



CASE NO: I 3296/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BONSAI INVESTMENTS EIGHTY THREE (PTY) LTD PLAINTIFF

and

HERTA BERTHA WALDTRAUT KÖGL 1st DEFENDANT

AMEIB RANCH (PTY) LTD 2nd DEFENDANT

**MINISTER OF AGRICULTURE, WATER & FORESTRY 3rd
DEFENDANT**

CORAM: SCHIMMING-CHASE, AJ

Heard on: 20 June 2011

Delivered on: 4 July 2011

JUDGMENT

SCHIMMING-CHASE, AJ

[1] This is an exception raised by the first and second defendants to the plaintiff's particulars of claim, on the grounds that no cause of action is disclosed.

[2] The plaintiff claims an order declaring the lease agreement concluded between the first and second defendants in respect of a portion of Farm Ameib ("the property"), Usakos district, to be null and void, as well as an order evicting the first defendant from that farm. The exception relates to the eviction order only. Mr Barnard, appearing for the first and second defendants, concedes that the lease agreement is void and unenforceable.

[3] The basis for the eviction order *ex facie* the particulars of claim is that the plaintiff claims that it obtained rights to possess the property pursuant to a sale in execution held on 8 July 2010. The plaintiff relies on the conditions of sale in execution which provide *inter alia* the following:

"10 The property may be taken possession of immediately after payment of the initial deposit, and shall after such deposit be at the risk and profit of the Purchaser. Should the Purchaser take possession of the property before date of transfer, the Purchaser shall be liable to pay occupational interest at a rate equal to 10% of the purchase price paid for the property per month."

[4] The deposit was paid on the date of the sale in execution.

[5] The first and second defendants' exception, in particular, paragraphs 6 - 9 thereof, contains the following:

- “6. The agreement consequent to the sale in execution is to the effect that the plaintiff obtains ownership of immovable property upon date of registration of transfer of ownership.*
- 7. Until such time as registration of transfer of the immovable property has taken place, the second defendant remains the owner of the immovable property.*
- 8. The plaintiff makes no factual allegation which would establish the right of occupation or possession of the property by either the plaintiff or the Sheriff.*
- 9. Consequently the particulars of claim contain no allegations in terms of which plaintiff is entitled to an eviction order.”*

[6] The essence of the exception, as I understood it during argument, is that as the common law provides that ownership only passes in immovable property upon registration of transfer. The

Deputy Sheriff does not become the owner or acquire the rights of an owner, and does not acquire the right to occupation or exclusive possession of the property. Further, as an attachment creates only a *pignus judiciale* or legal pledge, for the purposes and with the content as provided in terms of the Rules, the Deputy Sheriff did not have the power to transfer the right of possession to the plaintiff.

[7] Mr Barnard, for the first and second defendants, further submitted that in any event the Rules of Court relating to attachment and sale of immovable property in execution do not provide that ownership of immovable property or the right of exclusive possession passes from the registered owner to the Deputy Sheriff either upon attachment or at a sale in execution.

[8] In this regard, Mr Barnard relied, *inter alia* on the authority of Sheriff for the District of Wineberg v Jakoet 1997 (3) SA 425 (CPD), especially at 429F-H of that judgment, where it was held that the purchaser of immovable property at a sale in execution is not the owner of the property nor the actual possessor thereof, as a result of which the purchaser had no *locus* to act against a trespasser, and further that the Messenger had no more rights to the property than those conferred upon him by the provisions of the Magistrate's Court Act, 32 of 1944 and the Rules promulgated thereunder.

[9] Ms Schneider, for the plaintiff, argues that a cause of action is

indeed disclosed and that the plaintiff's claim for eviction arises out of its right to immediate possession obtained upon payment of the deposit at the sale in execution. She further submitted that in terms of the common law as well as the conditions of sale, the plaintiff lawfully obtained possession of the property and need not allege and prove any title to the property from which the first defendant is to be evicted. She relied in this regard on the cases of Ebrahim v Pretoria Stadsraad 1980 (4) SA 10 (T) and Boompret Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd 1990 (1) SA 347 (A) at 351.

[10] The common law principles which apply to judicial seizure of property to give effect to a court's judgment, are that an arrest effected creates a legal pledge over such property. The goods attached are thereby placed in the custody of the Deputy Sheriff or the Messenger, as the case may be. The property passes out of the estate of the judgment debtor and vests in the hands of the Deputy Sheriff.

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

[11] Further, in Sedibe and Another v United Building Society and Another 1993 (3) SA 671 (T), Eloff J at 676B, with reference to a number of South African authorities, restated the common law principle that in performing his functions the Deputy Sheriff does not

act as anyone's agent but as an executive of the law.

[12]

[13] He further held at 676C that this principle applies with equal force when the Deputy Sheriff disposes of property in pursuance of a sale in execution, and when, as part of the process, he commits himself to contractual terms, he does so *suo nomine* by virtue of his statutory authority; he becomes bound to the terms of the contract in his own name and may enforce it on his own.

[14] The authority of the Deputy Sheriff, being a creature of statute is, of course, circumscribed by the High Court Act, 16 of 1990 and the High Court Rules.

[15] Rule 46(13) which deals with execution in respect of immovables, provides that the Deputy Sheriff shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him or her shall be as valid and effectual as if he or she were the owner of the property.

[16] Rule 46 must be read in conjunction with Form 22, which contain the Conditions of Sale in Execution of Immovables.

Paragraph 9 of Form 22 provides that:

[17]

“The property may be taken possession of immediately after payment of the initial deposit and shall after such deposit be at

the risk and profit of the purchaser.”

[18] Paragraph 9 of Form 22 reads identical to the first portion of clause 10 of the conditions of sale signed by the plaintiff's representatives and the Deputy Sheriff subsequent to the sale in execution on 8 July 2010, quoted above. It is also not in issue that the deposit was paid.

[19] Ms Schneider argues, that in light of the foregoing, the Deputy Sheriff acted in terms of his authority and power contained in the Rules as well as the common law, and therefore, the plaintiff properly acquired possession of the property. It was also pointed out that the risk and profit in the property was also transferred to the plaintiff.

[20] Mr Barnard replied that the Rules are in conflict with the common law, insofar as the Deputy Sheriff was given authority to deal with immovable property sold in execution if he was the owner, because the common law clearly provides that ownership of immovable property only passes upon formal transfer of the property to the purchaser. Ownership does not vest in the Deputy Sheriff, but in the registered owner until registration of transfer. Furthermore, Mr Barnard submitted that the right of exclusive possession is one of the incidents of ownership of immovable property, and that the Deputy Sheriff therefore could not transfer the right of possession in terms of the conditions of sale. He relied on the Jakoet case *supra* as well as the case of Chetty v Naidoo 1974 (3) SA 13 (AD) at 20A-C.

[21] The Chetty case concerned amongst others, a dispute between the litigants regarding ownership of property which was taken on appeal. Jansen JA, as he then was, dealt *inter alia* at page 20 of the judgment with the burden of proof with regard to the legal concept of ownership, where he referred to the well established principle that one of the incidents of ownership is exclusive possession of the thing. He further stated at 20B that:

“It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right).” (emphasis supplied)

[22] The Jakoet case, incidentally, turned on the interpretation of the contractual terms contained in the conditions of sale concluded at a sale in execution. In that case the Deputy Sheriff was, in terms of those conditions not empowered, nor obliged to nor did he even agree to give immediate or vacant occupation to the purchaser. But, the purchaser was held to be bound to that agreement concluded with the Deputy Sheriff at the sale in execution, dispute her attempt to cancel that sale when a lessee prevented immediate occupation taking place by refusing to move out.

[23]

[24] In this matter, the conditions of sale are different. The plaintiff in accordance with its terms was granted immediate possession of the property.

[25] I find myself in agreement with the submissions made by Ms Schneider to the effect that contractually, immediate possession was granted to the plaintiff by the Deputy Sheriff at the sale in execution and that the Deputy Sheriff was vested with the power to deal with the property as if he were the owner in terms of the Rules of Court. I am also in respectful agreement with the principles laid down with regard to the role and authority of the Deputy Sheriff in sales in execution of immovable property in Sedibe case *supra*.

[26] A sale in execution of any property, especially immovable property, is not a transaction undertaken with the free will of the owner. It takes place pursuant to a judgment of the Court. To give effect to the sale in execution, the Rules of Court as well as the common law empower the Deputy Sheriff to contractually bind the judgment debtor (the registered owner) and the purchaser. The Rules do not make the Deputy Sheriff the owner of the property but allow the Deputy Sheriff to deal with the property in a certain manner in order to enable sales in execution to take place effectively, as well as to give the purchaser some form of security. This, in my view, is what is intended by the Rules. The Deputy Sheriff therefore simply obtains an enforceable contractual right, which falls within the exemption

mentioned by Jansen JA in the Chetty case, quoted above.

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

[28] In the result the following order is made:

- (a) The exception is dismissed with costs.

- (b) The costs are to include the costs of one instructing and one instructed counsel.

SCHIMMING-CHASE, AJ

ON BEHALF OF PLAINTIFF

Ms H Schneider

Instructed by:

F Erasmus & Partners

ON BEHALF 1st AND 2nd DEFENDANTS

Mr P Barnard

Instructed by:

Van der Merwe-Greeff Inc