



Reportable

REPUBLIC OF NAMIBIA

CASE NO.: I 1940/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PETER MBUTU

PLAINTIFF

versus

WESSEL ESTERHUIZEN N.O

1ST DEFENDANT

DE WET ESTTERHUIZEN N.O.

2ND DEFENDANT

JOHAN ESTERUIZEN N.O.

3RD DEFENDANT

CORAM: SMUTS, J

Heard on: 17 October 2011

Delivered on: 25 November 2011

JUDGMENT

SMUTS, J [1] In this matter, the parties have approached the court to determine a stated case by agreement. The pertinent portion of the agreed stated case is as follows:

- “1. At all relevant times the deceased, Valerie Esterhuizen was the duly appointed Deputy Sheriff for the District of Windhoek;
2. On 27 March 2008, the plaintiff, at an auction sale in execution, was the highest bidder in the amount of N\$2.8 million, in respect of certain immovable property –

CERTAIN Erf 3450 (a portion of Consolidated Erf 441) Windhoek

SITUATED in the Municipality of Windhoek

Registration Division “K” Khomas Region

HELD by Deed of Transfer No. T7580/1995

3. The sale in execution was held pursuant to a writ of execution taken out in respect of the aforesaid property under High Court Case No. (P) / 1261/2001;
4. The deceased was the auctioneer at the auction sale in execution at which the plaintiff's aforesaid bid was accepted;
5. The plaintiff and the deceased signed the conditions of sale on 27 March 2008 – annexure **POC 2** to the particulars of claim;
6. The plaintiff paid to the deceased the amount of N\$135 000.00 as auctioneer's charges / commission as required in terms of clause 8 of the conditions of sale, as well as a deposit in the amount of N\$280 000.00;
7. The plaintiff failed to furnish security for the balance of the purchase price as is required in terms of clause 6 of the conditions of sale;
8. The sale execution was subsequently cancelled by Order of Court on 5 June 2008, a copy of which Order is annexure **POC 3** to the particulars of claim;

9. *On 10 July 2008, the same immovable property was then again sold at an auction in execution of the same writ to a third party for N\$2.5 million the deceased again acting as auctioneer. A copy of the conditions of such sale are attached hereto marked “SP1”;*
10. *The third party paid auctioneer’s charges / commission to the deceased in an amount of N\$125 000.00 plus VAT as required in terms of clause 8 of “SP 1”;*
11. *The deceased, and now her estate, are retaining the amount of N\$135 000.00 paid by the plaintiff to the deceased;*
12. *Despite demand, the defendants refuse to repay the amount of N\$135 000.00 nor any part thereof on the grounds that the auctioneer’s charges / commission retained by the deceased (and now her deceased estate) did not in the circumstances become repayable in law.*

B ADJUDICATION

The parties agree that they request the Court to adjudicate the matter on the question:

1. *Does the amount of N\$135 000.00 constitute auctioneer’s charges / commission as envisaged in item 5c(xiv) of the fourth schedule to the High Court Rules?*
2. *Is the deceased’s estate liable in law to repay the amount of N\$135 000.00 to plaintiff as a consequence of the cancellation by Order of Court, of the sale in execution concluded on 27 March 2008?”*

[2] The question is thus whether the deceased was entitled to a charge for her attendance in respect of the sale, and if so what she was entitled to under the tariffs for deputy sheriffs. Item 5 sets the tariffs for attendances on the part of deputy sheriff in

connection with the execution of any writ. The relevant portion is item 5 (c) (xiv) which provides:

5. For the execution of any writ –

.....

(c) against immovable property –

.....

(xiv) on the sale of immovable property by the deputy sheriff as auctioneer, 5% (percent) of the proceeds of the sale which shall be paid by the purchaser

[3] Ms Schneider, who appeared for the plaintiff contended that the charge or fee to which the Deputy Sheriff is entitled in a sale in execution arises under item 5(c)(xiv) of the tariffs for Deputy Sheriffs, prescribed under the Rules of this court. Ms Schneider argued that the fee item envisages a “*sale in execution*” and that an auction sale which does not result in the transfer of the immovable property to the purchaser and the consequent collection of the proceeds to the judgment creditor in sales in execution of the judgment debt would not fall within what the rule maker contemplated as “*execution*”.

[4] In support of this argument, Ms Schneider referred to authority which describes the concept of execution to mean, albeit in a different context “carrying out” or “giving effect” to a judgment by inter alia passing transfer under a writ of execution¹.

¹ Reid and Another v Godart and Another 1938 AD 511 at 514

Ms Schneider also referred to a discussion of the concept of execution by Kriegler J (as he then was) where the learned judge referred to execution being perfected eventually by a number of procedures culminating in delivery to the purchaser.

[5] But this was also said in different context. That case concerned the impact of the intervening insolvency of a judgment debtor after his immovable property had been sold in execution but before transfer to the purchaser of a sale in execution. The court there, with respect, correctly held that the property vested in the Master as part of the insolvent estate as ownership had not passed.

[6] Ms Schneider thus contended that the tariff in item 5(c)(xiv) caters for a completed sale and that in the event of an incomplete sale, the Deputy Sheriff would not be entitled to in execution charge under that item as the incomplete sale (where transfer had not resulted) would not amount to “*execution*” as envisaged by the Rules and that item.

[7] Mr Slabber, who appeared for the defendants took a contrary view. He argued that an auction sale is governed by the conditions of auction, and that those bidding are deemed to agree to those conditions. He referred to Rule 46(8)(a) which requires that conditions of sale are to be prepared by the execution creditor as near as may be in accordance with form 22 of the First Schedule the Rules. Mr Slabber proceeded to rely upon clause 8 of the condition of sale which states:

“The Purchaser shall pay auctioneer’s charges on the day of sale and in addition transfer duties, costs of transfer, and arrear rates, taxes and other charges necessary to effect transfer, upon request by the attorney for the execution creditor”.

[8] He pointed out that the wording of this clause closely followed the formulation in form 22. Mr Slabber argued a valid sale had occurred on 27 March 2008. As a consequence, the Deputy Sheriff became entitled to payment of her charges determined in the form of commission by the purchaser (the plaintiff). He argued that the Deputy Sheriff was thus entitled to retain that payment even if transfer did not proceed where a purchaser was unable to pay the full purchase price and the property is auctioned again.

[9] The starting point in this enquiry would be to examine the charge stipulated within the context of the Rules as the tariffs are after all set for attendances performed and contemplated by the Rules.

[10] Item 5 provides for the tariffs for various attendance by Deputy Sheriffs when executing a writ pursuant to the Rules of Court. The other items prescribe tariffs for other attendances by them in fulfilling the duties and functions accorded to them under the Rule 46 such as:

“ascertaining bonds and other encumbrances registered against the property, consideration for the notices of sale prepared by the execution creditor, verifying that the notice of sale has been published, forwarding the notice of sale to every judgment creditor who has caused the property to be attached and to every mortgagee, affixing the notice of sale at the prescribed places and for considering the conditions of sale.”

[11] Item 5 is however to be considered in the context of its empowering provision and the rules. Rule 68(1), entitled, “Tariff for Deputy Sheriffs” provides:

“The fees and charges contained in the Fourth Schedule hereto shall be chargeable and allowed to Deputy Sheriffs..”

Sub rule 68(3) provides:

“Where any dispute arises as to the validity or amount of any fees or charges, or where necessary work is done and necessary expenditure incurred for which no provision is made, the matter shall be determined by the taxing master of the court”.

[12] Although the plaintiff disputes the validity of the charge retained by the deceased, the defendants have not taken the point that the issue needs to be determined by the taxing master and that this would oust the jurisdiction of this Court to hear the plaintiff's claim and the resultant stated case. As this was not raised, I decline to deal with it. But I do not consider that the jurisdiction of this court would be ousted to grant the declaratory relief essentially sought in the stated case.

[13] Item 5 is in my view also to be read with Rule 46 dealing with the execution of immovables. This is because Rule 46 sets out the duties and functions to be performed by a Deputy Sheriff in attending to the execution of immovables. The attendances, for which the tariffs are set in item 5, are those set out in Rule 46. These in essence start with attachment pursuant to a writ as near as may be in accordance with a prescribed form. After attachment, a sale in execution is to take place. A number of attendances are necessary prior to the sale in execution. These include notices to preferent creditors, advertisements of the sale, giving notice to judgment creditors and the like. Relevant for present purposes are the conditions of sale under Rule 46(8). They must be as near as possible in accordance with the prescribed form (form 22) attached to the Rules. These conditions are then to lie for inspection by interested parties at the office of the deputy sheriff at her office. Interested parties may even apply (under Rule 46(a)) for a modification of these conditions.

[14] Rule 46(10) expressly requires that immovable property attached in execution is to be sold by the Deputy Sheriff by public auction. The property is to be sold without

reserve to the highest bidder² and the Deputy Sheriff is to give transfer against payment of the purchase price³. Rule 46(11) states:

“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 deputy-sheriff after due notice to the purchaser, and the property may again be put up for sale, and the purchaser shall be responsible for any loss sustained by reason of his or her default, which loss may, on the application of any aggrieved creditor whose name appears on the deputy-sheriff’s distribution account, be recovered from him or her under judgment of the judge pronounced summarily on a written report by the deputy-sheriff, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purpose; and, if he or she is already in possession of the property, the deputy-sheriff may, on 10 days’ notice, apply to a judge for an order ejecting him or her or any person claiming to hold under him or her therefrom”.

[15] Item 5 is thus to be seen and considered within this context of the duties and functions of a deputy sheriff with regard to sales in execution and that the tariffs are set as the rates to be charged for those attendances. Item 5 accordingly merely sets the tariffs for attendances which are performed pursuant to the Rules. The terms and ambit of an attendance are thus not set by Item 5 but are rather to be considered in the context of the duties and functions set out in the rules.

[16] The relevant tariff in item 5 is in respect of the sale of the immovable property as auctioneer. The tariff is set at 5% of the proceeds of the sale. The tariff also provides that it is payable by the purchaser. That is the extent of the tariff in setting the quantum of the prescribed charge.

² Rule 46(12)

³ Rule 46(13)

[17] The tariff applies when such a sale by auction occurs as prescribed by Rule 46(10). In this matter such a sale occurred. That is common cause. That is the attendance performed by the deputy sheriff for which the purchaser (plaintiff) was charged. The tariff does not determine when a deputy sheriff is entitled to the charge in question or the extent of the obligations or duties of a deputy sheriff in relation to such an attendance. It merely sets the tariff for the attendance itself. In assessing whether or not the attendance is performed and whether the deputy sheriff is entitled to charge for it, regard should be had to Rule 46.

[18] The sale in execution by auction (in respect of which the tariff in question applies) is prescribed by Rule 46. It is to be conducted in accordance with conditions to accord with a form referred to in that rule and attached to the rules. Those conditions are to lie for inspection by interested parties – including prospective purchasers in the sale by auction. Those conditions include clause 8 which closely follows the wording of the form attached to and expressly contemplated by the Rules.

[19] That condition expressly provides and requires that a purchaser is to pay the auctioneer's charges (which are specified in the tariff) on the day of the sale. That is when the rule giver contemplated that such charges would be payable and not upon delivery or transfer. Rule 46 entails a number of attendances performed by a deputy sheriff in execution in respect of immovable property. I have referred above to a number of them. Item 5(c) in turn refers to the tariff which can be charged for those attendances. One such attendance is a sale by auction of the immovable property. The deceased performed that attendance. Once she had performed a sale in execution as auctioneer, then the deputy sheriff is in my view entitled to payment by the purchaser of her attendance. The payment for attendance is measured in accordance with the tariff. The

amount of the tariff is determined as a percentage of the proceeds of the sale, as is common with auctions.

[20] The fact that the purchaser was ultimately (and subsequently) unable to perform in terms of the sale would not in my view alter the position. Ms Schneider was unable to refer to a tariff which would apply for such an attendance. Her reference to Rule 46(11) does not in my view assist the plaintiff. That sub-rule refers to “loss” which may preferably arise by virtue of a subsequent sale realizing less. But this would not cover the question entitlement on the part of a deputy sheriff to a charge for the attendance performed. That is because the deputy sheriff would be entitled to payment of the charge upon completion of a valid auction sale on the day of the auction as is expressly contemplated by the Rules which including the conditions provided for in the form attached to the Rules. The deputy sheriff, having attended to a valid sale as auctioneer, in my view become entitled to charge for that attendance upon doing so.

[21] Ms Schneider’s argument also overlooks the fact that there is a separate and further tariff applicable for the attendance by a deputy sheriff for giving transfer to a purchaser⁴. The next item after 5(c)(xiv) provides for the deputy sheriff to charge for the attendance of a report made under Rule 46(11) – where a purchaser fails to carry out any of his or her obligations leading to the cancellation of a sale (by auction). The next tariff listed in item 5(c) is for giving transfer. These tariffs read with Rule 46, which sets out the nature and extent of the attendances for which they are charged, in my view further demonstrates that a deputy sheriff is entitled to charge for a valid sale when it is reached at the auction. This is because he or she is entitled to a further charge if a report is filed under Rule 46(11) and yet a further charge when giving transfer.

[22] The authorities referred to by Ms Schneider on execution in different contexts do thus not in my view assist the plaintiff. The reference by her in reply to the term

⁴ Item 5(c)(xiv)

“proceeds” in item 5 (c)(xiv) would not in my view alter the nature of the attendance contemplated by Rule 46 read with the conditions. The relevant definition of “proceeds” given by the authoritative New Shorter Oxford Dictionary is⁵:

“money produced or gained by a transaction or undertaking, profit, or outcome, a result.”

In this context it would carry the meaning of an outcome or result as is often used with the term sale and would not necessarily contemplate that the amount has in fact been paid. This term would not in my view change the nature of the attendance contemplated by the sale for which a deputy sheriff is to be paid at a rate set by the tariff. The attendance is that contemplated by the Rule. The term “proceeds” used in the item is merely for the purpose of calculating the quantum of the rate and does not explain the extent and nature of the attendance itself.

[23] It follows in my view that the first question posed in the stated case is to be answered in the affirmative, and the second in the negative.

[24] Even if I were to be incorrect in answering the first question in the affirmative, it would not in my view follow that the deceased’s estate would be liable to repay the plaintiff by reason of the plaintiff’s acceptance of the conditions of sale which required that he pay the deceased’s charges (of her commission) in respect of the sale on the day of the sale. The plaintiff participated in the auction on the basis of the conditions which stipulated that he was liable to pay the charge (as set by the tariff) on the day of the auction which he did.

[25] I accordingly conclude that:

⁵ (1993) Vol. 2 p2363

- a) The amount of N\$135 000.00 constitutes the auctioneer's charges as envisaged by item 5(c)(xiv) read in the context of Rules; and
- b) The deceased's estate is not liable to repay that sum to the plaintiff as a consequence of the subsequent cancellation by court order of the sale in execution concluded on 27 March 2009.

[26] The defendants have been successful in this matter and are entitled to their costs. In answering the two questions posed yes and no respectively, I award the defendants their costs.

SMUTS, J

ON BEHALF OF THE PLAINTIFF:

ADV. SCHNEIDER

Instructed by:

FRANCOIS ERASMUS & PARTNERS

ON BEHALF OF THE FIRST DEFENDANT:

MR. SLABBER

Instructed by:

DR. WEDER, KAUTA & HOVEKA INC.