

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CIV-MOT-GEN-2022/00431

In the matter between:

THE ACTING DEPUTY SHERIFF FOR WINDHOEK

APPLICANT

and

MICHAEL NGHILWAMO

RESPONDENT

Neutral citation: *The Acting Deputy Sheriff for Windhoek v Nghilwamo* (HC-MD-CIV-MOT-GEN-2022/00431) [2023] NAHCMD 501 (15 August 2023)

Coram: RAKOW J

Heard: 9 June 2023

Delivered: 15 August 2023

Flynote: Applications – Eviction – Immovable property declared executable – Acting deputy-sheriff, in his capacity as an official tasked with the execution of court orders – Deputy sheriff must ensure that transfer indeed happens – For transfer to happen it is necessary to gain access to the property and to allow various local authority officials to enter the property – Eviction order granted.

Summary: On 3 October 2019, this court declared Erf 5268, Khomasdal executable and authorised a writ of execution against such immovable property. This writ was issued on 7 October 2019. The acting deputy sheriff was then instructed on 18 October 2019 to attach and sell the immovable property. He proceeded and attached the immovable property on the same date.

The respondent still resides in the property and at this stage simply refuses to give his cooperation to make the transfer possible, as he refuses the purchaser or a person acting on the instructions of the purchaser and the relevant authorities' access to the immovable property. The respondent further indicated that he will only grant access to the property if the applicant accepts a proposal to pay the outstanding amount in instalments. This resulted in the purchaser being unable to obtain transfer of the immovable property since it is unable to obtain a compliance certificate from the relevant authorities. The debtor further proceeded and used excessive amounts of water. The outstanding amount on the municipal account was N\$309 000 with the respondent using 364 000 litres of water in two months. He does not make a single payment towards the water and electricity although he is residing in the house. Almost two years after the sale in execution, the applicant is still waiting for the transfer of the property. The acting deputy-sheriff, in his capacity as an official tasked with the execution of court orders, approached this court for assistance.

Held that: it is clear that although the deputy sheriff does not have to give unoccupied possession of a property when transfer happens, he must ensure that transfer indeed happens. This is the role he has to play as an executive of the law and in the employ of the court. In this instance for transfer to happen it is necessary to gain access to the property and to allow various local authority officials to enter the property and to conduct the inspections they have to conduct. At this stage it is not possible because the respondent refuses to give anyone access to the property.

Held further that: the applicant made out a good case to show that the only way that he will be able to give transfer to the purchaser, would be to evict the respondent that will allow the necessary officials to have access to the house.

ORDER

1. An order is hereby granted ejecting the Respondent, and all others occupying through him, from the premises at Erf No 5268, Khomasdal (Extension No 16), in the Municipality of Windhoek, Registration Division "K", Khomas Region, measuring 589 square metres, held by Deed of transfer No T 1701/2011.
 2. Costs of suit for one instructing and two instructed legal practitioners in favour of the applicant.
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JUDGMENT

RAKOW J

Introduction

[1] The applicant in this matter is Manfred Hennes, the acting deputy sheriff for the district of Windhoek, duly appointed as such in terms of s 30 of the High Court Act 16 of 1990. The respondent is Michael Nghilwamo, a major male who resides at Erf 5268, Khomasdal. This is an application for the eviction of the respondent from the mentioned property.

Background

[2] On 3 October 2019, this court declared the above mentioned property executable and authorised a writ of execution against such immovable property. This writ was issued on 7 October 2019. The acting deputy sheriff was then instructed on 18 October 2019 to attach and sell the immovable property by Mess. Fisher, Quarmby & Pfeiffer, who is the legal practitioners on record for the execution creditor. He proceeded and attached the immovable property on the same date.

[3] On 15 November 2021, this property was sold by judicial auction to Bank Windhoek Limited for an amount of N\$1 599 686. The purchaser proceeded and paid the ten per cent deposit which is required as well as the deputy sheriff's charges, fees and commission, including the VAT on the said amounts. The purchaser tendered performance and compliance with all obligations which are necessary for it to obtain transfer of the immovable property. The applicant in terms of rule 110(2) of the High Court Rules is obliged to give transfer to the execution purchaser. He is therefore authorised to do all things necessary to effect registration of the transfer as if he was the owner of the immovable property.

[4] The respondent still resides in the property and, at this stage, simply refuses to give his cooperation to make the transfer possible, as he refuses the purchaser or a person acting on the instructions of the purchaser and the relevant authorities' access to the immovable property. The respondent further indicated that he will only grant access to the property if the applicant accepts a proposal to pay the outstanding amount in instalments. This resulted in the purchaser being unable to obtain transfer of the immovable property since it is unable to obtain a compliance certificate from the relevant authorities. The debtor further proceeded and used excessive amounts of water. The outstanding amount on the municipal account was N\$309 000 with the respondent using 364 000 litres of water in two months. He does not make a single payment towards the water and electricity although he is residing in the house. Almost two years after the sale in execution, the applicant is still waiting for the transfer of the property. The acting deputy sheriff, in his capacity as an official tasked with the execution of court orders approach this court for assistance.

Conditions of sale

[5] The conditions of sale published by the applicant indicates that the purchaser is liable to pay:

(1.1) a deposit of 10% of the purchase price on the day of the auction and the balance of the purchase price (in the manner prescribed) 14 days after the auction. This is per clause 7.1.

(1.2) interest at 13.5% per annum calculated daily and compounded monthly on the auction amount until the date when the property is transferred into the name of the purchaser or when the full price is paid to the execution creditor, as per clause 7.2.

(1.3) the deputy-sheriff's charges, fees and commission, on the day of the sale and in addition, transfer duty, costs of transfer, stamp duty on transfer and bond documents, arrear rates and taxes and other charges necessary to effect transfer including building costs to obtain a compliance certificate from the relevant authorities, as per clause .

(2) In terms of clause 8, 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 auction if the purchaser fails to carry out any of its obligations and the purchaser shall be liable for any loss sustained by reason of his default.

(3) 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 purchase as per clause 10.'

The arguments on the point of law raised by the respondent

[6] On behalf of the respondent no arguments were filed but points of law were very belatedly raised. These dealt with the fact that a number of additional parties were not sited in the application. It was argued that Bank Windhoek, the judgment creditor, the second judgment debtor, Tuyeni Kumwe Food and Commodity Distributors CC, the Inspector-General and the Municipal Council of Windhoek were not sited because these parties have an interest in the matter. The last two parties' interests have to do with the relief that was sought. The applicant had no argument regarding the court order that was being sought.

[7] On behalf of the applicants, it was argued that the bank indeed supports the application and filed a supporting affidavit. They also do not seek to evict the second debtor, which is the reason why they did not join the second debtor. The relief they seek no longer included the assistance of the Namibian Police or the City Police and as such they do not need to be joined to the proceedings.

The arguments

[8] The respondent did not raise any other arguments except for the ones raised above. For the applicant it was argued that they could not take possession of the house despite the risk of profit and loss vested in it. They could further not obtain a building compliance certificate and a clearance certificate in respect of the rates and taxes as well as other utilities because the respondent refused the authorised officials of the local authority access to the property. They can further not inspect the property to establish its overall condition and determine any defects or areas in need of maintenance.

[9] The respondent further clearly showed his intention not to be bound by the execution process. The purpose of execution is the enforcement of the court's judgment, to which end proceedings are driven throughout by the judgment creditor for its exclusive benefit, through the sheriff acting in his or her executive capacity. During this process the sheriff acts as an executive of the law.

Legal considerations

[10] In *Deputy-Sheriff, Cape Town v South African Railways and Harbours and Others*¹, van Heerden J said the following about the execution of court orders:

'It is essential for the proper administration of justice that orders made by a Court should be effective and where an inability arises for the proper execution of an order or a writ due to circumstances beyond the control of the Sheriff or the Deputy-Sheriff, as the case may be, such officer is entitled to approach the Supreme Court for the proper relief and assistance in making such process effective, The Supreme Court will not hesitate to grant the necessary relief or assistance where it is within its powers to do so. Such Court cannot sit by and allow its judgment to be made ineffective by persons who are unwilling to cooperate and to exercise powers which reasonably could be exercised to make such orders effective.'

[11] In terms of *Mpakathi v Kgotso Development CC and others*² described the agreement that comes into place at a judicial sale as 'one between the purchaser and the sheriff acting as the executive of the law.'

¹ *Deputy-Sheriff, Cape Town v South African Railways and Harbours and Others* 1976 (2) SA 391 (C).

² *Mpakathi v Kgotso Development CC and others* (2006) 3 All SA 518 (SCA) para 13.

[12] The common law principles which apply to judicial seizure of property to give effect to a court's judgment, are that when executed, it creates a legal pledge over such property. The goods that are attached are thereby placed in the custody of the deputy sheriff. Effectively the property passes out of the hand of the judgment debtor and vests now in the hands of the deputy-sheriff. This is explained as follows in *Liquidators Union and Rhodesia Wholesale Ltd v Brown and Co*³ by Kotze AJ:

' An arrest effected on property in execution of a judgement creates a *pignus praetorium* or to speak more correctly, a *pignus judiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the court. They pass out of the estate of the judgement debtor.'

[13] The property so arrested or attached falls into the custody of the court represented by the court's officer, which is the deputy sheriff. The latter officer is responsible for the property which he or she has attached or arrested.⁴ In *Katjiuanjo v Willemse and Others*⁵, it was made clear that the deputy sheriff does not act as anyone's agent but as an executive of the law. Judge Geier in this case continued and said the following:

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

³ *Liquidators Union and Rhodesia Wholesale Ltd v Brown and Co* 1922 AD 549 at 558-559.

⁴ *MFV LIMB Sheriff for the Magisterial District of the Cape v South seas Driller, Her owners and all other parties interested in her and another* 1999 (4) SA 221 (C) .

⁵ *Katjiuanjo v Willemse and Others* 2013 (3) NR 850 (HC) at 686B.

[14] A sale in execution of immovable property entails two distinct transactions namely, the sale of the property and the transfer thereof. (see *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court* 1997 (1) SA 764 (D) at 778A-B). Rule 109 of the High Court Rules, 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.

[15] In *Bonsai Investments Eighty Three (Pty) Ltd v Kögl and Others*⁶, Schimming-Chase AJ, (as she was then) affirmed the exception to the common law rule that ownership only passes upon registration of transfer and quoted the following from *Chetty v Naidoo*⁷:

'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).'

[16] Schimming-Chase AJ then continued in *Bonsai* and found the following:

' 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.'

⁶ *Bonsai Investments Eighty Three (Pty) Ltd v Kögl and Others* (3296 of 2010) [2011] NAHC 189 (4 July 2011).

⁷ *Chetty v Naidoo* 1974 (3) SA 13 (AD).

[17] It therefore follows from the above that although the rules do not expressly empower the deputy sheriff to institute eviction proceedings, such power is implicit in the deputy sheriff's duty to see that transfer is passed to the purchaser.

[18] In *Katjuanjo v Willemse*⁸ Geier J, summarised the legal position as follows under the heading:

'The governing legal principles — the nature of the right acquired by a purchaser at a judicial sale in execution.

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

(a) *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T) where Eloff JP 31 for the full bench analysed the position as follows:

'I find it convenient to commence my discussion of the case by considering the validity of the notion that the sheriff acted as agent of the judgment debtor and that the latter was the true principal. The passage quoted earlier in the SA Permanent 33 case was an *obiter dictum*. With respect, I do not think that it correctly reflects the position in law. To begin with, no statutory provision that was quoted to us, or which I have been able to find, indicates that the deputy-sheriff acts as the agent of the judgment debtor. The functions of the sheriff are set out in the Rules and the Act and they are mainly the following. First of all, Rule 43(7) (a) says:

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

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

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

⁸ *Katjuanjo v Willemse* 2013 (3) NR 850 (HC).

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

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

"The messenger shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him shall be as valid and effectual as if he were the owner of the property.

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

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

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

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

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

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

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

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

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

Syfrets Bank Ltd and Others v Sheriff of The Supreme Court, Durban Central, I and Another; Schoerie NO v Syfrets Bank Ltd and Others 1997 (1) SA 764 (D) were the learned Judge states: 34

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

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

'As mentioned earlier, the authority of the Sheriff in relation to the sale in execution of immovable property is created and defined by Rule 46 of the Uniform Rules of Court and he must remain strictly within the limits of his authority. Accordingly, when immovable property is sold by the Sheriff in terms of Rule 46, he becomes a party to the contract *suo nomine* and he is bound to perform his obligations thereunder, which include the giving of transfer of the property to the purchaser, which, when effected, is considered done as validly and as effectually as if he were the owner of the property (vide Rule 46(13) and see, too, *Sedibe's* case *supra* at 676D).'

(c) Also, the Western Cape High Court has adopted this position. This appears from its exposition of the applicable position in the magistrates' court per Van Reenen J and Nel J as set out in:

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others [2003] 3 All SA 690 (C) in paras [45] – [46]:

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

[46] It is clear from the above that until an immovable property that has been sold in execution has been transferred into the name of the purchaser, the judgment debtor's ownership therein remains undisturbed as does his or her right, *qua owner*, to the use thereof. Although the transfer of ownership of such property to the new owner brings about an end to the legal basis of the judgment debtor's right to the use thereof, the impact of the transfer on such property will depend on the identity of the occupant and the legal basis of his or her occupation. If occupation is by a person other than the judgment debtor in terms of, for instance, a lease or a right of *precarium*, the transfer of ownership does not bring an

automatic end to the right of occupation. In the case of a lease the rule *huur gaat voor koop* applies and protects a tenant's continued occupation, subject to the prior rights of any mortgagee. (See: *ABSA Bank Ltd v Sweet and others 1993 (1) SA 318 (C) at 324B – F*) and, if it is held *precario*, by application of the principle *qui prior est tempore potior est jure*, after reasonable notice of termination (see: *Adamson v Boshoff and others 1975 (3) SA 221(C) at 229B*). Although after transfer of ownership the purchaser's right to the use thereof, qua owner, displaces the judgment debtor's right to do so, the former's use may manifest itself in different ways. The purchaser may want to occupy it personally or permit others to do so in terms of contractual or other arrangements that need not necessarily exclude the judgment debtor. The judgment debtor, once the legal basis for his or her occupation of an immovable property namely, his or her dominium therein, has come to an end has a choice. He or she may elect to vacate the property voluntarily or simply continue to occupy it without having entered into any contractual or other arrangements with the purchaser. In the event of the former, the loss of access to housing in respect of the particular residential unit is the result of a volitional act on the part of the judgment debtor and not the execution process. In the event of the latter, there will be a holding over by the judgment debtor, in which case the new owner will be obliged to institute legal proceedings for the eviction of the judgment debtor. Similarly a sheriff who has contractually bound himself to provide *vacua possessio*, will have to institute eviction proceedings. In such proceedings the substantive and procedural requirements of the PIE Act will have to be complied with.

Accordingly, if the judgment debtor is evicted from immovable property that constitutes his or her home and in the process is deprived of the right of access to that particular residential unit, such eviction will not have been brought about by the execution process but by separate legal proceedings instituted by the new owner based on a causa totally independent of the proceedings pursuant to which the execution had taken place'

(d) Van Reenen J reiterated this position subsequently — while considering the locus standi of the sheriff to enforce the conditions of a sale in execution — in:

Ivoral Properties (Pty) Ltd v Sheriff, Cape Town, and Others 2005 (6) SA 96 (C) ([2005] 3 All SA 178) when the court stated:

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

[66] A Sheriff may not sell immovable property attached pursuant to a duly issued writ of execution otherwise than by way of a public auction and his authority is created and circumscribed by the provisions of Uniform Rule 46 (see *Schoerie NO v Syfrets Bank Ltd and Others 1997 (1) SA 764 (D) at 771G; 773J – 774A*). When a Sheriff disposes of property in

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

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

Conclusion

[19] From the above, it is clear that although the deputy sheriff does not have to give unoccupied possession of a property when transfer happens, he must insure that transfer indeed happens. This is the role he has to play as an executive of the law and in the employ of the court. In this instance for transfer to happen it is necessary to gain access to the property and to allow various local authority officials to enter the property and to conduct the inspections they have to conduct. At this stage it is not possible because the respondent refuses to give anyone access to the property.

[20] I am satisfied that the applicant made out a good case to show that the only way that he will be able to give transfer to the purchaser would be to evict the respondent that will allow the necessary officials to have access to the house.

[21] In the result, I make the following order:

1. An order is hereby granted ejecting the Respondent, and all others occupying through him, from the premises at Erf No 5268, Khomasdal (Extension No 16), in the Municipality of Windhoek, Registration Division "K", Khomas Region, measuring 589 square metres, held by Deed of transfer No T 1701/2011.

3. Costs of suit for one instructing and two instructed legal practitioners in favour of the applicant.

E RAKOW
Judge

APPEARANCES

PLAINTIFF: Y Campbell (with her C Marais)
Instructed by Fisher, Quarmby & Pfeifer, Windhoek

DEFENDANT: K Amoomo
Of Kadhila Amoomo Legal Practitioners, Windhoek