IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER: 26018/2010

In the matter between:

ABSA BANK LIMITED Applicant

and

THE SHERIFF OF THE HIGH COURT
SIMON'S TOWN Respondent

In this matter the application to court was brought on an urgent basis to cancel a sale in execution that the sheriff of Simon's town was intending to proceed with as requested by Absa Bank , this was done by the bank in an effort to justify the "set off" of the debt owing by debtor to the first bondholder against the purchase price should the execution creditor become the purchaser in sales in Execution of fixed property by 1st bond holders .

By doing this the bank maintained that it does not have the obligation o pay the sheriff the proceeds of the sale and that such situation therefore makes the procedures of receiving and distribution of the proceeds by the sheriff in terms of Rule 46 irrelevant

The sheriff maintained that this is ultra vires with Rule 46 and form 21.

The sheriff further maintained that he had the right to change the conditions by insertion of alternative wording to it. This was done to amend the inserted clause to make it possible for the sheriff to remain in a position to complete his mandate as required by Rule 46

The Judge President of the Western Cape High Court determined that this matter is of National interest and ordered the appointment of a full bench [three judges] to deal with the matter. He went on to order that an Amicus Curiae be appointed

After looking at the relevant papers and hearing all arguments the following was determined:

And I quote from the order:

[18] The first question that arises is whether set-off applies in the circumstances under consideration. Set-off is the extinction *pro tanto* of two debts owed reciprocally to each other by two persons.

[22] In the circumstances it is clear that the set-off upon which applicant proposed to rely, would simply not have come into operation. In the absence of set-off there is no justification for the retention by applicant of any part of the purchase price paid by it as purchaser of the property. Put differently, the proviso to clause 10 of applicant's conditions of sale is *ultra vires* the provisions of Rule 46 and hence invalid.

The sheriff maintained that the inserted condition was not acceptable and in an effort to make it acceptable introduced an amendment to the provided conditions of sale by the insertion of the following: [in black]

> *"Provided that where the property is purchased by the execution creditor,* ***[and at the election of the Sheriff]****, only the balance of the purchase price that may be in excess of the judgment debt, shall be payable on date of transfer."*

The court ruled on this as follows:

[23] It follows from this conclusion that the amendment of the proviso to clause 10 which respondent sought to introduce, would be equally invalid.

[24] I may add that the proposed unilateral reservation of a right of election by respondent would have been invalid in any event. Rule 46 does not confer

any discretion upon respondent in regard to the procedures prescribed thereunder. In the Afrikaans version of rule 46 the word *"settle"* in sub-rule 46(8) is translated as *"goedkeur"* which means *approve*. In my view this accurately reflects the meaning of *"settle"* in sub-rule 46(8) (a) (i). In the course of such approval the sheriff would probably have the power to effect inconsequential changes to the conditions of sale such as spelling mistakes. In terms of sub-rule 46(8) (a) (i), however, it is the duty and right of the execution creditor to prepare the conditions of sale. The sheriff has no power to impose material changes to these conditions without the consent of the execution creditor.

[25] **It follows from these conclusions that applicant is not entitled to the relief sought by it.**

[28] In the result, I would make the following orders:

(1) The application is dismissed.

The court directed its attention to the sheriffs role in receiving and distributing the proceeds of sale and determined that:

[32] We understand that in practice, the above courses are followed notwithstanding conditions of sale being framed so as to record that payment is to be effected to the sheriff on transfer**. As pointed out by the *amicus*, by**

doing so the sheriff places himself at risk for the commercial convenience of the judgment creditor. Clearly this is not a satisfactory state of affairs and in today's stringent economic climate, attention may well have to be given to the problem faced by secured creditors, and banks in particular, in having to comply with the provisions of rule 46. The Registrar will therefore be directed to forward a copy of this judgment to the Rules Board for its consideration. **The Rules Board may also wish to give consideration to the requirement in sub-rule 46(14) (a) which requires the sheriff to pay the purchase consideration received by him from the buyer in execution into the deposit account of the magistrate.** We understand from the respondent that sheriffs throughout the country no longer make payment of funds received from purchasers at sales in execution into the magistrates' deposit accounts, but make payment into their own trust accounts and thereafter administer the funds themselves. The justification for ignoring sub-rule 46(14) (a) is said to be found in section 22 (1) of the Sheriffs Act, No 90 of 1986 which reads

> *"Every sheriff shall open and keep a separate trust account, which shall contain a reference to this sub-section, with a banking institution or building society, and shall forthwith deposit therein the monies held or received by him on account of any person."*

The current practice is clearly at odds with the provisions of sub-rule 46(14) (a).

<u>On the issue of the sheriffs "settling"of the conditions and the sheriff's risk the court ruled as follows:</u>

30] When the sheriff conducts a sale in execution of immovable property, he occupies a unique position in as much as he acts as an *"executive of the law"* and not as an agent of any person. When he 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 enforce it on his own (*Ivoral Properties (Pty) Ltd v Sheriff, Cape Town and Others* 2005 (6) SA 96 (C) at para [66]). **This is a further reason why the right to apply set-off on behalf of the judgment creditor is untenable,** for the sheriff as seller cannot come into the reckoning for the purposes of set-off until he is in a position to make payment to the judgment creditor. In any event sub-rule 46(14)(f) contemplates that it is the magistrate who is responsible to make payment, not the sheriff.

IN SHORT:

1. The sheriff may not change the conditions of sale unilaterally without the Execution creditors co-operation
2. The sheriff will be at risk if any stipulation in the conditions are found to be out of tune or ultra vires with form 21 and Rule 46

3. The sheriff should therefore not proceed with a sale in execution should any of this be found to be present [Not give a date for sale before the settling has been concluded]
4. The Execution Creditor may not apply the “set off “ principle and should the sheriff allow any deviation from form 21 or Rule 46 he does so at his / her risk
5. The sheriff shall comply with all the provisions of Rule 46 and receive, and distribute the proceeds of the sale after transfer
6. The issue of the paying of the funds into the court and the Magistrate making payment after the sheriffs distribution account has been dealt with in terms of the Rules seem to be “at odds” with the Sheriffs Act Section 22 and should be clarified by the Rules Board