

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3464/2011

In the matter between:

OTHILIE KATJUANJO

PLAINTIFF

and

DAWID WILLEMSE

FIRST DEFENDANT

ANNA MARIA WILLEMSE SECOND DEFENDANT

DEPUTY SHERIFF GOBABIS THIRD DEFENDANT

Neutral citation: *Katjuanjo v Willemse* (I 3464/2011) [2012] NAHCMD 5 (26 September 2012)

Coram: GEIER J

Heard: 12 July 2012

Delivered: 26 September 2012

Flynote: *High court—Civil proceedings—Execution—Sale in execution —Sale of immovable property—Deputy-Sheriff, when so selling such property, acting as an executive of the law—Where conditions of sale in sale in execution provide that*

'purchaser may be entitled to occupation and possession of the property... upon payment of the deposit...' – such term not conferring absolute right of immediate possession on purchaser - obligation to give vacua possessio that of the sheriff in prescribed circumstances only—Sheriff answerable ex contractu if he fails to perform in terms of the contract – Court not following Bonsai Investments Eighty Three (Pty) Ltd v Kögl & Others <http://www.saflii.org/na/cases/NAHC/2011/189.html>- in that regard

Execution—Sale in execution—Powers of Sheriff—The Sheriffs authority to sell immovable property pursuant to a writ of execution is created and circumscribed by Rule 46 of the Uniform Rules of Court. When the Sheriff disposes of property in pursuance of a sale in execution he acts as an 'executive of the law' and not as an agent of any person. When a Sheriff as part of the execution process commits himself to the terms of the conditions of sale, he, by virtue of his statutory authority, does so in his own name and may also enforce it on his own. A sale in execution of immovable property entails two distinct transactions, namely the sale itself and the passing of transfer pursuant thereto. Although Rule 46 does not specifically empower a Sheriff to institute proceedings in order to enforce the contract embodied in the conditions of sale, such power is implicit in the duty to see that transfer is passed and the provisions of Rule 46(13), which impose an obligation upon him to do anything necessary to effect registration of transfer – sheriff thus having power to also institute or defend proceedings in regard to the enforcement of any of the other remaining terms of such a contract of sale

Execution – judgment debtor's right of use and ownership of immovable property occupied - Until an immovable property that has been sold in execution has been transferred into the name of the purchaser, the judgment debtor's ownership therein remains undisturbed as does his or her right, qua owner, to the use thereof. Only the transfer of ownership of such property to the new owner brings about an end to the legal basis of the judgment debtor's right to the use and ownership thereof - the impact of the transfer on such property will however depend on the identity of the occupant and the legal basis of his or her occupation -

Practice – exception – defendants excepting to cause of action relied by plaintiff based on the condition of sale providing that ‘purchaser may be entitled to occupation and possession of the property... upon payment of the deposit...’ – court finding that such term not conferring absolute right of immediate possession on plaintiff – in casu plaintiff’s action ill-conceived on two grounds – it was firstly misdirected vis a vis the defendants, on contractual grounds – and secondly - it was simply premature - given the fact that transfer had not yet been taken – Exception therefore upheld

Summary: Plaintiff having purchased the immovable property of Defendants – in which they continued to reside - at a sale in execution – one of the conditions of sale providing that “the property may be taken possession of immediately after payment of the initial deposit and shall after such deposit be at the risk and profit of the purchaser” – plaintiff – prior to taking transfer - seeking eviction of defendants from immovable property in question on the basis of such term against defendants - the judgment debtors - also being the registered owners of the property in question - - Defendants excepting to relied upon cause of action based on the aforesaid term of the sale in execution – on the ground that the particular term not conferring any legal basis upon which the defendants ejectment from the immovable property could be obtained -

Held – as the deed of sale was concluded between plaintiff and the Deputy- Sheriff, such contract conferring no direct right on plaintiff to sue defendants direct for vacuo possessio – any contractual rights which plaintiff might have acquired enforceable against Deputy-sheriff only – sheriff in turn having locus standi – if the contractual framework allows for this - to institute proceedings regarding the enforcement of the of the terms of the sale in execution –

Held - until an immovable property that has been sold in execution has been transferred into the name of the purchaser, the judgment debtor’s ownership therein remains undisturbed as does his or her right, qua owner, to the use thereof. Only the transfer of ownership of such property to the new owner brings about an end to the legal basis of the judgment debtor’s right to the use and ownership thereof - the

impact of the transfer on such property will however depend on the identity of the occupant and the legal basis of his or her occupation –

Held - as – on the facts of this matter - the defendants' rights of ownership in Erf 103, Green Street, Nossobville, Gobabis – remained undisturbed – the plaintiff not yet having taken transfer of the property – the defendants remained entitled to the use thereof – until such time that they elect to voluntarily vacate such property, or until such time that they are lawfully evicted by the plaintiff, once the plaintiff has become the registered owner of Erf 103, which registration then – by operation of the law – would by then have brought about an end to the defendants' legal right of ownership and occupation –

Held - that the plaintiff's action in this matter was ultimately ill-conceived on two main grounds – it was firstly misdirected *vis a vis* the defendants, on contractual grounds – and secondly prematurely instituted, given the fact that transfer had not yet been taken. –

Held - that exception therefore had to be upheld with costs

ORDER

1. The first and second defendant's exception is upheld with costs, such costs to include the costs of one instructed– and one instructing counsel;
2. The plaintiff is granted leave to amend the particulars of her claim within 15 days of the delivery of this judgment – if so advised, - failing which the defendants are granted leave to apply for the dismissal of the plaintiff's action within 15 days of the expiry of the aforesaid 15 day period afforded to

the plaintiff.

JUDGMENT

GEIER J:

[1] This matter comes to court by way of an exception through which the defendants seek to ward off the plaintiff's quest to have them ejected from the immovable property in which they currently reside - being Erf 103, Green Street, Nossobville, Gobabis - the plaintiff having purchased such property at a sale in execution - through which the judgment creditor - Swabou Investments (Pty) Ltd - seeks to execute a judgment which it obtained against first and second defendants.

[2] It appears more particularly from the claim particulars that the plaintiff's claim for eviction is founded on one of the conditions of sale – clause 11 of annexure “A” - which governed the sale in execution - and in terms of which it was provided that:

‘the property may be taken possession of immediately after payment of the initial deposit and shall after such deposit be at the risk and profit of the purchaser’.

[3] The defendants in reply now contend that such a condition of sale cannot sustain a cause of action for eviction as:

- a) *Rule 46 of the High Court Rules and clause 11 of annexure “A” of the conditions of sale do not empower the third defendant, the deputy sheriff to place plaintiff in possession of the property while it is still occupied by the registered owners;*

Clause 11 of the said conditions of sale cannot and do not grant the plaintiff the right to claim possession of the property while it is still occupied by the owners;

Plaintiff relies on the right to possess the property which is not sufficient in law to evict the registered owners who are in occupation;

Plaintiff alleges first and second defendants' are in unlawful possession of the property which is factually and legally incorrect as they, the registered owners, in lawful occupation of their property;

The plaintiff does not allege that she complied with clause 7 of the conditions of the sale in that she furnished security within 14 (fourteen) days after the date of auction which entitles her transfer to the property. Consequently she has lost her right to purchase the property.

THE ARGUMENT ON BEHALF OF THE EXCIPIENTS

[4] The written heads of argument, filed on behalf of first and second defendants, firstly and in general, set out how real rights in immovable property are acquired in terms of section 16 of the Deeds Registries Act, Act 47 of 1937.

[5] It was submitted further that:

'Rule 46 (10)¹ provides that the deputy sheriff is the seller of the property. Rule 46 (12)² stipulates that the deputy sheriff shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale. This means the deputy sheriff and not the judgment creditor is the one to waive compliance with the conditions – assuming it can be done.

Furthermore, Rule 46 does not empower the deputy sheriff to put a purchaser in possession of a property sold by auction prior to transfer. Clause 11 of the conditions of sale provides that the purchaser "may" take possession of the property after the deposit was paid. This does not confer the right on a purchaser to deprive a registered owner of his/her rights in respect of the property.

¹ Of the Rules of High Court

² Of the Rules of High Court

*Ownership is generally the highest ranking right in respect of property. Therefore, subject to few exceptions, only an owner can evict an occupier of his/her property.*³

*A purchaser of immovable property who is not the actual possessor has no locus standi to apply for eviction even against a trespasser.*⁴

*A purchaser of immovable property who complied with her obligations has a personal right vis a vis the seller to enforce transfer and to obtain possession.*⁵ *Ownership does not pass on account of mere agreement to sell nor does actual possession follow an agreement to grant possession. Ownership passes on registration as required by section 16 of the Deeds Registry Act, 1937. Therefore the registered owner has the superior right in this context even if it is accepted that plaintiff has a right to possess (which defendants don't).*

*A recent case in Namibia*⁶ *is distinguishable. It appears no distinction was made between the right to possess and actual possession.*⁷ *This distinction is crucial because in law the purchaser who gained possession obtains a right in rem which entitles her to apply for ejection of someone with an inferior right to occupy the property.*⁸ *Furthermore the occupant of the farm in question in the BONSAI- case was a lessee in terms of an invalid agreement and not the owner as in this case.*

*The distinction is borne out by reference to the cases relied on in BONSAI:*⁹

Both relate to a landlord and tenant situation.

- a) *In EBRAHIM the applicant for eviction was the landlord whose title could not be disputed.*

In BOOMPRET the appellants (occupants of property to be evicted) occupied the land in terms of a sub-lease which came to an end while the respondent (applicant for eviction) was the lessee of the land in terms of a notarial lease agreement.

- b) *In both cases the principle was confirmed that a*

³ *BP Namibia (Pty) Ltd v Southline Retail Centre CC* 2009 (1) NR 268 (HC) at para [15]; *Hefer v Van Greuning* 1979 (4) SA 952 (A)

⁴ *Sheriff for the District Wynberg v Jakoet* 1997 (3) SA 425 (C); See also: *Kanniappen v Govender* 1962 (1) SA 101 (N) at p 104

⁵ *LAWSA Things* para 361; *Kanniappen supra*

⁶ *Bonsai Investments Eighty Three (Pty) Ltd v Koegl & Others*
<http://www.saflii.org/na/cases/NAHC/2011/189.html>-

⁷ See the dictum at para [22] of the *Bonsai* matter

⁸ *Bucholtz v Buchholtz* 1980 (3) SA 424 (W)

⁹ *Ebrahim v Pretoria Stadsraad* 1980 (4) SA 10 (T) and *Boompret Investments (Pty) Ltd & Ano v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA (A) at 351

lessee is bound by the lease agreement and cannot when it comes to an end resist returning occupation to the lessor. This is clearly not applicable here.'

[6] It was against this background submitted:

'It is trite that generally no one can evict an owner from his/her property. It is also established that someone who is not the owner and not in possession can in general not evict any occupant of property unless there is a lease arrangement to which the occupant is/was a party.

Plaintiff herein appears to rely on the following assertions to establish her right to evict defendants:

She purchased the property.¹⁰ The truth is she did not purchase the property yet. She simply acquired the right to purchase it subject to the conditions of sale. She has not exercised this right yet.

She complied with all her obligations in terms of the conditions of sale.¹¹ It is clear she did not. She paid the deposit and claims the judgment creditor waived her obligation to provide a guarantee.¹² As mentioned above it is not for the judgment creditor to do it. The deputy sheriff is not its agent.¹³ The deputy sheriff is the seller. Furthermore her right to purchase would become enforceable – against the deputy sheriff – once she paid the purchase price.

She derives her locus standi from clause 11 of the conditions of sale, which she alleges give her the right to possess the property after she paid the deposit.¹⁴ As mentioned the clause provides that she 'may' take possession. At best for her it entitles her to occupy the property if it is available for occupation and if not she must take transfer to obtain locus standi to evict defendants.¹⁵ Furthermore as demonstrated above: in terms of substantive

¹⁰ Pleadings p 4 para 5

¹¹ Pleadings p 5 para 5

¹² Pleadings p 19

¹³ BONSAI *supra* para [11]

¹⁴ Pleadings p 5 para 8

¹⁵ Jakoet *supra* p 4301

law she has no locus standi to apply for defendants' eviction. Rule 46 does not authorise the deputy sheriff to give her occupation prior to transfer. The conditions of sale cannot change the law especially because defendants are not party to it.

Defendants are in unlawful possession of the property.¹⁶ This is simply incorrect. They occupy the property as registered owners. They have the superior right in relation to plaintiff.'

[7] In Supplementary Heads of Argument, Mr Coleman, who appeared on behalf of the defendant's herein, reinforced these submissions, by also placing reliance on the analysis of the resultant position in the Magistrates Court as the set out in *Jaftha v Schoeman & Others*.¹⁷ I will return to this as will appear from what is set out below.

THE PLAINTIFF'S WRITTEN ARGUMENT

[8] It appears from Mrs Schneider's heads of argument that she premised her client's case squarely on the conditions of sale 'on which the plaintiff relied for her locus standi to evict the first and second defendants', as it was put. She countered the attack mounted against the plaintiff's failure to supply the security for the outstanding purchase price - which had to be supplied within 14 (fourteen) days of the sale - in terms of clause 7 of the conditions of sale – with reference to the fact that the judgment creditor in this matter - Swabou Investment (Pty) Ltd - had waived this particular requirement.

[9] She then summarised the common law principles which according to her applied to the judicial seizure of immovable property in order to give effect of a court's judgment as follows:

¹⁶ Pleadings *supra* p 5 para 9.

¹⁷ [2003] 3 All SA 690 (C) paras [45] & [46]

*'An arrest effected on property in execution of a judgment creates a pignus judiciale over such property. The effect of such a judicial attachment is that the goods attached are thereby placed in the hands and the custody of the officer of the court. The property passes out of the estate of the judgment debtor and vests in the hands of the she Sheriff.'*¹⁸

*When the Sheriff attaches and sells the property in execution he does not act as agent of the judgment creditor or the judgment debtor but does so as an executive of the law.'*¹⁹

*The authority of the Sheriff in relation to the sale in execution of immoveable property is created and defined by Rule 46 of the High Court Rules and the Sheriff must remain strictly within the limits of this authority. Accordingly, when immoveable 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 there under, which includes the giving of transfer of the property to the purchaser, which, when effected, is considered to be done as validly and as effectually as if he were the owner of the property.'*²⁰

*Although Rule 46 does not specifically empower a Sheriff to institute proceedings in order to enforce the contract embodied in the conditions of sale, such power is implicit in the duty to see that transfer is passed. If that were not so, the Sheriff's only remedy, in the event of a purchaser failing to carry out any of his or her obligations under the conditions of sale, would be to approach a Judge in Chambers for the cancellation thereof in terms of Uniform 46 (11) and would allow recalcitrant purchasers at sales in execution to avoid their obligations almost with impunity.'*²¹

Rule 46 (11) is only applicable when

"... the purchaser fails to carry out any of his or her obligations under the conditions of sale.."

This is not the case here.

The Rules of Court strictly regulate sales in execution of immovable property. As stated above, the Sheriff's authority is created and circumscribed by the provisions of Rule 46 of the High Court.

¹⁸ *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at 558 - 559

¹⁹ *Sedibe and Another v Untied Building Society and Another*, 1993 (3) SA 671 (TPD)

²⁰ *Ibid* at 676 D

²¹ *Ivor Properties (Pty) Ltd v Sheriff, Cape Town and Others* 2005 (6) SA 96 (C) at 118G-I

Rule 46 (8) (a) (i) provides –

“The conditions of sale shall, not less than 30 days prior to the date of the sale be prepared by the execution creditor as near as may be in accordance with Form 22 of the First Schedule, and the said conditions shall be submitted to the sheriff conducting the sale to settle them, and the execution creditor shall thereafter supply the deputy-sheriff with 2 copies of the conditions of sale, one of which shall lie for inspection by interested parties at his or her office.”

Form 22 carries the heading: “Conditions of Sale in Execution of Immovables.”

Paragraph 9 thereof reads:

“The property may be taken possession of immediately after payment of the initial deposit, and shall after such deposit be at the risk and profit of the purchaser.” (Own emphasis)

The provisions of paragraph 9 of Form 22 were specifically included in the Conditions of Sale signed by the purchaser.

The position as set out by the excipient in its Heads of Argument is a correct exposition of the common law, in contracts of purchase.²² Reference to the Rules of Court are not taken into account in the exposition.

The Rules of Court

The role played by the Rules of Court, are eloquently stated in The Law of

²² Van der Linden - *Regtsgeleerd Practicaal en Koopmans Handboek*, 1.15.9.

Civil Procedure in High Court of South Africa²³:

“The law of procedure is adjective law and is thus accessory to substantive law, which defines legal rights, duties and remedies. Adjective law deals with the proof and enforcement of rights, duties and remedies.” (Own emphasis).

And further

“A knowledge of substantive law is essential, but will not in itself enable a legal practitioner to secure redress for a client. It does, however, assist in answering three questions which are in their nature preliminary, though, no less fundamental on that account: (1) Does my client have a right? If so, (2) has there been an infringement of that right? (3) What is the remedy – not: Does he have a remedy?”

That the above must be so is because when there is a right there must be a remedy (*ubi ius ibi remedium*).²⁴

It is trite that legislation may modify the common law. The Namibian Constitution explicitly provides for this:²⁵

‘Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.’

It is pointed out that, not only does payment of the initial deposit entitle the

²³ *Herbstein & Van Winsen*, 5th Ed at 3

²⁴ *Minister of Interior & Ano v Harris & Others* 1952 (4) SA 768 (A) at 781

²⁵ Article 66 (2) of the Namibian Constitution

purchaser (plaintiff herein) to possession, but the risk of the property becomes the plaintiff's risk. In order to carry the risk of the property, the purchaser needs to have control of the property and thus the Rules of Court make provision for a purchaser at a sale in execution to be entitled to possession.

The Rules of Court, being (albeit subordinate) legislation, have purposefully made a modification to the common law position relied on by the excipient.

That this is the position in law, was recognised by the Court in as early as 1913:²⁶

"I am of the opinion that it is not the duty of the Sheriff to guarantee possession, but that his duty is confined to seeing that transfer is passed. If there is any difficulty in obtaining possession, the purchaser must take proceedings for ejectment."

The fact that the deputy-sheriff does not act as an agent of anybody but as an executive in law²⁷, implies that the purchaser at a sale in execution, due to the sui generis nature of the contract of sale (embodied by the prescribed Conditions of Sale) must have a right to institute an action against a person who is preventing him from taking possession and controlling his risk in relation to the property.

The fact that the common law does not provide the purchaser with standing to institute vindictory eviction proceedings, cannot stand in the way of a plaintiff who is entitled to possession and risk by way of a right conferred on him by law. In this respect the Court has held, in respect of the purchaser²⁸:

"... the purchaser was entitled to possession in the sense that he was entitled to be considered the new landlord and was entitled to collect the rentals."

This Honourable Court, in dealing with an exception raised in similar circumstances and on the same basis (being lack of locus standi of a purchaser at an auction to sue for eviction), held as follows:²⁹

"As a result, the purchaser having concluded the conditions of sale with the Deputy

²⁶ *Goedhals v Deputy Sheriff of Albany* 1913 CPD 108 at 110

²⁷ *Syfrets Bank Ltd & Othysers v Sheriff of the Supreme Court, Durban Central & Ano* 1997 (1) SA 764 (D) at 773E

²⁸ *Timm v Kay and Another* 1954 (4) SA 585 (T) at 587F

²⁹ *Bonsai Investments Eighty Three (Pty) Ltd v Herta Bertha Waltraut Kögl and Two Others* reported at <http://www.saflii.org/na/cases/NAHC/2011/189.html> - at para [24]

Sheriff, obtained possessory rights in terms thereof, and is perfectly within its rights, to sue for eviction. On that basis the exception cannot succeed.”

It is respectfully submitted that the plaintiff has the necessary standing to sue for the eviction of the first and second defendants.’

ORAL ARGUMENT

[10] Some of Mr. Coleman’s oral argument focused on whether or not the preconditions for the sale, which would operate suspensively, were met. His main argument however focused on the nature of the right acquired by plaintiff, in terms of the conditions of sale. According to Mr. Coleman this was only a personal right which had accrued only *vis a vis* the sheriff and not against the registered owners of the property against which execution was levied. He sought to distinguish the *Bonsai* case from the present situation in that the occupants in the *Bonsai* case were clearly in unlawful occupation of the property i.e. they were trespassing - which was clearly not the situation here - as his clients - the defendants – were always the lawfully registered owners of the property which had been sold at the sale in execution – and that such situation therefore was distinguishable.

[11] In the alternative he submitted that the *Bonsai* case had been wrongly decided.

[12] Mrs. Schneider, on the other hand, countered these submissions by arguing that the principles as set out by the court in the *Goedhals* decision were not applicable to the present matter, that the present case was distinguishable as the conditions of sale in this instance clearly provided that the purchaser - after the payment of the initial deposit – could elect to take possession, which possession would then be at the risk and profit of the purchaser - and that it was this condition which indicated that the plaintiff was entitled to possession. She submitted that her

client was merely enforcing this possessory right which had been afforded to her in terms of the conditions of sale, which right she could also enforce, *vis a vis* the vindicatory rights, of the defendants.

[13] Encouraged by the court's finding, as made in the *Bonsai* case, on which authority she relied in the main, she submitted that the plaintiff's particulars of claim disclosed a valid cause of action – and that it should therefore follow that the defendants' exception was liable to be dismissed with costs.

[14] In reply Mr. Coleman forcefully reiterated that in terms of the conditions of sale the only rights, which had accrued to the plaintiff, were those *vis a vis* the other contracting party, and that such rights which were enforceable against the deputy sheriff, who was the other contracting party in such scenario. These rights, so Mr. Coleman argued, could still be excused way of the remedy of specific performance against him. The obvious further remedy – which had always remained available to plaintiff - was to seek the transfer of the property³⁰ and thereafter the ejectment of the defendants.

THE GOVERNING LEGAL PRINCIPLES – THE NATURE OF THE RIGHT ACQUIRED BY A PURCHASER AT A JUDICIAL SALE IN EXECUTION

[15] In my view the correct applicable legal position has been set out in a number of South African decisions:

- a) *Sedibe and another v United Building Society and another* 1993 (3) SA 671 (T) were Eloff JP³¹ for the Full Bench analysed the position as follows³² :

³⁰ it was common cause between the parties that transfer of the property into plaintiff's name had not yet taken place.

'I find it convenient to commence my discussion of the case by considering the validity of the notion that the sheriff acted as agent of the judgment debtor and that the latter was the true principal. The passage quoted earlier in the SA Permanent³³ case *was an obiter dictum*. *With respect, I do not think that it correctly reflects the position in law. To begin with, no statutory provision that was quoted to us, or which I have been able to find, indicates that the deputy-sheriff acts as the agent of the judgment debtor. The functions of the sheriff are set out in the Rules and the Act and they are mainly the following. First of all, Rule 43(7)(a) says:*

"(a) The conditions of sale shall be prepared by the execution creditor and shall, inter alia, provide for payment by the purchaser of any interest due to a preferent creditor from the date of sale of the property to date of transfer. The execution creditor shall not less than 28 days prior to the appointed date of sale, deliver two copies of the conditions of sale to the messenger and one copy thereof to each person who may be entitled to notice of the sale.

(b) Any interested party may not less than 21 days prior to the appointed date of sale, upon 24 hours' notice to such other persons as may have received a copy of such conditions of sale and to the execution creditor, apply to a judicial officer for a modification of such conditions of sale and such judicial officer may make such order as he may deem just."

Furthermore, Rule 43(8) says the execution creditor may appoint a conveyancer for the purpose of transfer. In Rule 43(10) it is provided:

"The sale shall be by public auction without reserve and the property shall, subject to the provisions of s 66(2) of the Act and to the other conditions of sale, be sold to the highest bidder."

And lastly, as regards the Rules, reference may be made to Rule 43(13):

'The messenger 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 shall be as valid and effectual as if he were the owner of the property.'

Reference might also be made to the Act itself which in s 68(4) and (5) states:

'(4) Whenever, if the sale had not been in execution, it would have been necessary for the execution debtor to endorse a document or to execute a cession in order to pass the property to a purchaser, the messenger may so endorse the document or execute the

³¹ With whom Goldstein J and Myburgh J concurred

³² At p 675B – 676D

³³ *South African Permanent Building Society v Levy* 1959 (1) SA 228 (T)

cession, as to any property sold by him in execution.

(5) The messenger may also, as to immovable property sold by him in execution, do anything necessary to effect registration of transfer. Anything done by the messenger under this subsection or ss (4) shall be as valid and effectual as if he were the execution debtor.'

None of these provisions, to my mind, casts the sheriff in the role of the representative of the judgment debtor. They do not support such a legal fiction as was assumed by Kuper J. Secondly, in a contractual setting, such as that with which we are here concerned, there is no room for the view that the former owners played any role at all. They were merely brought onto the scene by reason of the foreclosure. They had no right to control the course of events and they in fact took no part in the formulation of the conditions of sale.

The fact, stressed in counsel's heads, that the former were at the time of the sale the owners of the property, is irrelevant. It affords no basis for the legal fiction that they were really disposing of the property.

In several decisions it was held that, in performing his functions, the messenger or sheriff does not act as the agent of anybody but as an executive of the law. Reference might in this regard be made to the following: Hill v Van der Byl 1869 Buch 126 at 132; Cyster v Du Toit 1932 CPD 345 at 348; Weeks and Another v Amalgamated Agencies Ltd 1920 AD 218 at 225 and 226; Kathrada Brothers v Findlay & Sullivan 1938 NPD 321 at 329 and 330; Paizes v Phitides 1940 WLD 189 at 191; and, lastly, Phillips v Hughes; Hughes v Maphumulo 1979 (1) SA 225 (N) at 229J-H.

That, in my view, applies with equal force where the messenger disposes of property in pursuance of a sale in execution. When, as part of the process, he commits himself to contractual terms, he does so suo nomine by virtue of his statutory authority; he becomes bound to the terms of the contract in his own name and he may enforce it on his own.

That leads me to the conclusion that the obligation created in casu by clause 5, by which vacua possessio was guaranteed, was that of the sheriff. He had to make good his undertaking and he was answerable ex contractu if he failed to ensure that the appellants obtained undisturbed possession.'

b) This position seems to have been endorsed by Combrink J in:

Syfrets Bank Ltd and others v Sheriff of The Supreme Court, Durban Central,

and another; -Schoerie No v Syfrets Bank Ltd and others 1997 (1) SA 764 D were the learned Judge states³⁴ :

'When the Sheriff attaches and sells the property in execution he does not act as agent of the judgment creditor or the judgment debtor but does so as an executive of the law. See Sedibe and Another v United Building Society and Another 1993 (3) SA 671 (T), where the obiter dictum of Kuper J in South African Permanent Building Society v Levy 1959 (1) SA 228 (T) at 230B to the effect that in a sale of execution the Sheriff acts as a statutory agent on behalf of the judgment debtor, was disavowed as a correct reflection of our law by the Full Bench of the Transvaal Provincial Division per Eloff JP. In Weekes and Another v Amalgamated Agencies Ltd 1920 AD 218 at 225 De Villiers AJA (as he then was) said the following:

"Now the Messenger is an officer of the Court who executes the orders of the Court. V Leeuwen ad Peckium: Deel XXIV 2, says of the Deurwaerders, the Messengers of the Higher Courts (but the principles also apply to Messengers of the Lower Courts): "sunt enim executores, manus regis et ministeriales iudicis." And Voet (V i 62), speaks of them while discharging their functions as representing the Judge "*cujus mandato instructi sunt*". But he points out they are not protected and may be resisted when they either have no mandate or go outside the limits of their authority (*mandati fines*). The duties of the Deurwaerders were very carefully circumscribed in various Placaats. In the Instructie v/d Hove van Holland, etc of 20 August 1531 (Groot Placaatboek II art 91) they were enjoined "*de brieven die aan hen gedirigeerd worden . . . terstond ten versoeke van partije, ter executie stellen na heur vorm en inhouden*". And that still applies today. The writ is the authority of the Messenger for the Attachment, and as all arrests are odious he must at his peril remain strictly within the four corners of the writ (v Leeuwen R-D Law V vi 12).'

As mentioned earlier, the authority of the Sheriff in relation to the sale in execution of immovable property 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 676D)."

c) Also the Western Cape High Court has adopted this position. This appears from its exposition of the applicable position in the Magistrate's Court per Van

³⁴ At p 773E – 774A

Reenen J and Nel J as set out in:

Jaftha v Schoeman & others; Van Rooyen v Stoltz & others [2003] 3 ALL SA 690 at paras [45] – [46]:

“[45] A warrant of execution against immovable property authorizes and requires the sheriff to attach and sell in execution in accordance with the provisions of subsections 62(2) –(8) and section 68 of the Magistrates Court Act and Magistrates Court Rule 43. The Sheriff in attaching and selling immovable property in execution acts as an executive of the law” (see: Sedibe and another v United Building Society and another 1993 (3) SA 671 (T) at 676A-B). An attachment brings about a pignus judiciale which does not affect the judgment debtor’s dominium in the attached property but merely places it in the hands or under the custody of the sheriff (see: Liquidators Union and Rhodesia Wholesale Ltd V Brown & Co’1922 AD 549 at 558-9). A sale in execution of immovable property entails two distinct transactions namely, the sale of the property and the transfer thereof see : (Syfrets Bank Ltd and Others v Sheriff of the Supreme Court 1997 (1) SA 764 (D) at 778A-B). Unless the sheriff in the conditions of sale – which he concludes eo nomine contractually binds himself to the purchaser to do so (see: the Sedibe case {supra} at 676C-D) his duty is to see to it that transfer is passed to the purchaser and not the guaranteeing of vacua possessio. (See:Goedhals v Deputy Sheriff of Albany 1913 CPD 108 at 110).

[46] It is clear from the above that until an immovable property that has been sold in execution has been transferred into the name of the purchaser, the judgment debtor’s ownership therein remains undisturbed as does his or her right, qua owner, to the use thereof. Although the transfer of ownership of such property to the new owner brings about an end to the legal basis of the judgment debtor’s right to the use thereof, the impact of the transfer on such property will depend on the identity of the occupant and the legal basis of his or her occupation. If occupation is by a person other than the judgment debtor in terms of, for instance, a lease or a right of precarium, the transfer of ownership does not bring an automatic end to the right of occupation. In the case of a lease the rule huur gaat voor koop applies and protects a tenant’s continued occupation, subject to the prior rights of any mortgagee. (See: ABSA Bank Ltd v Sweet and others 1993 (1) SA 318 (C) at 324B-F) and, if it is held precario, by application of the principle qui prior est tempore potior est jure, after reasonable notice of termination (see: Adamson v Boshoff and others 1975 (3) SA 221(C))

at 229B). Although after transfer of ownership the purchaser's right to the use thereof, *qua* owner, displaces the judgment debtor's right to do so, the former's use may manifest itself in different ways. The purchaser may want to occupy it personally or permit others to do so in terms of contractual or other arrangements that need not necessarily exclude the judgment debtor. The judgment debtor, once the legal basis for his or her occupation of an immovable property namely, his or her dominium therein, has come to an end has a choice. He or she may elect to vacate the property voluntarily or simply continue to occupy it without having entered into any contractual or other arrangements with the purchaser. In the event of the former, the loss of access to housing in respect of the particular residential unit is the result of a volitional act on the part of the judgment debtor and not the execution process. In the event of the latter, there will be a holding over by the judgment debtor, in which case the new owner will be obliged to institute legal proceedings for the eviction of the judgment debtor. Similarly a sheriff who has contractually bound himself to provide *vacua possessio*, will have to institute eviction proceedings. In such proceedings the substantive and procedural requirements of the PIE Act will "have to be complied with. Accordingly, if the judgment debtor is evicted from immovable property that constitutes his or her home and in the process is deprived of the right of access to that particular residential unit, such eviction will not have been brought about by the execution process but by separate legal proceedings instituted by the new owner based on a *causa* totally independent of the proceedings pursuant to which the execution had taken place ...".

- d) Van Reenen J reiterated this position subsequently – while considering the *locus standi* of the Sheriff to enforce the conditions of a sale in execution - in :

Ivoral Properties (Pty) Ltd v Sheriff, Cape Town, and others 2005 (6) SA 96 (C)

when the Court stated :

[65] Did the first respondent possess the power and authority to have instituted proceedings against the fourth respondent for the enforcement of the conditions of sale?

[66] A Sheriff may not sell immovable property attached pursuant to a duly issued writ of execution otherwise than by way of a public auction and his authority is created and

circumscribed by the provisions of Uniform Rule 46 (see Schoerie NO v Syfrets Bank Ltd and Others 1997 (1) SA 764 (D) at 771G; 773J - 774A). When a Sheriff disposes of property in pursuance of a sale in execution he acts as an 'executive of the law' and not as an agent of any person. When a Sheriff, as part of the execution process, commits himself to the terms of the conditions of sale, he, by virtue of his statutory authority, does so in his own name and may also enforce it on his own (see Sedibe and Another v United Building Society and Another 1993 (3) SA 671 (T) at 676A - C). A sale in execution of immovable property entails two distinct transactions namely, the sale itself and the passing of transfer pursuant thereto (see Schoerie NO v Syfrets Bank Ltd (supra) at 778A - B). Although Uniform Rule 46 does not specifically empower a Sheriff to institute proceedings in order to enforce the contract embodied in the conditions of sale, such power is implicit in the duty to see that transfer is passed and the provisions of Uniform Rule 46(13) which impose an obligation upon him to do anything necessary to effect registration of transfer. If that were not so the Sheriff's only remedy, in the event of a purchaser failing to carry out any of his or her obligations under the conditions of sale, would be to approach a Judge in Chambers for the cancellation thereof in terms of Uniform Rule 46(11) and would allow recalcitrant purchasers at sales in execution to avoid their obligations almost with impunity.

[67] I accordingly incline to the view that the first respondent did have the power and authority to institute proceedings against the fourth respondent to enforce compliance with the terms of the conditions of sale.'

[16] It appears from the above cited case law that the here applicable legal position has been set out in a number of South African decisions. The South African cases reflect a thorough analysis of the applicable authorities and – in the absence of any applicable reported Namibian case law – save for the abovementioned Bonsai case – to which I will return - I can find no reason not to follow these authorities which I accordingly adopt.

THE IMPACT OF THESE PRINCIPLES ON THE EXCEPTION

[17] Having said this, it follows that it is the Deputy – Sheriff – as executive of the law³⁵ – that concludes the agreement of sale with a purchaser at a judicial sale in execution. The Sheriff and the purchaser are the parties to such agreement – which is then – in accordance with the normally applicable legal principles – enforceable

³⁵ *Sedibe & AnO v United Building Society & Ano* 1993 (3) SA 671 (T) at 675B-676D - *Syfrets Bank Ltd & Others v Sheriff of the Supreme Court, Durban Central, & Ano* - 1997 (1) SA 764 D at 773 E

between these contracting parties.

[18] If it is the Deputy- Sheriff who has contractually bound himself to provide *vacua possessio* of a property sold in execution, the purchaser has clearly acquired such a right directly only *vis a vis* the Sheriff. This right may obviously be enforced, on the one hand, by the purchaser against the Sheriff. On the other it also follows that it is the Deputy- Sheriff that will have to institute eviction proceedings, if the underlying legal position allows this and the contractual framework provides for this.

[19] This he may do by virtue of his implicit statutory authority, in his own name.³⁶

[20] It also seems correct that a sale in execution of immovable property entails two distinct transactions³⁷ namely, the sale itself and the passing of transfer pursuant thereto. Although Uniform Rule 46 does not specifically empower a Sheriff to institute proceedings in order to enforce the contract embodied in the conditions of sale, such power is implicit in the duty to see that transfer is passed and in the provisions of Uniform Rule 46(13), which impose an obligation upon him to do anything necessary to effect registration of transfer³⁸. By that same token it is implicit that the Sheriff must also have the power to institute or defend proceedings in regard to the enforcement of any of the other remaining terms of such a contract of sale.

[21] In terms of the cited case law, no such direct right is afforded to the purchaser of an immovable property pursuant to a sale in execution prior to transfer. This is not surprising given the underlying legal position – which I have accepted as correct – and which is to the effect that ‘until an immovable property

³⁶ *Ivorl Properties (PTY) LTD v Sheriff, Cape Town, & Others* 2005 (6) SA 96 (C) at para [66]

³⁷ *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* [2003] 3 ALL SA 690 at para [45]

³⁸ *Ivorl Properties (PTY) LTD v Sheriff, Cape Town, & Others* 2005 (6) SA 96 (C) at para [66]

that has been sold in execution has been transferred into the name of the purchaser, the judgment debtor's ownership therein remains undisturbed as does his or her right, qua owner, to the use thereof. Only the transfer of ownership of such property to the new owner brings about an end to the legal basis of the judgment debtor's right to the use and ownership thereof - the impact of the transfer on such property will however depend on the identity of the occupant and the legal basis of his or her occupation.³⁹

[22] As – on the facts of this matter - the defendants' rights of ownership in Erf 103, Green Street, Nossobville, Gobabis – remained undisturbed⁴⁰ – the defendants remain entitled to the use thereof – until such time that they elect to voluntarily vacate such property, or until such time that they are lawfully evicted by the plaintiff, once the plaintiff has become the registered owner of Erf 103, which registration then – by operation of the law – would by then have brought about an end to the defendants' legal right of ownership and occupation.

[23] It follows that in such event the defendants' eviction would then also not have been brought about by the execution process direct but by separate legal proceedings, instituted by the new owner, based on a *causa* totally independent of the proceedings, pursuant to which the execution had taken place ... “. The purchaser does indeed then have a right to institute an action against a person who is unlawfully preventing him from taking possession. This right however accrues only in the circumstances mentioned above.

[24] In such scenario it appears that Mrs Schneider's blanket submission – to the effect that 'the purchaser must have a right to institute an action *against a person who is preventing him from taking possession and controlling his risk in relation to the property*' – in the context of this matter - is simply too wide as it is qualified by

³⁹ *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* [2003] 3 ALL SA 690 at para [46]

⁴⁰ The plaintiff not yet having taken transfer of the property

the applicable legal position in terms of which a purchaser may thus indeed have a right to institute such an action – depending on the circumstances through the medium of the Deputy-Sheriff. A purchaser is thus also not altogether without remedy – as was submitted further - as it has appeared - for example – that prior to the taking of transfer – such possessory remedies would be contractually confined – which remedy – subsequent to the taking of transfer would then have been transformed into vindicatory rights by virtue of the passing of ownership.

[25] It also follows that – contrary to Mrs Schneider’s further submissions relating to the plaintiff’s *locus standi* – that the law does indeed confer standing on a purchaser in certain circumstances to institute eviction proceedings prior to transfer via the Sheriff, and – if transfer has been given – and a tenant remains in occupation – the purchaser will indeed be considered the new landlord, and have *locus standi* in that capacity, for instance.

THE ARGUMENT RESTING ON THE ‘BONSAI INVESTMENTS’ CASE

[26] In that case the Court upheld Mrs Schneider’s submissions to the effect that in terms of the same particular term of the underlying sale in execution⁴¹ ‘ ... *immediate possession was granted to the plaintiff by the Deputy Sheriff at the sale in execution*’⁴²

[27] The following observations can however not be reconciled with this finding:

- a) no immediate or absolute right to possession is expressly or impliedly

⁴¹ “the property may be taken possession of immediately after payment of the initial deposit and shall after such deposit be at the risk and profit of the purchaser”.

⁴² At page 7 – para 22 of the judgment

created by the particular contractual term – it only affords the purchaser a possibility to take possession – so much is indicated by the word ‘may’;

the right having been created *ex contractu* – is clearly enforceable between the contracting parties – ie. *vis a vis* the Deputy Sheriff only – and in certain circumstances by the Deputy Sheriff, on the strength of his implicit authority against a third party;

the term also imposes a condition precedent – which will first have to be met – ie the payment of the deposit;

implicit in such term – and thus impacting thereon - will always be the residual terms - imposed thereon - by operation of the applicable law;

this means that possession ‘may’ only be taken in the limited circumstances authorized by law – ie. if the registered owners have, for instance, voluntarily vacated the property; or

by that same token this means in the converse – that if the judgment debtor’s dominium – and the legal basis for his or her occupation of the property - has not yet been terminated by operation of the law, ie. through transfer into the purchaser’s name – the purchaser ‘may’ also not take possession until such time that he or she has become entitled to *vacuo possessio*; or

were an occupant, such as a tenant remains in lawful occupation – the purchaser ‘may’ obviously – and despite transfer – also not take possession by virtue of the principle ‘*huur gaat voor koop*’; for instance.

[28] It appears therefore that the finding in the *Bonsai* matter, that the contractual term in question provides – ‘... that contractually immediate possession was granted to the plaintiff’ - cannot be correct as a general statement.

[29] I also respectfully beg to differ with the learned judge in the *Bonsai matter* – para [24]⁴³ - were she comes to the conclusion that the purchaser obtained possessory rights in terms of the contract that was concluded with the sheriff which rights were enforceable directly against the occupants of the property in question –

⁴³ “As a result, the purchaser having concluded the conditions of sale with the Deputy Sheriff, obtained possessory rights in terms thereof, and is perfectly within its rights, to sue for eviction. On that basis the exception cannot succeed.”

as in my view - if any possessory rights were acquired by the plaintiff in the Bonsai case – such rights were not acquired *vis a vis* the defendants there – but were contractual rights acquired *vis a vis* the Deputy- Sheriff, through which possession might be acquired through the means of the Deputy – Sheriff in the same manner as the Sheriff would be obliged to see to it that transfer would be passed to the purchaser.

[30] For these reasons I consider myself not bound to follow the Bonsai case.

[31] In the final equation I conclude therefore that the plaintiff's action in this matter was ultimately ill-conceived on two scores – it was firstly misdirected *vis a vis* the defendants, on contractual grounds – and secondly - it was simply premature - given the fact that transfer had not yet been taken.

[32] In the premises the exception is upheld with costs, such costs to include the costs of one instructed and one instruction counsel.

LEAVE TO AMEND?

[33] As a matter of general practice the Courts, upon the upholding of an exception, tend to grant leave to amend to the relevant party 'if so advised'⁴⁴.

[34] Mr Coleman has submitted that the plaintiff's claim is beyond redemption and that the Court should thus outright dismiss the plaintiff's action.

⁴⁴ See for instance : *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works & Land Affairs)* 1991 (3) SA 787 (T) at 794 A - B

[35] Mrs Schneider on the other hand has requested an opportunity to consider an appropriate amendment.

[36] Although there may be merit in Mr Coleman's submission I consider it unfair not to afford the plaintiff the opportunity sought.

[37] Accordingly I grant the plaintiff leave to amend the particulars of her claim – within 15 days of the delivery of this judgment – if so advised, - failing which the defendants are granted leave to apply for the dismissal of the plaintiff's action within 15 days of the expiry of the aforesaid 15 day period afforded to the plaintiff.

H GEIER
Judge

APPEARANCES

PLAINTIFF:

H SCHNEIDER

Instructed by Van der Merwe-Greeff

Incorporated, Windhoek.

FIRST and SECOND

DEFENDANTS: G B COLEMAN

Instructed by AngulaColeman, Windhoek