [3] The matter was allocated to me by the office of the Deputy Judge President on 08 August 2024. On the same date, accepting - at face value that the objection has taken the form of a formal application - I caused to be issued directives to the parties as to the further exchange of papers. The last of the papers, in the form of a replying affidavit, was filed on 22 August 2024. Thereafter, I directed (after an agreement with the parties that there is no need for an physical hearing or oral submissions) that the parties or their legal representatives file written argument or heads of argument in lieu of oral submissions. This was in the Court’s quest to limit costs of the proceedings. The last of the submissions is dated 13 September 2024. I am grateful to the legal representatives for the comprehensive material filed in this regard.

Brief background

- [4] The brief background to this matter is as appearing next. Most of the issues in the background to this matter are not in dispute. Where there is a genuine dispute this would be pointed out and the relevant issue would appear under the parties’ respective cases, discussed below.
- [5] As stated above, the current application arose from a sale in execution of a judgment by the sheriff which took place on 26 October 2024. The applicant was the successful bidder at the sale in execution or auction and ultimate purchaser of the property.
- [6] The applicant paid the deposit and the sheriff’s commission on the date of the auction. These were some of the requirements in terms of the conditions of sale (‘the COS’) which served as of the agreement between the parties prior to the transfer and registration of title in favour of the applicant. A guarantee for the balance of the purchase price was supplied on 13 May 2024. The other material conditions in accordance with the COS, included, that:

6. RISK AND OCCUPATION

6.1 The purchaser shall be entitled to possession of the Property on the signing of the sale conditions, payment of the initial deposit and the Sheriff's commission and thereafter, and the balance of the purchase price being secured, as set out hereinabove.

6.2 Should the purchaser receive possession of the Property, the purchase [sc. purchaser] shall be liable for occupational rental at the rate of R10 000.00 (ten thousand rand) per month from date of occupation to date of transfer.

6.3 Upon the purchaser taking possession (occupation), the Property shall be at his sole risk, profit, risk and loss off [sc. of] the purchaser.

6.4 The Execution Creditor and the Sheriff give no warranty that the purchaser shall be able to obtain personal and/or vacant occupation of the Property or that the Property is unoccupied and any proceedings to evict the occupiers shall be undertaken by the purchaser at his own cost and expense.

- [7] Further, the COS included that the purchaser would obtain the prescribed valid electrical installation certificate of compliance and test report.
- [8] The property was registered in the name of the applicant on 27 June 2024. On 03 July 2024 the sheriff prepared a distribution plan in respect of the sale and execution of the property. The plan, among others, reflected the following: (a) purchase price of the property in the amount of R857 000; (b) 10% deposit payable by the purchaser in the amount of R85 700;
- (c) the sheriff's commission of R25 355 (without value added tax). Further, the plan reflected the balance of the purchase price received including interest as at 27 June 2024 and occupational rent paid by the applicant, as the purchaser, in the amount of R80 000. Also, the plan reflected payments made from the funds received to Standard Bank, ostensibly as the mortgage bondholder, the plaintiff or judgment creditor, as cited above, and to defendants or judgment debtors, also as cited above.
- [9] The applicant lodged an objection in terms of Rule 46(14)(d)[3] against the plan. The objection is dated 10 July 2024. The objection (in its entirety, save for formal headings and endings), states the following:

The applicant did not take occupation of the property on the date of the sale

1. In terms of the liquidation and distribution account, the applicant has paid an amount of R80 000.00 (Eighty Thousand Rand) in respect of occupational rent. This is correct, however, it was paid under protest as the transfer was being withheld by the Respondent who was demanding payment thereof. This amount is incorrectly bundled in the Proceeds of the Purchase price which are distributed to the bondholder, execution creditor and execution debtor;
2. The applicant/purchaser did not enjoy occupation of the Property from the date of purchase until the date of the registration of the Property in the name of the applicant/purchaser and as such, should not have been liable to make payment of the R80 000.00 in the first place;
3. The applicant/purchaser, on the date of the sale, noted that the property was not permanently occupied but was used by unknown vagrants without any permission from the registered owner or anybody else for the purpose of taking drugs which resulted in damage to the property being caused;

4. The applicant/purchaser thus placed a security guard at the property to prevent further damage occurring to the property. This security guard did not prevent the respondent, the execution creditor or the execution debtor from accessing the property and only ensured that no persons used the property for illegal purposes in that time;
5. The purchaser did not take beneficial occupation of the property until 01 June 2024 and as such ought to be reimbursed the R80 000.00 paid towards occupational rental;
6. The applicant/purchaser is entitled to and in fact often required to prevent further damage to the property from the date of sale to ensure that it is transferred to him in the same condition as when it was bought on the day of the auction as if there is further damage to the property, the applicant/purchaser shall have no claim against the sheriff or the registered owner for the damage incurred between these dates. In this regard we refer to clause 6.6 of the conditions of sale wherein it states “Neither the sheriff nor the Execution Creditor shall be responsible for any defect in respect of the property which may exist thereafter” [own emphasis];
7. The applicant/purchaser, took reasonable steps to prevent further harm to the property by incurring costs to place security at the property and should not be burdened with the additional costs of occupational rental;
8. Rule 46(13)(a) specifically states, “All moneys in respect of the purchase price of the immovable property sold in execution shall be paid to the sheriff” [own emphasis] and Rule 46(13)(c) states “No

amount of the purchase money shall be paid out until the provisions of subrule (14) have been complied with” [own emphasis]. No mention is made in the rules that occupational rent shall be distributed to either the judgment debtor or the judgment creditor.

9. Consequently, the sheriff has erred by bundling this under the heading “PROCEEDS OF SALE” as this is not a proceed of the sale and should be dealt with and distinguished therefrom. As this amount should never have been paid by the purchaser, the distribution account should be amended such that this amount should be refunded to the applicant/purchaser.

In the alternative

10. In the alternative and even if it is found that the applicant/purchaser did take occupation of the property on the date of the sale, which remains denied, this does not entitle the sheriff to include these in the “Proceeds of Sale” and award these funds to the execution creditor and/or execution debtor as has been done in the distribution account. Rule 46(13)(a) specifically states, “All moneys in respect of the purchase price of the immovable property sold in execution shall be paid to the sheriff” [own emphasis] and Rule 46(13)(c) states “No amount of the purchase money shall be paid out until the provisions of subrule (14) have been complied with” [own emphasis].

11. No mention is made in the rules that occupational rent shall be distributed to either the judgment debtor or the judgment creditor. Clause 6.3 of the Conditions of Sale indicates that, "Upon the purchaser taking possession (occupation), the Property shall be at his sole risk, profit, risk and loss off the purchaser" [own emphasis]. In the circumstances, even if the purchaser had taken occupation and possession of the property on the date of occupation, profit, loss and risk passed to the applicant/purchaser. The applicant/purchaser is then entitled to all profits obtained from the property from the date he took occupation and consequently, is entitled to all rental income received.
12. In the absence of anything to the contrary in the Rules and the Conditions of Sale, there is no reason why the sheriff/respondent should award that this money be paid to the bondholder, the execution creditor or the execution debtor. The Rules expressly limit the distribution by the sheriff to "the purchase price". The execution creditor and execution debtor having washed their hands of the property following the sale and alleged occupation by the applicant/purchaser in terms of risk to the property cannot then benefit from the rental income. The Conditions of Sale expressly provide that the property shall be at the applicant's sole profit from when he takes occupation which includes any rental income.
13. Consequently, if it is found that the applicant/purchaser did take occupation of the property before the transfer took place on the date of the sale as alleged by the respondent and/or execution creditor and/or execution debtor, the distribution account should be amended such that the occupational rental shall be payable to the party who held the risk, profit and loss in the property which according the conditions of sale is the applicant.

Other errors with the Distribution Account

14. It is stated in the distribution account that the "Proceeds of Sale to be paid on the 04 July 2024". The Distribution account is only dated 03 July 2024 in terms. In terms of Rule 46(13)(c) "No amount of the purchase money shall be paid out until the provisions of subrule (14) have been complied with." It is impossible that the provisions of Subrule 14 have been complied with as such this date needs to be removed or amended.

WHEREFORE the Distribution account should be amended such that the Applicant/Purchaser, should be reimbursed R80 000.00 for occupational rental that should not have been paid alternatively, that the applicant/purchaser being the party holding risk, profit and loss of the property from date of occupation shall be awarded R80 000.00 in occupational interest collected by the respondent. Finally, the date for payment of the distribution should be amended to be in line with the timelines set out in the Uniform Rule of Court.

TAKE FURTHER NOTICE THAT should the respondent fail to amend the distribution account within 5 days of receipt hereof, the applicant shall bring this objection before a judge for review in terms of Rule 46(14)(d)(ii) and Rule 46(14)(e) in the form of a substantive application supported by an affidavit by the Applicant/Purchaser.

TAKE FURTHER NOTICE THAT in terms of Rule 46(14)(e), the judge on review shall hear and determine the matter in dispute and may amend or confirm the plan of distribution or may make such order including an order as to costs as he or she deems appropriate.

TAKE FURTHER NOTICE THAT should the applicant be forced to take the matter on review, the applicant will seek a cost order against the respondent and or any party in opposition thereto.

[10] Evidently, the sheriff did not accede to the request or the terms of the objection. This application ensued and was issued on 23 July 2024. It is opposed by the sheriff.

Applicant's case (including submissions)

[11] The applicant is a private company based in Randburg, Johannesburg. At all material times, the applicant was represented by its director Mr Vincent Okafor. He also deposed to the affidavits in that capacity.

[12] Although, strictly speaking, the relief sought by the applicant ought to be as set out in the four corners of the objection, quoted in its entirety above, the applicant seeks the following relief in terms of the notice of motion to the application, including costs:

1. The Applicant is not liable to pay occupational rent and the distribution account of the sheriff should be amended to reflect that all money paid by the applicant to the sheriff in respect of occupational rent shall be refunded to the applicant;
2. In the alternative to Prayer 1, the respondent is not authorised to distribute occupational rental received and as such the distribution account should be amended to exclude the occupational rental in toto and should be refunded to the applicant who has paid the occupational rental;
3. In the alternative to prayer 1 & 2, that the risk, loss and profit transferred to the applicant on the day that he took occupation and as such, all rental income received from the sheriff has been received for his benefit and consequently the Distribution account should be amended to reflect that all rental income received by the sheriff should be paid to the applicant/purchaser ...

[13] The sheriff, as the respondent in the proceedings, asserts that the applicant appears to have strayed from the applicant's case as set out in the objection. But, the sheriff - to her credit - appear to have, nevertheless, dealt with or addressed the material issues as raised in the founding affidavit. I do not consider it necessary to deal with the discrepancies that may exist between the objection and the notice of motion or even the application itself. All I can say is that the issues requiring

determination

to dispose of the dispute between the parties would be comprehensively dealt with - to the extent deemed necessary - by the Court.

[14] As already appearing above, at some stage the sheriff required the applicant to pay occupational rental in terms of the COS as the applicant was considered to have taken possession of the property. The full amount paid as reflected in the plan, referred to above, is R80 000. The applicant says it was forced to pay the occupational rental amount to the sheriff before the sheriff would transfer the property to the applicant. The applicant made the payment(s) 'under protest', it is argued.

[15] The circumstances which, according to the applicant, led it to take possession or occupation of the property are set out in the

objection, quoted above,[4] but they appear as follows in the founding affidavit:

5.5 During the course of the transfer process I needed access to the property in order to obtain the electrical compliance certificates and obtain funding from financial institutions who naturally need to assess the property before they will grant a loan and supply guarantees. There are thus express conditions in the conditions of sale which naturally require me to access the property. When accessing the property, I noted that the property was being used by teenagers as a place to consume alcohol and take drugs which resulted in the inevitable damage to the property taking place as the property was otherwise vacant.

5.6 As a result of this damage, I needed to do repairs to the property before the electrical compliance certificate would be granted. I further needed to ensure that the property was not used for the purposes of taking drugs such that it would be damaged other wise I would suffer the losses from those damages as per the express provision in the agreement exempting the judgement creditor from liability for any defects to the property which occur after the property was sold but before it was transferred.

5.7 I thus attended to the necessary repairs to the property so that an electrical compliance certificate could be issued and I placed a security guard at the property at the applicant's cost in order to ensure that the property was not vandalised further and a financial institution would be willing and able to extend a bond to secure the remainder of the purchase price.

5.8 I did not prevent the execution debtors, creditors or bondholder from occupying the property. In fact, had they occupied the property this would have been better for me and the applicant as I would then not have had to incur the cost of a security guard. The security guard was simply placed there as the conditions of sale made it clear that the respondent and the execution creditor would not take any responsibility for damage caused to the property after the sale but before the transfer took place.

5.9 In the light of the circumstances that were transpiring, the applicant was forced to place a security guard on the property to mitigate further damage to the property being caused by vagrants.

5.10 During the course of the transfer process, the attorneys for the judgement creditor became aware that the applicant had placed a security guard at the property and demanded that the applicant pay occupational rental. I refused their demands.

5.11 The respondent refused to affect [sc. effect] transfer of the property to the applicant until the applicant made payment of the occupational rent despite the fact that payment of occupational rent was not required in order for me to demand transfer of the property in terms of clause 6.9 of the contract.

5.12 Eventually, I relented and paid the occupational rental demanded under protest in order to speed up the transfer as I was incurring penalty interest for every day that the transfer was delayed despite the fact that it was the first respondent unreasonable refusal to affect [sc. effect] transfer of the property which was causing the delay and not me.[5]

[16] I hasten to point out what I consider – with respect - to be inaccuracies in the statements, quoted above, from the applicant's

founding affidavit. The applicant's case refers to during 'the transfer process' or 'the transfer of the property' and also that the applicant wanted 'to speed up the transfer' by making payments of the occupational rental, done 'under protest'. On the applicant's own version the guarantees for the balance of the purchase price were only furnished on 13 May 2024.[6] My understanding of the COS and the transfer process is that the guarantee or securing of the balance of the purchase price was a pre-condition for the transfer of the property. This would mean that until when the applicant has furnished the guarantee there was no transfer process, unless the sheriff has waived the requirement. Therefore, the period which can accurately be labelled 'during the transfer process' is post 13 May 2024. Any delay in the transfer of the property or speeding up of the process would have been between the aforesaid period and 27 June 2024 when the transfer took place. It is actually pointed out by counsel for the sheriff in his submissions that, in fact, the guarantee or balance of the purchase price was due and payable within a period of 14 days from the date of auction, meaning that this condition should have been met as far back as 26 November

2023. The applicant failed to comply. The applicant only complied after steps were taken against it including a letter of demand by the sheriff in December 2023; the applicant being placed on terms to comply with the COS during January 2024 and, ultimately, activities being undertaken during April 2024 geared towards formal court proceedings in terms of Rule 46(11) of the Uniform Rules to cancel the sale in execution. According to the sheriff the applicant only secured the balance of the purchase price six months after the due date. Therefore, I immediately hasten to mention that the applicant's assertion that he paid R80 000 to speed up the transfer process or avoid delays is improbable. It is submitted on the applicant's version that it was charged

occupational rental in the amount of R10 000 per month for 8 months. But nothing would turn on this for purposes of the outcome of this application.

- [17] The applicant's case is that it did not take 'beneficial occupation' of the property until 01 June 2024 and, thus, it was not liable to pay occupational rental.[7] The applicant's case gets slightly modified, in other parts of the founding affidavit, to the effect that even if it took 'occupation and possession' (as opposed to the earlier 'beneficial occupation') of the property before 01 June 2024, it should have benefitted from the same rental it paid as the risk, profit and loss had transferred to the applicant on the date it took occupation of the property.[8]
- [18] The applicant also says that the sheriff in terms of the Uniform Rules of this Court is not authorised to distribute funds received as occupational rental, as the authority is circumscribed and expressly limited to the distribution of the 'purchase price'.
- [19] The applicant contends that when it paid the R80 000 under protest it contemporaneously informed the sheriff that it would object to the distribution account or plan if the money was not refunded after the transfer. This is because according to the sheriff the applicant took occupation of the property immediately after the auction on 26 October 2023. This is denied by the applicant. The sheriff bears the burden of proof in this regard, it is submitted on behalf of the applicant. The sheriff ought to have provided evidence that the alleged occupation took place.
- [20] According to the applicant it did not take 'beneficial occupation' of the property on 26 October 2023 or at any time before 01 June 2024. As an alternative to this assertion, the applicant says that it is entitled to the occupational rental of R80 000 paid as it bore all risk over the property and was entitled to all benefits over the property (including rental) from the date of occupation.
- [21] The other leg of the applicant's objection, as already hinted, is that the sheriff is not authorised to collect or distribute occupational rental in terms of the Rules of this Court or the COS. Therefore, collection and distribution of the rental to the judgment debtor, as borne by the distribution plan, is ultra vires.
- [22] In reference to conditions or clauses 6.1 and 6.2 of the COS, it is submitted on behalf of the applicant that, there is an interchangeable use of the words 'possession' and 'occupation' in clause 6.2. This is so, despite the often distinct use of the words. Ultimately, it is argued on behalf of the applicant that, naturally, the purchaser ought to be in both possession and occupation of the property to be liable for occupational rental.
- [23] The applicant says that, as prescribed in clause 6.1 of the COS, it was only entitled to obtain possession of the property after it had, among others, secured the balance of the purchase price by delivering the guarantees. As this only took place on 13 May 2024 it was impossible for the applicant to have taken possession prior to that date.
- [24] Further, that had the applicant intended (read 'truly considered itself', being the applicant's words) to take occupation and possession of the property for its benefit it would have secured a tenant for that purposes as it did on 01 June 2024. Prior to that date, all the

applicant did – instead of taking possession of the property – was to take reasonable steps expected of a reasonably diligent businessman (probably in reference to the applicant's director) to protect the investment in compliance with the COS. The applicant bore all losses and risks relating to damage to or defect of the property post the auction.

[25] In the end, the applicant prayed that it is entitled to the refund of the occupational rent it paid and other ancillary relief as fully set out above.

Sheriff's (i.e. respondent's) case (including submissions)

[26] The sheriff says the terms or conditions in the COS are a replica of those contained in Form 21 to the Uniform Rules of this Court. I understand this to mean that the applicant has no cause to be concerned as the material terms are used on a regular basis or widely.

[27] As indicated above, the sheriff is concerned that the applicant's case appearing to have expanded in the application from what it was in the objection. The sheriff points out that nothing was mentioned in the objection about the applicant undertaking 'full time' repairs and construction work at the property. The sheriff, adds that, the applicant also actively marketed the property through estate agents. This is not denied by the applicant although it is stated that the marketing was done online. It is argued on behalf of the sheriff that this accords with the meaning of the words 'occupation' and 'possession' often used interchangeably.[9]

[28] The sheriff, further, refers to authorities for the assertion that the word 'occupation' ought to be interpreted in reference to the context in which it is used. Further, that to 'occupy' does not only mean to reside in a property, but also includes presence at a property for other reasons such as carrying on a trade.

[29] It is the sheriff's case that the applicant has been in occupation or possession of the property since the auction by placing a security guard at the property to avoid it vandalised by vagrants; by attending to extensive restoration and repair work at the property; successfully marketing the property during a period of about three months, and causing a family to move into the premises prior to registration of the property. It is argued on behalf of the sheriff that the aforesaid considered either conjunctively or separately reflect(s) that the applicant was in absolute control of access to the property. He (probably in reference to the applicant's director) did not intend to occupy it personally but to secure it by placing security guard at the property and to attend to the construction or renovation works. These notwithstanding the applicant not informing either the sheriff or the execution creditor of his aforesaid actions. Should the applicant not have intended to take possession or occupy the property, it could have secured permission from either the sheriff or the execution creditor to do so.

[30] It is also argued on behalf of the sheriff that placing a security guard over a property signifies absolute control and possession and/or occupation of the said property as the person who does that regulates access to the property.

- [31] The sheriff points out that the applicant could have rented out the property for more than the occupational rental paid and, thus, exercised to its benefit the right to hold the property for profit and loss. The sheriff also points out that the applicant did exactly this by causing the Khumalo family to be in occupation of the property including occupation as at 28 May 2024. This, it is pointed out, is the essence of the clause in the COS referring to the passing of risk, profit and loss in respect of the property.
- [32] The sheriff rejects, as untenable, the applicant's assertions regarding the collection of the occupational rent for the benefit of the purchaser (who assumed risk and possessed the property for profit and loss) and the alleged lack of authority on the part of the sheriff to levy and distribute occupational rental.

Applicable legal principles

[33] This is a review premised on Uniform Rule 46(14) which reads as follows:

- (a) After conclusion of the sale, but before preparation by the sheriff of a plan of distribution, the execution creditor or his or her attorney shall provide the sheriff with a certificate of all money paid by the judgment debtor to the execution creditor or his or her attorney after the issue of the writ of execution.
- (b)(i) Within 10 days after the date of registration of the transfer, the sheriff shall have prepared a plan of distribution of the proceeds in order of preference and must forward a copy of such plan to the registrar and to all other sheriffs appointed in that district.
- (ii) Immediately thereafter the said sheriff shall give notice to all parties who have lodged writs and to the execution debtor that the plan of distribution will lie for inspection at his or her office and the office of the registrar for 15 days from a date mentioned, and unless such parties signify in writing their agreement to the plan, such plan will so lie for inspection.
- (c) After deduction from the proceeds of the costs and charges of execution, the following shall be the order of preference:
- (i) Claims of preferent creditors ranking in priority in their legal order of preference; and thereafter
- (ii) Claims of other creditors whose writs have been lodged with the sheriff in the order of preference appearing from sections 96, and 98A to 103 (inclusive) of the Insolvency Act, 1936 (Act No. 24 of 1936).
- (d) Any interested person objecting to the plan must —
- (i) before the expiry of the period referred to in paragraph (b)(ii), give notice in writing to the sheriff and all other interested persons of the particulars of the objection; and
- (ii) within 10 days after the expiry of the period referred to in paragraph (b)(ii), bring such objection before a judge for review upon 10 days notice to the sheriff and the said persons.

- (e) The judge on review shall hear and determine the matter in dispute and may amend or confirm the plan of distribution or may make such order including an order as to costs as he or she deems appropriate.
- (f) If —
- (i) no objection is lodged to such plan; or
- (ii) the interested parties signify their concurrence therein; or
- (iii) the plan is confirmed or amended on review,

the sheriff shall, on production of a certificate from the conveyancer that transfer has been given to the purchaser, pay out in accordance with the plan of distribution.

[34] What Rule 46(14) provides for is a review of an objection by any interested person against a distribution plan.[10] It is sufficient that the rule is complied with substantially.[11]

[35] The review is to be determined by a judge sitting otherwise than in open court, which is a judge in chambers.[12]

Issues for

determination

[36] From what appears above, I consider the following to be issues dispositive of the determination of this matter:

[36.1] whether the applicant is liable to pay occupational rent?

[36.2] whether the occupational rent should be refunded to the applicant?

[36.3] is the sheriff authorised to distribute occupational rent received?

[36.4] whether the risk, loss and profit transferred to the applicant on the day that it took occupation, includes rental income

[37] Some of the issues or questions, such as the first and second questions above, do overlap and will be dealt with conjunctively.

Whether the applicant is liable to pay occupational rent and whether the occupational rent paid ought to be refunded to the applicant?

[38] There is no dispute between the parties about the conclusion of the agreement in the form of the Conditions of Sale (i.e. the COS) on 26 October 2024. The source of the current dispute is located in clauses 6.1 to 6.3 of the COS.[13]

[39] The clauses allow a purchaser to gain or take possession or occupation of the property prior to the transfer of title. The words 'possession' and 'occupation' are both used in the aforementioned clauses. For example, the word 'possession' is used in clause 6.1 in the sense that the purchaser is 'entitled to possession of the Property' upon fulfilment of some pre-conditions. In clause 6.3 the words appear together and seem to be given identical or similar meaning.

[40] The word 'possession' is explained in RC Claassen and M Claassen, Dictionary of Legal Words and Phrases,[14] among others, as follows:

Is a compound of a physical situation and of a mental state, ie, of the physical holding or detention of a corporeal thing by a person and of the mental state of that person towards the thing. In other words, it is the physical detention of a corporeal thing by a person, whether with or without any claim or right, with the intention of holding it as his own, to which the law has given its sanction by interposing certain legal remedies or interdicts for its protection, should it be interfered with by other people. But it is essential to the existence of possession that there should at one time or another have been both such detention or occupation and such intention present together at one and the same time.

[underlining added]

[41] I understand the above authority to be saying that at some stage possession would be accompanied by occupation. This accords with interchangeable use in clauses 6.1 to 6.3 of the COS of the words 'possession' and 'occupation'. They can mean the same thing. It is argued on behalf of the applicant that often the words are used distinctively. According to the applicant a purchaser ought to be in both possession and occupation of the property to be liable for occupational rental.

[42] Overall, it is my view that although the words 'possession' and 'occupation' may bear the same meaning or in some instances distinct meaning, in the impugned clauses of the COS they are used interchangeably. Therefore, there is no need to further decipher the meaning of the words.

[43] Also, the applicant import other words into the COS such as 'beneficial occupation' to advance its argument that it was not in beneficial occupation until 01 June 2024 and, that it only placed a security guard and did not occupy the property. There is no room for this approach in modern interpretation.[15]

[44] On the applicant's own version it placed the security guard at the property to prevent its destruction by vagrants. This alone could amount to occupation, but it would have been unfair to determine this against a purchaser whose sole purpose was to protect the property. But in this matter the applicant says it also attended to effect restoration and/or repair work of the property. This step alone constitutes occupation of the property. If ever there was a need to perfect possession of the property denoted by placing a guard, the construction work confirmed that the applicant did more and occupied the property. I conclude that the

applicant was indeed in occupation of the property.

[45] The second leg of the determination under this part is the date when the applicant took occupation of the property. According to the sheriff, this was immediately after the auction on 26 October 2023, hence the charge of R80 000. This would have been for eight months when calculated until 27 June 2024 when the title to the property passed onto the applicant. The applicant concedes that it occupied for at least one month by allowing a certain family to move in by 01 June 2024.

[46] The applicant says the sheriff bears the burden of proof in this regard. I do not agree. The applicant ought to make out a case on the papers for the Court to interfere with the sheriff's plan of distribution, otherwise the application or objection would fail.[16] The applicant asserts that a particular position exists not only in the objection but also in this application: that it is entitled to the repayment of the R80 000 it paid as the money is not due and payable. The following extract from Erasmus: Superior Court Practice is very authoritative in this regard:

‘Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities’. It is well established that if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order unless, of course, the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.

If in such a case the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief sought.[17]

[underlining added and footnotes omitted]

[47] Other than the issue of the location of the duty to prove date of occupation, there seem to be a dispute of fact in this regard. The applicant says it did not beneficially occupy the property before 01 June 2024, but only placed a guard on some undisclosed date, whilst the sheriff is of the view that occupation followed immediately after the auction. The procedure provided by Rule 46(14) is clearly not meant to decide matters where there is a dispute of fact. It should have been clear to the applicant that there is a dispute not likely to be resolved on affidavit regarding the occupation of the property.

The authorities above do not require that a respondent (i.e. the sheriff for current purposes) in the matter should be saddled with the onus to establish the basis for the relief sought by the applicant. Even if the matter takes the form of a review of an

objection the subject matter sought to be reviewed by the applicant in this matter is such that the application should fail as the applicant has not established that it should be refunded the R80 000 as it was not liable for occupational rent.

Is the sheriff authorised to distribute occupational rental received?

- [48] Another issue to be dealt with in terms of the objection or application is whether the amount levied as occupational rent can be distributed by the sheriff. The applicant disputes – as incorrect – the fact that the amount is ‘bundled’ as part of the proceeds of sale or purchase price and distributed to the bondholder, execution creditor and execution debtor.
- [49] The applicant’s case in this regard is also that the Uniform Rule does not authorise the sheriff to distribute funds received as occupational rental, as the authority is expressly limited to the distribution of the ‘purchase price’. I do not see anything in the Rule as prohibiting the sheriff to handle (i.e. levy and distribute) occupational rent in the manner the sheriff did. Even if this was so, the applicant would not qualify as an interest bearer in respect of the material issue, as I have already ruled that the applicant is not entitled to a refund. Therefore, this part of the relief will also be refused.

Whether the risk, loss and profit transferred to the applicant on the day that it took occupation, include rental income

- [50] This issue arises from the applicant’s interpretation of clause 6.3 of the COS. The applicant’s case in this regard is that in terms of the clause upon taking possession or occupation of the property it was entitled to the ‘profit’ in the same way that it bore the ‘sole risk’ and ‘loss’ as envisaged by the clause. The applicant considers the occupational rent to constitute ‘profit’ contemplated by the clause.
- [51] I find – with respect – the applicant’s assertions to be a form of a circuitous argument. The applicant needed to have paid the occupational rent, in the first place, to be entitled to any profit and loss with regard to the property. Without the payment the applicant loses the qualification or position and thus will not be entitled to anything at all. Payment of the occupational rent was the sine qua non (i.e. ‘indispensable condition (or: prerequisite)’)[18] of access to any profit arising from possession of the property. I agree with the sheriff that the latter refers, for example, to the fact that the applicant could have rented out the property for an amount which was more than the occupational rental it paid. The applicant was aware of this option as it did with the Khumalo family. Therefore, this part of the objection or application will also be refused.

Conclusion and costs

- [52] The application has fallen on all its legs. Liability as to costs would follow this outcome. The sheriff, as with the applicant, sought costs on the attorney and client scale. It labelled the objection spurious. I agree. The objection and the application are actually vindictive. The applicant simply did not have any prospects to reclaim the R80 000 paid as occupational rent. The applicant was irritated by what happened which led to the sheriff forcing payment

of the occupational rental amount. The applicant resorted to using the law – at all cost - to get its own back. This type of conduct or approach contribute to the abuse of the systems of this Court. A punitive costs order is warranted and will be ordered. Further, the sheriff as an officer of this Court did nothing but what she was in law entitled to do. She mustn't find herself out of pocket in defending spurious and vindictive litigation. Costs will be awarded at the scale of attorney and client against the applicant.

Order

[53] In the result, I make the order, that:

- a) the application is refused and the objection is set aside, and
- b) the applicant shall be liable to payment of the costs of the application and/or the objection on the scale of attorney and client.

Khashane La M. Manamela

Acting Judge of the High Court

Date of Last Written Submissions

(submitted in lieu of a Hearing)

: 13 September 2024

Date of Judgment

: 10 December 2024

Legal representatives

(in the preparation of heads of argument)

For the Applicant

: Mr Dawson

Applicant's Attorneys

: Naude Dawson Inc, Pretoria

For the Respondent

: Mr CGVO Sevenster

Instructed by

: Vezi & De Beer Inc, Pretoria

[1] Par

[33] below for a reading of Rule 46(14) in the material part.

- [2] Par
- [6] below for a reading of the material conditions of sale of the property.
- [3] Par
- [33] below for a reading of Rule 46(14)(d).
- [4] Par [9] above.
- [5] Founding Affidavit ('FA') pars 5.5 to 5.12, CaseLines 019-11 to 019-13.
- [6] Par
- [6] above.
- [7] FA par 3.2, CaseLines 019-8.
- [8] FA par 3.4, CaseLines 019-8.
- [9] Ndlovu v Ngcobo; Bekker and another 2003
- (1) SA 113 (SCA) [15].
- [10] Klagbruns Inc v Adjunkbalju, Bronkhorstspuit 1979
- (2) SA 169 (T) at 170C.
- [11] DE van Loggerenberg, Erasmus: Superior Court Practice (Service 23, Jutastat e-publications May 2024) RS 23, 2024 ('Erasmus: Superior Court Practice') at RS 22, 2023, D1 Rule 46-21.
- [12] Erasmus: Superior Court Practice at RS 22, 2023, D1 Rule 46-21. See also Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel Herbststein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th edn, Juta/Jutastat e-publications 2009) RS 23, 2024 at ch37-p1078.
- [13] Par
- [6] above for a reading of the material clauses from the COS.
- [14] RC Claassen and M Claassen, Dictionary of Legal Words and Phrases (LexisNexis, 2024) 'Claassen's Dictionary of Legal Words'.
- [15] In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) SA 593 (SCA) [18] Wallis JA set out the principles of interpretation as follows: 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent

purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' [footnotes omitted].

[16] Management Committee, Leather Provident Fund v Padayachee 1966 (3) SA 624 (N) at 625G.

[17] Erasmus: Superior Court Practice at RS 23, 2024, D1 Rule 6-34.

[18] VG Hiemstra and HL Gonin, Trilingual Legal Dictionary (3rd edn, Juta 1992).

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