

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Number: HC-MD-CIV-MOT-REV-2022/00359

In the matter between:

HANUS PROPERTIES AND CONSULTANTS CC
HAROLD ARTHUR VON LÜTTICHOU

1st APPLICANT
2nd APPLICANT

and

**THE DEPUTY-SHERIFF FOR THE DISTRICT OF
SWAKOPMUND**
STANDARD BANK NAMIBIA LIMITED
CONROY MOUTON
THE REGISTRAR OF DEEDS
THE REGISTRAR OF THE HIGH COURT OF NAMIBIA

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT
5th RESPONDENT

Neutral citation: *Hanus Properties and Consultants CC v The Deputy Sheriff for the District of Swakopmund (HC-MD-CIV-MOT-REV-2022/00359)*

[2023] 646 (13 October 2023)

Coram: PRINSLOO J

Heard: 7 June 2023

Delivered: 13 October 2023

Flynote: Review application – Rule 76 – Writ of execution executed by deputy sheriff in respect of immovable property – Actions of the deputy sheriff not susceptible to review in terms of rule 76 of the Rules of Court – Point in limine upheld.

Rules of Court – Rule 110 – Rules for procedure of sale of immovable property – Strict compliance with rule 110(10) – Rule 112 – Superannuation.

Summary: The applicants seek to review and set aside the sales in execution held by the deputy sheriff of Swakopmund on 24 March 2022 and 12 July 2022 in respect of erf no. 2277, extension 8, no. 78 Turmaline Street, Hage Heights, Swakopmund. The applicants further seek to review and set aside the registration of the transfer of the immovable property and the steps associated thereto. Standard Bank is the only respondent who opposes the review application filed by the applicants.

Held that the actions of the deputy-sheriff do not fall within the purview of rule 76 and are not susceptible to review and the point in limine is upheld.

Held that the court order, declaring the immovable property executable is of full force and effect, as there was no application to have that order set aside by a court of competent jurisdiction.

Held that there was no reason to superannuate the judgment as required by rule 112(1) because once a writ of execution of a judgment has been issued, it remains in force and may be executed without being renewed as contemplated in rule 112(3).

Held that a public auction concerns not the place of the auction but the authority by which the sale is held and there can be no doubt regarding the latter.

Held that the applicants did not avail any authority to this court fortifying their submission that the failure of the bidder to be physically present at the auction would impede the integrity of the process.

Held that in the current instance, there was a valid agreement of sale in respect of the first sale and that sale had to be set aside in order to proceed with a resale.

Held that the discretion whether to cancel the sale or not lies with the judge to whom the report is submitted for consideration.

Held that rule 110(3) does not provide that the publications must be done in local newspapers but instead provides for the publication in two suitable newspapers circulating in the district in which the property is situated.

Held that the national newspapers wherein the publications were done are suitable newspapers with a much broader base of readers than what a local newspaper at the coast would have.

Held further that having a forum on an electronic platform advising potential bidders is aimed at broadening the basis of potential buyers.

Held that there was substantive compliance with the rules regarding publication and the WhatsApp group was over and above the publications. The validity of the sale in execution was not reliant on the publication of an electronic platform and therefore, the complaint directed at the conduct of the deputy-sheriff in this regard is without merit.

ORDER

1. The review relief and alternative relief sought by the applicants are dismissed.
 2. The applicants are ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed counsel.
 3. The matter is regarded as finalised and removed from the roll.
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JUDGMENT

PRINSLOO J:

Introduction

[1] The matter came before me on an urgent basis on 11 August 2022 when the applicants, Hanus Properties and Consultancies CC (Hanus Properties) and Mr Harold Arthur Von Lüttichou (Mr Von Lüttichou) sought an order interdicting the first and third respondents from transferring, and registering the immovable property situated at Erf 2277, Extension 8, No 78 Turmaline Street, Hage Heights, Swakopmund, pending the finalisation of Part B of the Notice of Motion.

[2] The respondents in these proceedings are as follows:

- a) The first respondent is the deputy-sheriff for the District of Swakopmund (the deputy-sheriff), appointed in terms of s 30 of the High Court Act 19 of 1990;
- b) The second respondent is Standard Bank Namibia Limited (Standard Bank), a registered commercial bank and public company with limited liability, duly incorporated as such, with its head office in Chasie Street, Windhoek;
- c) The third respondent is Conroy Mouton (Mr Mouton), an adult male residing in Swakopmund;
- d) The fourth respondent is the Registrar of Deeds, appointed in accordance with s 2 of the Deed Registries Act 47 of 1937, with his offices situated at 45 Robert Mugabe Street, Windhoek;
- e) The fifth respondent is the Registrar of the High Court, appointed in terms of s 30 of the High Court Act 16 of 1990, with her offices at the High Court Building, c/o Judge JP Karuaihe Street and John Meinert Street, Windhoek. No relief was sought in respect of this respondent.

[3] Only Standard Bank opposed the application by the applicants. The deputy-sheriff and Mr Mouton did not oppose the application but took part in the proceedings scheduled for 11 August 2022.

[4] During the appearance on 11 August 2022, an agreement which was recorded in the following terms was concluded:

'As per Part A of the Notice of Motion:

1. That the non-compliance with rules of the High Court of Namibia relating to forms and service is hereby condoned as is envisaged in Rule 73(3) of the aforesaid rules and that the application is heard as a matter of urgency.
2. Pending the final determination of Part B in this application, the third respondent is hereby interdicted and restrained from causing the property situated at Erf no 2277 Swakopmund, Extension 8, in the Municipality of Swakopmund, Registration Division "G", held by Title Deed No T863/1975 ("the property") to be transferred to and registered in the name of any other third party.
3. Any agreement which may encumber the property, will be subject to the rights of the registered owner of the property at all material times, and any change in ownership shall result in automatic substitution of said owner with the signatory of the agreement. Further, any such agreement shall contain a termination clause in favour of the rights of the owner at the time to terminate same upon one (1) month's written notice, and this court order shall be annexed to such agreement.
4. Costs to be determined with the relief set out in Part B of this application.'

Background

[5] As indicated, above this matter concerns immovable property situated at Erf no. 2277, Extension 8, Swakopmund (the immovable property).

[6] Mr Von Lüttichou, the sole member of Hanus Properties, caused the property to be bought and registered in the name of Hanus Properties. This immovable property was transferred in the name of Hanus Properties on 14 August 2000. The purchasing of

the property was financed through Standard Bank. The title deed was registered in the name of Hanus Properties under T4928/2000 on 29 August 2000.

[7] The original loan was repaid. However, over the years, Mr Von Lüttichou borrowed money against the property and fell into arrears with the payments on the instalments. This resulted in Standard Bank issuing summons against the applicants under case number I 2970/2015, and Standard Bank obtained default judgment against the applicants on 22 June 2016.

[8] On 3 September 2021, Standard Bank obtained an order in terms of rule 108 declaring the property specifically executable.

[9] A sale in execution in respect of the immovable property was scheduled for 24 March 2022.

[10] On 24 March 2022, at the sale in execution, a certain Ms Judiana Erasmus (Ms Erasmus) was the highest bidder. In terms of the conditions of sale, Ms Erasmus purchased the property in her own name or the name of a nominee. On 4 April 2022, Ms Erasmus signed a decree of nomination and nominated Mr Mouton, the third respondent, as the nominee, who accepted the nomination and paid the required deposit. The deposit was subsequently paid back to Mr Mouton.

[11] A further sale was scheduled for 12 July 2022 pursuant to the sale in execution on 24 March 2022. The immovable property was again sold to Mr Mouton, the third respondent on the said date.

[12] On 4 August 2022, the immovable property was registered in the name of Mr Conroy Elred Mouton under title deed number T5084/2022.

The current application

[13] On 29 November 2022, the applicants filed an amended notice of motion seeking the following relief:

'TAKE NOTICE that the above-named applicants hereby amend or vary, as contemplated in rule 76(9), the terms of their notice of motion by deleting the prayers therein and substituting it with the following:

1. Calling upon the Respondents to show cause why the following actions/decisions/proceedings should not be reviewed and set aside:

1.1. The writ of execution - immovable property issued on 7 September 2021 directing the first respondent to attach and take into execution the property of the applicants being Erf no. 2277 Swakopmund, Extension 8, Swakopmund, ("the property");

1.2. The purported attachment of the property by the first respondent pursuant to the abovementioned writ of execution – immovable property;

1.3. The sale in execution held on 24 March 2022 at the property where the property was purportedly sold to Judiana Erasmus by way of auction as well as the subsequent nomination of the third respondent; 1.4. The sale in execution held on 12 July 2022 at the property where the property was purportedly sold to the third respondent by way of auction.

ALTERNATIVELY, in the alternative to prayer 1 and only in the event that the court finds that review proceedings are inappropriate in respect of the above actions/decisions/proceedings:

2. Declaring the following actions/decisions/proceedings to be unlawful and/or invalid and setting them aside:

2.1. The writ of execution - immovable property issued on September 2021 directing the first respondent to attach and take into execution the property of the applicants being Erf no 2277 Swakopmund, Extension 8, Swakopmund, ("the property");

2.2. The purported attachment of the property by the first respondent pursuant to the abovementioned writ of execution – immovable property;

2.3. The sale in execution held on 24 March 2022 at the property where the property was purportedly sold to Judiana Erasmus by way of auction as well as the subsequent nomination of the third respondent as purchaser;

2.4. The sale in execution held on 12 July 2022 at the property where the property was purportedly sold to the third respondent by way of auction.

3. An order:

3.1. setting aside the transfer and registration of the property to the third respondent on 4 August 2022 as contemplated in section 6(1) of the Deeds Registries Act, Act 47 of 1937; and

3.2. directing the fourth respondent to cancel any mortgage bond which may have been registered over the property pursuant to such transfer into the name of the third respondent;

3.3. directing the fourth respondent to cancel Deed of Transfer No T5084/2022 under which the property was transferred to the third respondent and to thereafter cancel the relevant endorsement on Deed of Transfer No 4928/2000, as contemplated in section 6(2) of the Deeds Registries Act, Act 47 of 1937.

4. That the respondents who elect to oppose this application pay the costs thereof, jointly and severally, the one paying the other to be absolved.

5. Further and/or alternative relief.'

[14] From the reading of the amended notice of motion, it is clear that the applicants launched a two-pronged attack, which is aimed at:

- a) Reviewing and setting aside the sale in execution; and
- b) Reviewing and setting aside the registration of transfer of the immovable property and the steps associated therewith.

[15] In support of their application, the applicants raised a number of issues which can be loosely termed as grounds of review. These are as follows:

- (i) The writ of attachment is invalid for want of revival of the judgment;
- (ii) The failure to attach the immovable property as contemplated in rule 109(3);
- (iii) The failure to comply with rule 110(8) because the auction was not held in public;
- (iv) The 24 March 2022 sale in execution was not cancelled;

(v) Failure to comply with rule 110(3);

(vi) Irregularities in the actions taken by the deputy-sheriff in respect of the sale in execution.

Founding papers

[16] It is common cause that the first applicant fell in arrears with the payments in respect of the loans advanced by Standard Bank, and attempts by Mr Von Lüttichou to make alternative payment arrangements in respect of the arrears, was unsuccessful.

[17] Mr Von Lüttichou deposed to a comprehensive founding affidavit, and I do not intend to replicate it. I will summarise the grounds on which the applicants seek the sale of the immovable property reviewed and set aside. Mr Von Lüttichou avers that the sale of the immovable property is invalid for the following reasons:

i) *The writ of attachment is invalid for want of revival of the judgment*: In support of this contention, Mr Von Lüttichou submitted that the writ of execution for purposes of attaching the property was issued on 7 September 2021 after the court declared the property specially executable on 3 September 2021. However, Mr Von Lüttichou points out that, the writ of execution was issued more than four years after the judgment was obtained. The issuing of the writ of execution is, therefore, contrary to the provisions of rule 112(1), as there was no application brought to revive the judgment, nor did Standard Bank seek consent from the first applicant to revive the judgment. In these circumstances, so contend Mr Von Lüttichou, there could not have been a valid attachment of the property, and as a consequence, there could be no valid sale in execution.

ii) *The immovable property was not attached, and therefore, there was a failure to comply with rule 109(3)*: From a subsequent supplementary affidavit filed by Mr Von

Lüttichou, it appears that the applicants no longer pursue this ground of review, having considered the documents discovered by Standard Bank.

iii) *Failure to comply with rule 110(8) as the auction was not held in public*: Mr Von Lüttichou submits that in terms of rule 110(8), the deputy-sheriff must sell any immovable property that has been under attachment by public auction. According to him, the auction was held on both occasions in the kitchen/dining area of the house. In addition to the fact that the auction was not held in public, the successful bidder in respect of the 12 July 2022 auction, was via a telephone bid. Mr Von Lüttichou contends that it is irregular for the deputy-sheriff to receive a bid telephonically, which is inconsistent with the requirement of a public auction.

iv) *The 24 March 2022 sale was not cancelled*: Mr Von Lüttichou submits that if a purchaser does not comply with the conditions of sale, the court may, in terms of rule 110(10), on a report of the deputy-sheriff, and after due notice to the purchaser, summarily cancel the sale and the property may again be up for sale. In the current instance, he was informed by the deputy-sheriff that the immovable property was sold on 24 March 2022 and that the purchaser paid the 10 per cent deposit. Despite a request for proof of payment of the deposit, nothing was forthcoming. According to Mr Von Lüttichou, the deputy-sheriff also informed him that the guarantee was sent to Standard Bank's legal representative, but the transfer of the immovable property did not happen. Instead, the property was again put up for sale, without the 24 March 2022 sale being cancelled by the court.

v) *Failure to comply with rule 110(3)*: Mr Von Lüttichou contends that the two auctions were not published in a newspaper circulating in the district in which the property is located. According to Mr Von Lüttichou, he requested proof of the publication of the sale in execution but received nothing. Due to the respondents' non-compliance with rule 110(3), it resulted in prejudice to the applicants, because publication of the sale would result in more people attending the auction and more people who would bid and thereby, likely, secure a higher purchase price.

vi) *Irregularities by the deputy-sheriff*: Mr Von Lüttichou submits that the deputy-sheriff committed an irregularity by creating a WhatsApp group and inviting the participants on the group to the sale. According to Mr Von Lüttichou, the process followed by the deputy-sheriff destroys the integrity of the execution process and renders the sale in execution irregular.

[18] Pursuant to the filing of the founding affidavit, Mr Von Lüttichou also filed a supplementary affidavit, which to a large extent is a repetition of what was mentioned in the founding affidavit but also raised further issues that did not form part of the grounds of review.

[19] These issues raised included the alleged tampering with documents in the deeds office, the late payment of transfer duties, the alleged invalidity of the power of attorney to pass transfer signed by the deputy-sheriff, alleged failure to comply with s 76 of the Local Authorities Act 23 of 1992, the alleged irregularity in the request for expedition and the alleged failure of the purchaser timeously complying with the conditions of sale.

Answering affidavit

[20] Mr Colmer, the Manager: Specialised Recoveries of Standard Bank deposed to the answering affidavit on behalf of the second respondent.

[21] As indicated above, Standard Bank raised a point in limine which is that the relief sought by the applicant is not competent under rule 76. Rule 76 provides for the review of a decision or proceedings of an inferior court, a tribunal, an administrative body or an administrative official. Mr Colmer contends that the deputy-sheriff is not an administrative official and his actions at a sale in execution is not administrative in nature. He further contends that the deputy-sheriff is an official of the court who conducts a sale in execution in terms of the rules of court and a sale in execution (and

the conduct of the deputy-sheriff) is not an administrative action and as a result, not subject to review.

[22] Mr Colmer comprehensively responded to the grounds of appeal raised by the applicants. I will briefly summarise these responses as follows:

i) The writ of attachment is invalid for want of revival of the judgment: Mr Colmer submits that, the timelines from the date of judgment to the granting of the order declaring the immovable property executable clearly indicate that there was no need for the superannuation of the judgment as required by rule 112(1). According to him the applicants, on numerous occasions were served with a writ of attachment (dating back to 2016). He contends that once the writ of execution had been issued, it remained in force and may be executed without being renewed. In the case of the applicants two writs were issued, one against the movables on 24 June 2016 and one against the immovables or immovable property on 7 September 2021. As a result, he denies that the writ was invalid or that the subsequent attachment of sale in execution was tainted.

ii) The failure to attach the immovable property as contemplated in rule 109(3): Mr Colmer referred the court to the applicants' supplementary affidavit dated 29 November 2022 wherein the applicants appear to have abandoned this ground of review, and there is no need to deal with it further.

iii) The failure to comply with rule 110(8) because the auction was not held in public: In this regard, Mr Colmer submits that, whether or not an auction is a public auction, or not, is not determined by the place at which it is held, nor by the specific room or area within a property. He contends that in order for the immovable property to be sold by public auction, it simply means that any and all persons, who choose, are permitted to attend and offer bids. On the issue that one of the bidders bid telephonically, he contends that bidders are not prohibited from submitting

telephonic bids. The sale in execution was advertised in terms of the rules of court, and as a result, all members of the public were invited to attend the auction.

iv) The 24 March 2022 sale in execution was not cancelled: Mr Colmer conceded that the immovable property was sold to Ms Judiana Erasmus or her nominee on 24 March 2022. On 4 April 2022 the purchaser, in writing nominated the third respondent as the purchaser of the property, and on 6 April 2022, Mr Mouton accepted the nomination. Given the manner in which the purchaser nominated Mr Mouton, Standard Bank's legal practitioner requested the deputy-sheriff to consider cancelling the sale, refunding the deposit to the purchaser and arranging a new sale in execution. Mr Colmer states that for reasons known to the deputy-sheriff, the sale was not cancelled but submits that the validity of the second sale in execution cannot be tainted by the deputy-sheriff's failure to have the sale in execution cancelled by a judge in chambers.

v) Failure to comply with rule 110(3): Mr Colmer submits that both sales in execution were duly advertised. It was published in the government gazette and in both the Namibian and Republikein newspapers, the latter, which are circulated nationally, including in the district where the immovable property is situated.

vi) Irregularities in the actions taken by the deputy-sheriff in respect of the sale in execution: Mr Colmer states that he has no knowledge of the WhatsApp groups created by the deputy-sheriff, generally or in this particular matter. Mr Colmer however, submits that on the face of it, the fact that the deputy-sheriff took additional steps by circulating the notice of the sale on social media in addition to the publications stands to benefit the judgment debtor as the notice of sale was brought to the attention of the wider public.

[23] Mr Colmer is of the view that the complaints or grounds of review raised by the applicants are without merit and stand to be dismissed.

Arguments advanced

[24] Both counsel advanced very able arguments not only in their written heads but also in their supplementary oral arguments. These arguments were comprehensive, and I will not attempt to replicate them. Instead, I will attempt to lift out the major points made by the respective counsel in support of their arguments during my discussion hereunder.

[25] Where in the course of this judgment, I use the words 'submit' and 'argue' and their derivatives, they must be understood to encompass both the heads of arguments and the oral submissions made in court.

Discussion

Point in limine

[26] The regulatory framework within which the deputy-sheriff is appointed is s 30(1) of the High Court Act 16 of 1990, which reads as follows:

'30 Appointment of officers of High Court

(1)(a) The Minister may, subject to the laws governing the public service, appoint for the High Court a registrar and such deputy-registrars, assistant registrars, sheriffs, deputy-sheriffs and other officers as may be required for the administration of justice or the execution of the powers and authority of the said court: Provided that if, in the opinion of the Minister the duties of such deputy-sheriff can be performed satisfactorily or with a reduction in governmental cost by a person who is not an officer in the public service, the Minister may appoint any person as such deputy-sheriff at such remuneration and on such conditions as the Minister may determine.'

[27] Section 32 deals with the execution of process and the obligation and duty of the deputy sheriff to execute all judgments, writs, orders, warrants, commands and processes of this court. Section 32 reads as follows:

'32 Execution of process

(1) The sheriff or the deputy-sheriff concerned or his or her assistant shall execute all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the High Court directed to the sheriff and make return of the manner of execution thereof to the court and to the party at whose instance they were issued.

(2) The return of such sheriff or a deputy-sheriff or his or her assistant of the steps taken in connection with any such process of the High Court, shall be prima facie evidence of the matters stated therein.

(3) The Sheriff shall receive and cause to be detained all persons arrested by order of the High Court or committed to his or her custody by any order of that court, or by any competent authority authorised by this Act.

(4) A refusal by such sheriff or any deputy-sheriff to perform any act which he or she is by law empowered to perform, shall be subject to review by the High Court on application ex parte or on notice, as the circumstances may require.'

[28] From subrule (4) it is quite clear that the refusal of a deputy-sheriff to perform an act that he is by law empowered to perform shall be subject to review by this court. The review application in the current context is not about the deputy-sheriff's refusal to perform an act but rather a complaint regarding non-compliances by the deputy-sheriff. The argument advanced on behalf of the Bank is not that the conduct of the deputy-sheriff is not reviewable but it contended that review in terms of rule 76 in the current context is incompetent.

[29] Rule 76 (1) provides as follows:

'All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official are, unless a law otherwise provides, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal,

the chairperson of the administrative body or the administrative official and to all other parties affected.'

[30] The review before this court is neither in respect of proceedings of an inferior court, nor is it in respect of a tribunal. What remains is a review of the 'decision or proceedings' 'of '...an administrative body or official...'. The pertinent question raised by the Bank is whether the deputy-sheriff is an administrative official and whether his conduct amounts to administrative action.

[31] Ms Campbell argued that the deputy-sheriff is neither an administrative body nor an administrative official and therefore the review relief in terms of rule 76 is incompetent.

[32] In *Todd v Firstrand Bank Ltd and Others*¹ Bins-Ward J, when faced with an application to set aside a sale in execution as a result of non-compliance by the sheriff to affix a copy of the notice of sale at the place where the sale was to take place stated the following in his discussion of the legal principles:

'[32] A sale in execution is part of the administrative process by which a judgment creditor can enforce a judgment given in its favour by a court. In effecting the sale the Sheriff exercises a public function in terms of legislation. In my view a sale in execution purportedly effected by the Sheriff has factual and legal consequences unless and until set aside by a competent court; cf. *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA).

[33] Any impugment of a so-called 'judicial sale' on grounds that the Sheriff has failed to comply with the applicable legislation is thus essentially a review of administrative action, and

¹ *Todd v Firstrand Bank Ltd and Others* (20373/10, 1467/12) [2012] ZAWCHC 7 (9 February 2012).

amenable to the courts' wide discretion in such matters. That applications in this type of case are more often than not framed as applications for declaratory orders assisted by ancillary relief (cf. e.g. *Menqa and another v Markom and others* 2008 (2) SA 120 (SCA)), and not in a form consonant with the procedure in terms of rule 53, does not detract from this characterisation (see *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A)).

[34] Mr Tjombe argued the case for the applicants along similar lines, albeit not with reference to the aforementioned case. Mr Tjombe argued that the deputy-sheriff is an administrative official and performs an administrative act when conducting a sale in execution. In doing so, he is giving effect to and executing court orders, which is a public function which he does based only on the power derived from the High Court Act.

[35] The *Todd* matter however went on appeal² and in concluding his judgment Lewis JA remarked the following with respect to the judgment of Binns-Ward J on characterising the deputy-sheriff's action as administrative in nature:

'[23] There is one final matter that requires mention. The high court characterised the Deputy Sheriff's action as administrative in nature and said that the rules for judicial review were pertinent. That is not so. A sale in execution is a procedure executed by an official of the court in terms of the Uniform Rules of Court. It is not an administrative action and is not subject to review as such. If the official fails to comply with the rules, and the non-compliance does go to the root of the matter, the sale in execution (or any other court process similarly affected) will be invalid. Review proceedings are not required to set it aside. So too, the invalid act does not stand and have legal consequences until it is set aside.'

[36] In *Standard Bank Namibia Limited v Somaeb*³ Cheda J followed the South African Supreme Court (supra) when he held that the deputy-sheriff is not an administrative official but a court official who executes a court order.

² *Todd v First Rand Bank Ltd and Others* (497/12) [2013] ZASCA 61; [2013] 3 All SA 500 (SCA) (24 May 2013).

³ *Standard Bank Namibia Limited v Somaeb* (I 1912/2013) [2014] NAHCMD 98 (26 March 2014) at para [13].

[37] In *Januarie v Registrar of High Court & Others*⁴ the applicant brought an application for review against the registrar of the High Court, the deputy-sheriff, of Rehoboth and the registrar of deeds. The applicant sought to set aside the original decision of the Registrar to declare the property executable and seeking further and ancillary relief, namely, setting aside the writ and the purported decision of the Deputy-Sheriff to sell the property by public auction and to proceed with the transfer of the property and to set aside the 'decision' of the Registrar of Deeds to execute registration of the transfer by means of a review. Smuts J held as follows:

[30] There is also further reason why the application would fall to be dismissed. It concerns the point taken on behalf of the second respondent that the order declaring the property as executable does not constitute administrative action for the purpose of a review and is thus not susceptible to review proceedings in the High Court. As was argued by Mr. Boonzaier with reference to authority, the order itself is judicial in nature and deemed to be a judgment of this court. As an order of this court, that it would not therefore be susceptible to review in an application to this court. For this reason, as well, the application would fall to be dismissed.'

[38] The aforementioned matters tie in with the SCA judgment in *Todd*, and as a result, I am of the view that the actions of the deputy-sheriff do not fall within the purview of rule 76 and are not susceptible to review and the point in limine is upheld.

Alternative relief sought

[39] I will proceed to consider the alternative relief sought as the point in limine is not dispositive of the matter. The grounds of review (complaints) also serve as the basis for the declaratory relief sought in the alternative.

The writ of attachment is invalid for want of revival of the judgment

[40] Rule 112 of the rules of court reads as follows:

⁴ *Januarie v Registrar of High Court & others* (I 396/2009) [2013] NAHCMD 276 (8 October 2013).

'112. (1) A writ of execution may not be issued after the expiry of three years from the day on which a judgment has been pronounced, unless the –

(a) debtor consents to the issue of the writ; or
(b) judgment is revived by the court on notice to the debtor, but in such a case no new proof of the debt is required.

(2) In case of a judgment for periodic payments the three years referred to in subrule (1) run in respect of any payment from the due date of payment.

(3) Once a writ of execution of a judgment has been issued, it remains in force and may, subject to section 11(a)(ii) of the Prescription Act, 1969 (Act No. 68 of 1969), at any time be executed without being renewed until judgment has been satisfied in full.'

[41] The applicants advanced their case for the invalidity of the writ in paras 69 and 70 of the founding affidavit deposed to by Mr Von Lüttichou. The applicants state that the reason for the invalidity of the writ of attachment of the immovable property is that the writ was issued on 7 September 2021, which is more than four years after the granting of the judgment on 22 June 2016. The applicants maintain that because the judgment was not revived, the writ of attachment was issued contrary to the provisions of rule 112(1).

[42] Standard Bank responded to this averment by setting out the chronology of the litigation in this matter indicating that a writ of execution was issued against movables on 24 June 2016 and thereafter the said writ of execution was served on the first applicant on 16 July 2017, 23 January 2019 and 29 October 2019, when nulla bona returns were filed, and on the second applicant on 10 October 2023.

[43] In the replying affidavit by Mr Von Lüttichou, he stated for the first time that the writ of execution was only in respect of the second applicant's movable property and that no writ of execution was issued in respect of the movable property of the first applicant, who is the registered owner of the immovable property.

[44] Interestingly, Mr Von Lüttichou then proceeded to state the following in respect of the rule 108 proceedings and the order in para 23 of his replying affidavit:

‘The application was not opposed. However, the court should not have granted the order because there was never a valid nulla bona return in respect of the first applicant. Whilst I do not challenge the order, the error in issuing the order should be taken into consideration in determining the validity of the further processes.’

[45] What Mr Von Lüttichou stated in the replying affidavit with regards to the rule 108 proceedings, in my view, is a contradiction in terms. On the one hand, he does not take issue with the order or challenge it yet in the same breath wants this court to take the purported error into consideration in determining the validity of the further processes.

[46] The order of this court declaring the immovable property executable is in my considered view, with full force and effect as there was no application to have that order set aside by a court of competent jurisdiction.

[47] Ms Campbell argued that the applicants took an about-turn in their replying papers and raised a completely different reason for the invalidity of the writ and why there should have been compliance with rule 112 of the rules of court. I agree with this contention. The augmented complaint raised in the replying affidavit appears to be an afterthought and does not speak to the founding papers. Standard Bank could also not respond to the further issue in respect of rule 112 raised in the replying papers. The applicants will remain limited to their founding papers in this regard. As an aside I need to also mention that the paper file in this matter went missing and had to be reconstructed. The second respondent could not assist the court further in this regard but pointed out that nulla bona returns were filed in respect of the first applicant.

[48] There was no reason to superannuate the judgment as required by rule 112(1) because once a writ of execution of a judgment has been issued it remains in force and may be executed without being renewed as contemplated in rule 112(3). Two writs were

issued in this matter, i.e. 24 June 2016 (two days after the judgment) and 7 September 2021 (five days after the order declaring the property executable).

[49] This ground of complaint therefore has no merit and is dismissed.

The failure to attach the immovable property as contemplated in rule 109(3)

[50] The applicants did not pursue this point further apart from relying on the complaint of superannuation, but in light of the discussion above, this ground of complaint has no merit and is dismissed.

The failure to comply with rule 110(8) because the auction was not held in public

[51] The basis of the applicant's complaint is that there was a non-compliance with rule 110(8) as the deputy-sheriff held the auction inside the immovable property.

[52] Rule 110(8) provides that the deputy-sheriff must sell by public auction any immovable property attached in execution. It is however informative to note that the rules do not define the words 'public' or 'public auction'.

[53] The Oxford Advanced Learner's Dictionary of Current English⁵ defines 'the public', as being, amongst others, 'members of the community in general', and 'in public' as, 'openly, not in private'.

[54] In *S v Rossouw*⁶ on appeal to the Transvaal Provincial Division, Boshoff J and de Villiers JJ had to decide whether, in the particular circumstances of the case the shares were offered to a member of the public as prohibited by section 80 *bis* (1) of the Companies Act. In answering this question Boshoff J stated (translated) that:

⁵ Hornby, Albert Sydney. Oxford Advanced Learner's Dictionary of Current English, Editor Jonathan Crowther. Oxford, England: Oxford University Press, 1995.

⁶ *S v Rossouw* 1968 (4) SA 380.

'The word "public" normally refers to the public as whole, rather than the community as an organized unity. It may also refer to a particular part of the community, but that will depend on the context within which it is used. In such a case there is normally some indication to which part of the community reference is made. In section 80 bis there is nothing which gives the word, as used therein, any limited meaning...'⁷ (my emphasis)

[55] The question of what is a public auction arose in *Osry v Hirsch, Loubser & Co., Ltd*⁸ where the court had to decide whether it was competent for an agent to purchase the goods of his principal at a public auction. In answering the question, Kotze JP did an extensive review of the Roman Law and Roman Dutch authorities in determining the distinction between public and private auctions. Kotze JP explained the distinction as follows:

'The material point is not the meaning of the term *auctio*, but in what sense do the jurists understand the expression *publica auctio*. After having defined *auctio* (in his Book *De Auctionibus*, Lib. 1, chap. 2) as a sale in which the thing to be sold is openly knocked down by the crier to the highest bidder, Matthaeus, in chap.3, n.2, divides auctions into *public* and *private*. "by the former, (i.e. "public auction") he says, is to be understood a sale where the fiscus or the magistrate, on behalf of the state, proclaims certain goods for sale, or where by the authority of the judge the property of a judgment debtor or of a debtor hiding is sold; and by the latter (i.e. "private auction") wherever private persons voluntarily hold a sale, whether to be through bankers at their banking table, or without them in open places and streets. In this distinction between the two, not the place, but the person is regarded. For if we pay attention to the place, then every auction will be public, since it is held in the market place, at the bankers' tables, or even at a house, a place nevertheless open to anyone. According to Matthaeus then *publica auctio* does not denote the sale by bidding held in a public place, or to which anyone has access, but a sale held by public authority. When therefore, at the commencement of chapter 10, Matthaeus states that 'it is handed down by the jurists as a rule that he, who is

⁷ *S v Rossouw* supra at 385 C-D.

⁸ *Osry v Hirsch, Loubser & Co., Ltd* 1922 CPD 531.

otherwise prohibited from buying, can nevertheless purchase, if the thing is being sold by public auction," his meaning is that the sale by auction takes place by public authority.⁹ (my emphasis)

[56] And later on the learned judge proceeded to state that:

'It appears therefore, from what has been premised, that Matthaeus is correct when he writes that the distinction between a public and private auction relates not to the place where, but the authority by which, the sale by bidding (auctio) is held. The conclusion, therefore is that, when the jurists state that a tutor can buy his pupil's property at a public auction they have in view a sale by means of bidding held by authority of the State or Government, under which is included the decree or sentence of a judge, acting in his official and public capacity. It also follows that, if a Tutor sells the things of his pupil at ordinary auction sale, he cannot buy any of these things *palam et bona fide*, for the simple reason that the auction is held by his on authority as tutor, and, as already shown, a Tutor cannot be *auctor in rem suam*. The mere employment by him of an auctioneer or crier does not in any way alter the legal character of the sale. – it would remain a private and not a public auction in the sense of the law....'¹⁰ (my emphasis)

[57] The judge concluded that:

'The true import of these words has already been explained. They denote in law, unless the contrary appears from the context, an auction sale held by public authority, whereas an ordinary auction sale, to which those members of the public who care to attend have free access, is held to be by private auction.'¹¹ (my emphasis)

[58] The applicants are missing the mark with their submission that the auction was not conducted in public, as a public auction concerns not the place of the auction but the authority by which the sale is held and there can be no doubt regarding the latter.

[59] The applicants further raised the issue that Mr Mouton was not present at the auction as he submitted his bid telephonically. The applicants did not avail any authority to this court fortifying their submission that the failure of the bidder to be physically

⁹ Supra at 554 to 555.

¹⁰ At p. 557.

¹¹ At p. 560.

present at the auction would impede the integrity of the process. It should further be noted that the deputy-sheriff informed all the bidders in attendance that there was a phone bidder and enquired if there was an opposition to the deputy-sheriff receiving a phone bid. There was no opposition.

[60] This ground of complaint is without merit and therefore dismissed.

The 24 March 2022 sale in execution was not cancelled, therefore, the sale of 12 June 2023 cannot be valid.

[61] The following is common cause regarding the sale of 24 March 2022:

- a) That a sale was scheduled and held on 24 March 2022.
- b) The conditions of sale were not complied with by Ms Erasmus who was the successful bidder.
- c) The required 10 per cent deposit on the purchase sum was not paid at the time of the sale.
- d) On 4 April 2022 Ms Erasmus nominated Mr Mouton as the purchaser of the property.
- e) On 6 April 2022 Mr Mouton, in writing, accepted the nomination and paid the 10 per cent deposit in the sum of N\$215 000.
- f) The sale in execution of 24 March 2022 was not cancelled by a judge as provided for in rule 110(10).

[62] Rule 110(10), provides as follows:

'110(10) 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.'

[63] The applicants take issue with the fact that the deputy-sheriff and the second respondent proceeded to schedule a second sale in execution for 12 July 2022 and the

immovable property was resold, albeit to the same purchaser and contend that the failure to cancel the first sale tainted the second sale with irregularity.

[64] In *Standard Bank Namibia Limited v Groenewald*¹² Angula DJP stated the following:

'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.'¹³

[65] On 24 March 2022, the highest bidder was Ms Erasmus and a valid agreement came into being when the bid was awarded to Ms Erasmus (or her nominee). The public auction was over when her bid was accepted by the deputy-sheriff and with it ceased the deputy-sheriff's authority under the rules to further sell the property. Upon the conclusion of the sale by public auction of the property to the Ms Erasmus or her nominee, the deputy-sheriff became *functus officio*.¹⁴

[66] In *Syfreets Bank Ltd and Others v Sheriff of The Supreme Court, Durban Central, and Another; Schoerie NO v Syfreets Bank Ltd and Others*,¹⁵ Combrink J held (in the context of rule 46 of the South African Uniforms rules, which is the equivalent to our rule 110) that:

¹² *Standard Bank Namibia Limited v Groenewald* (I 633/2016) [2023] NAHCMD 296 (6 June 2023).

¹³ *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.

¹⁴ *Nicolau v Navarone Investments (Pty) Ltd* 1971 (3) SA 883 (W) at 886A.

¹⁵ *Syfreets Bank Ltd and Others v Sheriff of The Supreme Court, Durban Central, and Another; Schoerie NO v Syfreets Bank Ltd and Others* 1997 (1) SA 764 (D) at 771 F-G.

'The public auction was over when the bank's final bid was accepted by the Sheriff and with it ceased the Sheriff's authority under the Rules to further sell the property. Upon the conclusion of the sale by public auction of the property to the bank, the Sheriff became *functus officio* (see Nicolau's case supra at 886A). To undo that sale the Sheriff had no power under Rule 46 other than to obtain cancellation of the sale by a Judge in chambers in terms of Rule 46(11) and even then the Sheriff's authority under the Rules would require a sale by public auction once more. No other form of sale is within the Sheriff's power.' (my emphasis)

[67] The act of the deputy-sheriff is not an 'application' contemplated by rule 65. The deputy-sheriff presents a report and the judge cancels the sale. The act of the judge in cancelling the sale in terms of rule 110(10) is not a judgment in any conventional sense. The procedure is *sui generis*. Its function is to provide judicial oversight to the process of execution of judgments. The 'cancellation', albeit a decision of the judge, defies forensic classification. It is not an approval of the deputy-sheriff's act; the judge *per se* effects the cancellation, albeit at the instance of the deputy sheriff and, doubtless, in turn, at the instance of the judgment creditor. This cancellation is the precursor to authorising, as contemplated by the rules, a resale.¹⁶

[68] The nature of the rule 110(10) process was further clarified in *Agricultural Bank of Namibia v Ntema and Another*,¹⁷ when Angula DJP stated as follows:

'[29] What remains for consideration is the format the report under rule 110(10) and 110(11) should take. It is to be noted that rule 110(10) makes mention of 'the report' to a Judge whereas rule 110(11) speaks of 'an application to a Judge'. I am aware that there is no uniformity amongst the Deputy-Sheriffs when they file a report requesting a cancellation of the sale in terms of rule 110(10). This is to be expected because the rule does not prescribe the format the report should take. Some Deputy-Sheriffs write letters as 'a report' in terms of rule 110(10) other file 'a report' in a form of an affidavit.

¹⁶ *Standard Bank of South Africa Ltd v Ndlovu and Another In re: Sheriff of Johannesburg South v Kibel In re: Kibel v Standard Bank of South Africa Ltd and Another* (2010/33229) [2012] ZAGPJHC 285 (28 March 2012).

¹⁷ *Agricultural Bank of Namibia v Ntema and Another* (HC-MD-CIV-ACT-CON- 3643/2018) [2023] NAHCMD 83 (28 March 2023).

[30] In my view, the rule does not contemplate a formal application in terms of rule 65(4). I am however of the view that, since the 'report' serves a basis upon which a Judge makes a decision to cancel the sale which has far-reaching legal consequences for the parties, in particular the purchaser, it would be preferable that the 'report' be in a form of an affidavit. An affidavit has a force of evidence under oath upon which a judge can comfortably rely for his or her decision. On the other hand a loose 'report' in a form of a letter by the Deputy-Sheriff addressed to the Registrar with a request to place the letter before a Judge to cancel the sale in execution, lacks an aura of *quasi-judicial* authority under which a Deputy-Sheriff operates. It is trite that a Deputy-Sheriff discharges his or her functions as representing the Judge.¹⁸ In this connection regard must be had to the fact that the cancelation of the sale in execution is done by a Judge, this means that in doing so, a Judge is exercising judicial oversight over the process of execution. It follows therefore, in my view, the Judge must act upon verifiable and reliable information. It is for those reasons I would propose that the 'report' be made in a form of an affidavit as a requirement in this jurisdiction.' (my emphasis)

[69] Ms Campbell submitted that the wording of rule 110(10) is permissive and not peremptory and that nothing in the rules obliges the deputy-sheriff to cancel the sale in the event of non-compliance with the conditions of sale. I fully agree but this election by the deputy-sheriff will depend on whether or not he can waive strict compliance with respect to the conditions of sale. If the non-compliance is not material the deputy-sheriff will not approach a judge to set the sale in execution aside. However, in the current instance there was a valid agreement of sale in respect of the first sale and that sale had to be set aside in order to proceed with a resale.

[70] The conditions of sale before me are in line with the rules of court. The conditions of sale are clear that, in the event of failure by the purchaser to carry out his or her obligations under the conditions of sale, the sale may be cancelled by a judge, summarily on the request of the deputy-sheriff after due notice to the purchaser¹⁹. The

¹⁸ See footnote 15 supra.

¹⁹ Also see para 8 of Form 26.

discretion whether to cancel the sale or not lies with the judge to whom the report is submitted for consideration.

[71] The non-compliances by Ms Erasmus with the conditions of sale were material and there was no other choice but to approach a judge for an order in terms of rule 110(10).

[72] The deputy-sheriff was clearly aware of the provisions of rule 110(10) as he proceeded to draft a report for submission to a judge to obtain an order cancelling the sale of 24 March 2022. This report was never submitted to the legal practitioners of the Bank and never submitted to a judge to consider, apparently due to an oversight by the deputy-sheriff.

[73] The deputy-sheriff was under the misguided belief that the sale was cancelled in terms of rule 110(10) and proceeded with the resale which was scheduled for 12 July 2022, on which date the property was again sold to Mr Mouton for the N\$2 250 000 as as opposed to the N\$2 150 000 during the first sale in execution.

[74] During the second sale in execution there was compliance with the conditions of sale and full payment was made in respect of the purchase price and the property was registered in the name of Mr Mouton.

Failure to comply with rule 110(3)

[75] Rule 110(3) provides as follows:

'110(3) The deputy-sheriff must indicate two suitable newspapers circulating in the district in which the property is situated and require the execution creditor to –

(a) publish the notice referred to in subrule (2)(a) once in each of those newspapers not less than five days and not more than 10 days before the date appointed for the sale and in the Gazette not more than 14 days before the date appointed for the sale; and

(b) furnish the deputy-sheriff, not later than the day before the date of the sale, with one copy of each of those newspapers and with the number of the Gazette in which the notice is published, but a new notice must be published in respect of each subsequent sale re-scheduled after the initial publication.'

[76] It is common cause that the two auctions were not published in the local newspapers circulating in the district in which the property is located as the applicants insisted it should have been done. The publications were however done in two national newspapers, i.e. the Namibian and the Republikein, which are circulated in the Erongo region where the property is situated. The sale in execution was also published in the Government Gazette as required by rule 110(3)(b).

[77] As opposed to the argument advanced by the applicants, the rule does not provide that the publications must be done in local newspapers but instead provides for the publication in two suitable newspapers circulating in the district in which the property is situated.

[78] It would appear that the basis for the applicants' complaint is that they are prejudiced because local residents might not have seen the publications, which would have resulted in them not attending the auction. It was argued by Mr Tjombe that if more people attended the auction then more people would bid resulting in a higher purchase price.

[79] These submissions advanced by Mr Tjombe are mere speculation. The national newspapers wherein the publications were done are suitable newspapers with a much broader base of readers than what a local newspaper at the coast would have.

[80] The complaint raised that the deputy-sheriff had a WhatsApp group in respect of the properties on auction and that the people on the group are his friends is without merit. Having a forum on an electronic platform advising potential bidders is aimed at broadening the basis of potential buyers.

[81] One should not lose sight of the fact that there were substantive compliance with the rules regarding publication and the WhatsApp group was over and above the publications. The validity of the sale in execution was not reliant on the publication on an electronic platform and therefore, the complaint directed at the conduct of the deputy-sheriff in this regard is without merit.

Irregularities in the actions taken by the deputy-sheriff in respect of the sale in execution

[82] Various alleged irregularities were listed by the applicants as stated in full in paragraph [21] above. None of these complaints results in invalidity.

[83] I do not intend to discuss any of the purported irregularities because in my view it does not take the matter any further.

[84] I do however wish to remark that complaints against the behaviour of the deputy-sheriff are not grounds for review and if the applicants were dissatisfied with the conduct of the deputy-sheriff a complaint can be filed with the Registrar of the Supreme and High Courts of Namibia in terms of High Court Act.

[85] The court must express its displeasure with the *ad hominem* attack by the applicants on the deputy-sheriff, the Bank's legal practitioner and the conveyancer, this was uncalled for. Allegations of dishonest and improper conduct were made against these officers of court with no factual basis. These types of allegations should not be made lightly, and I am of the view that the allegations made in this respect were inappropriate.

Relief sought

[86] The predicament in the relief sought by the applicants is that the property was transferred and duly registered in the name of Mr Mouton. The applicants seek an order

setting aside the transfer and registration of the property to the third respondent on 4 August 2022. In addition thereto the applicants seek an order directing the fourth respondent to cancel any mortgage bond which may have been registered over the property pursuant to such transfer into the name of the third respondent²⁰ and further that this court should direct the fourth respondent to cancel the Deed of Transfer and the relevant endorsement on the Deed of Transfer.

[87] This relief can only be considered if the court finds that the sale in execution of 12 July 2022 was nullified as a result of the non-compliance with rule 110(10). However, I must pause and point out that even if the applicants are successful in their application their de facto position would not change and they would not receive possession of the property. The applicants did not make out a case for the setting aside of the writ in execution of the immovable property. In any event, in *Le Roux v Yskor Landgoed (EDMS) Bpk en Andere*²¹ the court held that a writ can only be set aside if the writ is no longer supported by the underlying causa. That is not the case in the current matter.

[88] The practical effect of an order setting aside the sale in execution of 12 June 2022 is that the applicants would still not be entitled to the immovable property and the deputy-sheriff would still be obliged to sell the property in a sale in execution. The reason is simple and that is that the applicants lost their right to claim any entitlement to the immovable property upon the granting of the order declaring the property executable.

[89] It should also be borne in mind that the bond registered in favour of the second respondent, Standard Bank, was cancelled and there is no provision made for the re-registering of the bond. The prayers of the applicants do not indicate in whose name the property should be transferred in the event that the relief sought is granted. The applicants also do not deal with the issue of enrichment or the repayment of the funds by Mr Mouton.

²⁰ There was no mortgage bond registered by the third respondent.

²¹ *Le Roux v Yskor Landgoed (EDMS) Bpk en Andere* 1984 (4) SA 257 A-B.

[90] In *Menqa and Another v Markom And Others*,²² Cloete JA in the dissenting judgment, discusses the consequences of being a successful litigant in the setting aside of a sale in execution:

[49] Matthaeus discusses the position where a debtor succeeds in having a sale in execution set aside. He says that if the debtor wishes to have the completed sale set aside for want of compliance with formalities, fairness dictates that he must return to the purchaser the money the latter disbursed. This is the situation, continues Matthaeus, when the debtor sues the purchaser and demands the goods unlawfully awarded to him; because if he sues the creditors, he is not obliged to pay the purchase price to them, but must pay the debt he owes together with accrued interest - and in such a case the purchaser is required to obtain the money he paid, from the creditors. It is not necessary to consider the position at common law any further because to require Markom to pay Menqa the price paid by the latter for the property, or to pay the execution creditor the full debt owed together with accrued interest, as a prerequisite to his being allowed to recover the property,..'

Was the sale in execution on 12 June 2022 a nullity and should the sale in execution be set aside?

[91] It is also important to note that Mr Mouton was the nominee of Ms Erasmus in the 24 March 2022 sale, when the property was sold for N\$2 150 000. Mr Mouton was the one who paid the deposit in that instance.

[92] When realising that there was no proper compliance with the conditions of sale it was decided that the sale should be cancelled. This was with the knowledge of Mr Mouton as the deposit was returned to him. On 12 June 2022, Mr Mouton was again the highest bidder and the property sold for N\$2 250 000, being N\$100 000 more than the first sale in execution.

²² *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA) 142 F-H.

[93] Rule 110(10) is for purposes of judicial oversight and there needs to be strict compliance with the rule, however, in my view, the circumstance of the current matter is unique in that the purchaser in both sales in execution is the same person and there was an increase in the sale price during the second sale. By ordering that, the second sale in execution would be to the prejudice of both the judgment debtor and the judgment creditor.

[94] If the circumstances were any different, for example, a different purchaser or the return on the second sale in execution was less than the first sale, I would not have hesitated in setting aside the second sale in execution for non-compliance with rule 110(10), but that is not the case before me.

[95] That being said, I am of the view that setting aside the second sale in execution would result in an absurdity. The deed of transfer would have to be cancelled and property would be reregistered, supposedly, in the name of the judgment debtors. The property would remain in the possession of the deputy-sheriff and a letter of demand must be directed to the purchaser in the first sale in execution to comply with the conditions of sale, which is Mr Mouton, the purchaser in the second sale in execution. Over and above the potential absurdity in granting the relief sought there are a number of practical issues resulting from an order setting aside the second sale in execution that were not addressed in the papers of the applicants as discussed in paras 88 and 89 above. The consequences for the innocent third party, Mr Mouton, who expended N\$2 250 000 as a result of the sale, would also be far reaching

[96] Immovable property validly sold in execution at judicial sales cannot, as a general rule, after registration of transfer be vindicated from a *bona fide* purchaser. It was held by Van den Heever JA in *Sookdeyi v Sahadeo*²³ that it was a principle of the common law that a perfected sale in execution should after transfer or delivery of the subject matter not be lightly impugned and that the reluctance to rescind perfected sales

²³ *Sookdeyi v Sahadeo* 1952 (4) SA (A) at 571G-572B.

in execution has been received in our case law. I must concur and cannot accede to the prayers of the applicants.

[97] For reasons set out above I am of the view that although there was no strict compliance with rule 110(10) by the deputy-sheriff it would be inappropriate to set the second sale in execution dated 12 June 2022 aside.

Order

[98] My order is as follows:

1. The review relief and alternative relief sought by the applicants are dismissed.
2. The applicants are ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed counsel.
3. The matter is regarded as finalised and removed from the roll.

JS Prinsloo

Judge

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