

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
RULING
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK

Case Title: STANDARD BANK OF NAMIBIA LIMITED // WILLEM JOHANNES GROENEWALD & 3 OTHERS	Case No: I 633/2016
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE-PRESIDENT	Date of hearing: 16 MAY 2023
	Delivered on: 6 JUNE 2023

Neutral citation: *Standard Bank Namibia Limited v Groenewald* (I 633/2016) [2023] NAHCMD 296 (6 June 2023)

The order:

Having heard Ms Kuzeeko, on behalf of the judgment creditor and Ms Shikongo, on behalf of the purchaser and having read the documents filed of record:

IT IS ORDERED THAT:

1. The sale in execution of Farm Janine No. 365, situated in Kunene Region which took place on 19 June 2019 is hereby cancelled.
2. The Deputy Sheriff for the District of Outjo is ordered to refund the amount of N\$711 000 to the purchaser, Ms Katrina Shimbulu.
3. The purchaser is to vacate Farm Janine No. 365, within 30 days from date of this order failing which the Deputy Sheriff is hereby authorised to take such steps as are necessary to evict the purchaser from Farm Janine No. 365 failing which the Deputy Sheriff is authorised to seek the assistance of the members of the Namibian Police Force who are hereby directed to render assistance to the Deputy Sheriff.
4. No order as to costs.

5. The matter is finalised and is removed from the roll.

Following below are the reasons for the above order:

Introduction

[1] This is an application in which the Deputy Sheriff for the District of Outjo ('the Deputy Sheriff') seeks an order for the cancellation of the sale in execution of Farm Janine No. 365, situated in the Kunene Region ('the property') held on 19 June 2019. The property was sold for N\$4 600 000 to Ms Katrina Shimbulu ('the Purchaser').

[2] In addition the Deputy Sheriff seeks an order ejecting the Purchaser from the property.

[3] It is necessary to point out that when a Deputy Sheriff sells property at a sale in execution, he or she does not act as the agent of the seller or the Purchaser. At a public auction, a sale agreement comes into existence between the Deputy Sheriff and the Purchaser and a fall of the hammer. The judgment creditor is not a party to the sales agreement. The obligation to deliver the property to the Purchaser remains with the Deputy Sheriff and the Purchaser's obligation to pay the purchase price is enforceable by the Deputy Sheriff and not the judgment creditor.¹

[4] I deemed it necessary to explain the relationship between the parties due to the judgment creditor through its legal practitioner participating in this proceedings. I took the view that, the reason the judgment creditor, so to speak, joined the fray was merely to place relevant facts and legal arguments before court to ultimately assist the court in the determination of this matter.

[5] The judgment creditor was represented by Ms Kuzeeko, it is not clear from the papers whether Ms Kuzeeko also represented the Deputy Sheriff. Initially, the Purchaser was represented by Mr Shimutwikeneni, but he withdrew, thereafter Ms Shikongo, came on record to represent the Purchaser.

Background

¹ Herbstein & Van Winsen. 2016. The Civil Practice of the High Court of South Africa. Cape Town: Juta & Co., p 1075.

[6] The history of this matter is a protracted one, as such I will only consider those facts which are necessary for the determination of this application.

[7] Subsequent to the sale in execution of the property which took place on 19 June 2019 at Outjo, the Purchaser and the Deputy Sheriff concluded a written sale agreement in terms whereof the Purchaser purchased the property from the Deputy Sheriff at a public auction. The material terms of the agreement were as follows:

6. a. The purchaser shall pay the purchase price and any other related fees to the Deputy Sheriff upon a waiver being successfully obtained, in cash on the day of obtaining the said waiver, or to be secured by a bank or building society guarantee, to be approved by Plaintiff's attorneys, to be furnished to the Deputy-Sheriff within 14 days after the date of obtaining the waiver. Thus, the sale will be of force and effect upon a waiver being issued.
 - b. The purchaser agrees to pay to the Plaintiff interest calculated and capitalized monthly at the rate of 20 per cent per annum. The said interest is to run from 30 days after the date of obtaining the waiver, until the date when the property hereby sold in execution, is transferred into the name of the purchaser or when the full purchase price has been paid in cash to the Plaintiff.
 - c. The day after the sale in execution of the property hereby, the Deputy Sheriff of OUTJO must apply for a waiver in terms of the Agricultural Land Reform Act, as amended.
7. If the purchaser fails to carry out any of his/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/her default, which loss may, on application of any aggrieved creditor whose name appears on the Deputy-Sheriff's distribution account, be recovered from him under judgment of a 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 a judge for such purpose; and if he/she is already in possession of the property, the Deputy Sheriff may, on seven days' notice, apply to a judge for an order ejecting him/her or any person claiming to hold under him/her therefrom.
8. The purchaser shall pay the auctioneer's charges on the day of sale and in addition,

transfer duties, costs of transfer, and arrear rates, taxes and any other charges necessary to effect, transfer upon request by the attorney for the execution creditor. The purchaser shall re-imburse the amount of N\$16 163.01 which the Plaintiff has already paid for Land Tax.

9. Purchaser shall take possession on date of obtaining the waiver and payment of the full purchase price, which date the risk pertaining to the property shall pass to him/her.

[8] It is common cause that the Minister of Agriculture, Water and Land Reform issued a waiver to the Deputy Sheriff on 23 October 2019. As a consequence the purchase price and all other related fees payable to the Deputy Sheriff became due and. On 11 November 2019, the Deputy Sheriff issued an invoice to the Purchaser for his fees. Despite being due on the date of waiver (23 October 2019), the Purchaser only paid the invoice, in instalments as follows: N\$331 000 paid on 8 February 2020; N\$200 000 paid on 26 February 2020, N\$70 000 paid on 11 May 2020 and N\$60 000 paid on 11 June 2020.

[9] It is further common cause that the Purchaser has failed to deliver the guarantee as required by clause 6(a) of the sale agreement within 14 days from the date the waiver was obtained by the Deputy Sheriff.

[10] The Deputy Sheriff granted the Purchaser multiple indulgences including applying for extension of the waiver to enable the Purchaser to secure the loan from a financial institution. After the original waiver had lapsed the Deputy Sheriff applied for a further new waiver which was granted on 20 October 2020 and was valid for a period of one year.

[11] Between the periods of August 2020 to October 2021, the Purchaser was equally granted various opportunities to provide the requisite guarantee from a financial institution particularly from Agribank Namibia and has to date failed to do so. In her papers before court the Purchaser blames Agribank Namibia for her failure to comply with the terms of the sale agreement.²

[12] Despite her failure to furnish the requisite guarantee, the Purchaser took possession of the property and is still occupying the property. It is for this reason that the Deputy Sheriff seeks an eviction order from the property.

[13] On 8 June 2021, the legal practitioner for the judgment creditor addressed a letter of

² Purchaser's opposing Affidavit, para 14.

demand to the Purchaser demanding that she complies with the conditions of sale within 14 days from the date of the letter.

[14] The letter further informed Purchaser that should she fail to heed to the demand, the sale will be cancelled. The Purchaser did not comply with the demand. On 21 October 2022, the Deputy Sheriff served a notice in terms of rule 110(10) on the Purchaser to cancel the sale in execution on the basis that the conditions of sale were not complied with. A further notice in terms of rule 110(10) was filed on 10 November 2022 and that is the notice serving before me, advising the Purchaser of the Deputy Sheriff's intention to cancel the sale agreement.

[15] The notice in terms of rule 110(10) is opposed by the Purchaser and accordingly the matter was moved from chambers to an open court.

Purchaser's case

[16] Before I set out the Purchaser's case, I should mention that before this application was set down for hearing, both the judgment creditor and the Purchaser were ordered to file heads of arguments. When this application was then called for hearing on 16 May 2023, it was only the legal practitioner for the judgment creditor who had filed heads of argument. The legal practitioner for the Purchaser, Ms Shikongo, indicated that she opted not to file heads and would abide by the Purchaser's opposing affidavit filed of record. As such no oral submissions were advanced by the legal practitioner for the Purchaser to resist the relief sought by the Deputy Sheriff.

[17] The Purchaser opposed the cancellation of the sale in execution and in her opposing affidavit she raised points *in limine*, firstly, relating to the failure by the Deputy Sheriff to serve the rule 110(10) report on her as contemplated by the rules of court.

[18] In my view there is no merit in this so called point *in limine*. The report was brought to the attention of the Purchaser and the Purchaser was able to file opposing papers.

[19] Secondly, the Purchaser contended that before applying for ejectment, the Deputy Sheriff was obliged to give 10 days' notice to the Purchaser in terms of rule 110(14) and 78 days' notice in terms of the sale agreement. The Purchaser strongly stated that she did not receive any notice and as such the report is not properly before court and should be

dismissed with costs. This aspect will be dealt with later in this judgment.

[20] The Purchaser's main opposition on the merits was premised on the fact that she instituted legal proceedings under case number HC-MD-CIV-ACT-CON-2022/00854 against the judgment creditor and the Deputy Sheriff, which is pending before court, in which she seeks the following relief.

- (a) An order declaring that the agreement entered into between her and the Deputy Sheriff on 19 June 2019 be regarded as valid and binding between the parties.
- (b) An order setting aside any subsequent agreement(s) of sale in respect of the property concluded after the 19 June 2019.
- (c) An alternative claim for payment in the amount of N\$711 000.00.

[21] In short, the Purchaser challenges the cancellation of the sale on the basis that a similar issue is already under judicial consideration (*lis pendens*) before court. The Purchaser also alleges that the report filed in terms of rule 110(10) is vague and does not indicate how she failed to comply with the conditions of sale. Case No. HC-MD-CIV-ACT-CON-2022/00854 is under case management before Parker AJ.

Issue for determination

[22] It would appear to me that there are three issues that the court is called upon to determine. Firstly, whether the plea of *lis pendens* finds application in the present matter. Secondly, whether the Deputy Sheriff is entitled to cancel the sale in execution of the property held on 19 June 2019. And lastly, whether the Deputy Sheriff is entitled to an order ejecting the Purchaser from the property.

[23] Does a plea of *lis pendens* find application to the present matter? As indicated above, the Purchaser main opposition was that there is a similar matter serving before court where the parties and the cause of action is the same, as in the present matter.

[24] In *Schuetze v Schuetze*, this court stated the following regarding the plea of *lis pendens*:

'[14] The requirements for the plea of *lis pendens* in terms of the law are these: there must be pending litigations; between the same parties or their privies; based on the same cause of action; and in respect of the same subject-matter, but this does not mean the form of relief claimed in both proceedings must be identical. The plea of *lis pendens* is not absolute. This means that even if it is found that the requirements have been met, the court has a discretion to allow an action to continue should that be considered just and equitable in the circumstances, despite the earlier institution of the same action.'

[25] In the present matter, the Deputy Sheriff seeks cancellation of the sale agreement concluded with the Purchaser on 19 June 2019, while in the action under case number HC-MD-CIV-ACT-CON-2022/00854, the Purchaser seeks an order declaring that very same agreement to be valid and binding, alternatively payment of N\$711 000 which was paid in an attempt to satisfy the purchase price. In my view the claims are not based on the same cause of action. In the one case, the cause of action is for the cancellation of the sale agreement due to the Purchaser's breach to pay the purchase price. In the other case, the Purchaser is seeking a declarator that the sale agreement concluded on 19 June 2019 is valid while admitting that she failed to pay the purchase price.

[26] In addition the parties in case number HC-MD-CIV-ACT-CON-2022/00854 are not the same as the parties in the present matter. In that matter, other defendants have been cited apart from the Deputy Sheriff. It follows thus that two of the requirements of a plea of *lis pendens* have not been met.

[27] Furthermore, what the Purchaser fails to appreciate is that the sale agreement concluded with the Deputy Sheriff on 19 June 2019 is valid and binding but due to the Purchaser's breach the Deputy Sheriff is forced to seek its cancellation under rule 110(10). Even if the requirements for a plea of *lis pendens* had been met, in the exercise of my discretion, I do not consider it just and equitable to uphold the plea.

[28] I thus considered it to be just and equitable that the point of *lis pendens* falls to be dismissed, in this circumstances.

The law on rule 110(10) and (14)

[29] Rule 110(10) of the rules of this court provides that:

'If the purchaser fails to carry out any of his or her obligations under the conditions of sale a judge may, on the report of the deputy-sheriff after due notice to the purchaser, summarily cancel the sale and the property may again be put up for sale.'

[30] On the other hand, rule 110(14) provides that:

'If the purchaser is already in possession of the property, the deputy-sheriff may, on 10 days' notice to the purchaser, apply to a judge for an order ejecting him or her or any person claiming to hold under him or her, from the property.'

[31] The overall guidance to this court in determining applications brought under rule 110 is the need to expedite proceedings in the interests of the judgment creditor and other interested parties.

[32] Considering the above, it is evident that all the information relevant to the cancellation of the sale agreement and subsequent ejectment should be placed before the court so as to avoid causing prejudice to the judgment creditor and/or any other interested party.

[33] Taking those factors and considerations into account, I proceed to deal with the remaining two issues.

Is the Deputy Sheriff entitled to cancel the sale in execution?

[34] It should be borne in mind that a valid agreement of sale comes into being at a sale in execution at the fall of the hammer on the terms and conditions set out in the conditions of sale which are displayed, pronounced or read out by the Deputy Sheriff, who is the auctioneer. The purpose of the signing of the conditions of sale is to record and have certainty of the oral contract and its contents, as concluded by the auction sale, and to ensure that the Deputy Sheriff and the Purchaser are bound thereto by reason of their signatures.³

[35] In the present matter, the Purchaser and the Deputy Sheriff duly concluded an agreement of sale on 19 June 2019. The waiver by the Government to allow the property which is agricultural land to be sold to the Purchaser, was issued on 23 October 2019, as a

³ See: *Schuurman v Davey* [1908 TS 664](#) at 668; *De Villiers v Parys Town Council* 1910 OPD 55 at 58; *Estate Francis v Landsales (Pty) Ltd and Others* 1940 NPD 441 at 457; *Clerke v CP Perks and Son* 1965(3) SA 397 (ECD) at 400 C.

consequence, the purchase price and any other related fees to the Deputy Sheriff became due and payable.

[36] The Purchaser similarly on her own version concedes that she did not comply with the conditions of sale because Agribank Namibia has been delaying the disbursement of the loan to her and has to date not given any written response.⁴ It is almost three years since the sale transaction took place.

[37] The Purchaser has only those rights that are to be found within the four corners of the sale agreement. If the guarantees are late, even though the purchaser might be blameless, there is no legal basis upon which to challenge the right of election vested in the Deputy Sheriff in clause 7 of the sale agreement to apply for cancellation of the sale to a judge in chambers. In any ordinary contract, a provision vesting a right to cancel upon the happening or no-happening of a specified event by a stipulated date is not susceptible to challenge. The election is not a breach of the contract. The mantle of judicial supervision over a sale in execution and its cancellation does not create more or better rights for the defaulting Purchaser.⁵

[38] The Purchaser conceded that she failed to comply with the conditions of sale. The breach is evident, as such the Purchaser cannot seek to challenge the right of the Deputy Sheriff to cancel the sale in execution. Accordingly, the Purchaser's challenge to the Deputy Sheriff action in this regard is dismissed.

Is the Deputy Sheriff entitled to ejectment?

[39] The Purchaser raised a *point in limine* that she has not been given 10 days' notice by the Deputy Sheriff before the latter applying for ejectment as per rule 110(14).

[40] In this regard, I earlier referred to *Maletzky* (supra) where the court held that that the fundamental purpose of service is after all to bring the matter to the attention of a party. As indicated above this matter was brought to the attention of the Purchaser and the Purchaser appeared before court and also filed opposing papers. The Purchaser, however, failed to place facts upon which she resists the ejectment order sought by the Deputy Sheriff.

⁴ Paragraph 11 and 14 of the Purchaser's opposing affidavit.

⁵ *Standard Bank of South Africa v Ndlovu* 2012 JDR 0524 (GSJ).

[41] The overriding objective of this court is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively. It is clear that the Purchaser is not interested in having the dispute disposed of in compliance with the overriding objectives, else she would have stated her defence in respect of the Deputy Sheriff's application for ejection.

[42] Similarly, it appears *ex facie* on the conditions of sale that the Purchaser is in unlawful possession and occupation of the property. I say so, because clause 9 of the conditions of sale provides that 'the Purchaser shall take possession on date of obtaining the waiver and payment of the full purchase price, which date the risk pertaining to the property shall pass to him or her.' Clearly after obtaining the waiver, the full purchase price has to date not been paid.

[43] Rule 110(14) provides that the Deputy Sheriff may, on 10 days' notice to the Purchaser, apply to a Judge for an order ejecting a Purchaser who took possession of a property pursuant to a sale in execution but failed to comply with the conditions of sale. The term 'apply' does not contemplate an application-type procedure, and, save in the case of opposition by the Purchaser, or possibly some exceptional situation which may require it.

[44] In the present matter, no facts have been put forward by the Purchaser as to how or why she took occupation of the property despite failing to comply with clause 9 of the conditions of sale and despite this court affording her an opportunity to do so.

[45] Having regard to the facts and consideration above, I am of the considered view that the Deputy Sheriff is entitled to an order ejecting the Purchaser from the property.

Conclusion and Costs

[46] The normally rule is that costs follow the event. As indicated earlier in this judgment, the judgment creditor was represented by Ms Kuzeeko. It is not clear from the papers whether Ms Kuzeeko also represented the Deputy Sheriff. As much as the court is appreciative of Ms Kuzeeko's assistance, I am not satisfied that she is entitled to any costs for the reason that the dispute was between the Purchaser and the Deputy Sheriff.

[47] Furthermore, the rule 110(10) and (14) does not envisage the need for the Deputy

Sheriff to engage legal practitioner in bringing a process of this nature, and therefore there will be no costs order.⁶

Judge's signature:	Note to the parties:
	Not applicable.
Counsel:	
Plaintiff	Purchaser
M KUZEEKO of Dr Weder, Kauta & Hoveka Inc., Windhoek	L SHIKONGO of Metcalf Beukes Attorneys, Windhoek

⁶ *Sheriff of the High Court of Johannesburg v Sithole and Three Similar Cases* 2013 (3) SA 168.