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Mrs Sharon Snell
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For Attention: Mrs Sharon Snell (snell@sheriffs.org.za)

Dear Mrs Snell

LEGAL OPINION ON WHETHER BANKS ARE ACTING WITHIN THE LAW WHEN THEY SELL PROPERTY WHILST UNDER ATTACHMENT

INTRODUCTION

1. We have been requested by the South African Board of Sheriffs ("Board") to consider—
 - (a) whether immovable property can be sold privately whilst still under attachment by the Sheriff in terms of rule 46 of the Rules Regulating the Conduct of Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa ("Uniform Rules of Court"). In other words, can a sale in execution be stayed or cancelled whilst under attachment and the immovable property sold privately; and
 - (b) whether movable property can be disposed of whilst still under attachment in terms of rule 45 of the Uniform Rules of Court.

2. In addressing the aforesaid legal questions we considered, amongst others, the following:

- (a) Superior Courts Act, 2013 (Act No. 10 of 2013) ("Superior Courts Act");
- (b) Consumer Protection Act, 2008 (Act No. 68 of 2008) ("Consumer Protection Act");
- (c) Consumer Protection Act Regulations, 2011 ("CPA regulations");
- (c) Uniform Rules of Court;
- (d) Case law; and
- (e) Applicable textbooks.

BACKGROUND

3. The Board is concerned that Banks are abusing the requirements of rules 45 and 46 of the Uniform Rules of Court. The Board advises that currently instructions are received to attach the property, the Sheriff then proceeds to serve the writ of execution and notice of attachment to the relevant parties. Once the property has been attached, the Sheriff proceeds to set the matter down for auction.

4. The Board advises further that just prior to the Sheriff reading the conditions of sale, an instruction is received in most cases from the attorney of the execution creditor to stay or cancel the sale in execution. According to the Board, the Banks would approach the debtor and convince the debtor to sell the property privately.

DISCUSSION

5. With regards to the attachment of property and sales in execution by the Sheriff, applicable legislation in this regard includes the Superior Courts Act¹, the Uniform Rules of Court² and the Consumer Protection Act.

¹ The Superior Courts Act repealed the Supreme Court Act, 1959 (Act No. 59 of 1959).
² Despite the repeal of the Supreme Court Act, 1959 the Uniform Rules of Court which was promulgated in terms of the Supreme Court Act, 1959 continued to operate as if they were regulated in terms of the Superior Courts Act. (See section 51 of the Superior Courts Act).

6. Section 43 of the Superior Courts Act sets out the execution process by the Sheriff. In terms of section 43(1), sheriff must, subject to the applicable rules, execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff and must make return of the manner of execution thereof to the court and to the party at whose instance they were issued.

7. Section 43(1) of the Superior Courts Act thus requires that the execution of writs by the Sheriff must be subject to the applicable rules.

8. Rules 45 and 46 of the Uniform Rules of Court provides for the execution procedure in the High Court. Rule 45 of the Uniform Rules of Court is concerned with executions in general and executions against movable property. Rule 46 on the other hand provides for the execution against immovable property.

EXECUTIONS AGAINST IMMOVABLE PROPERTY

9. As indicated above the issue that needs to be ascertained is whether immovable property can be sold whilst under attachment by the Sheriff in terms of rule 46 of the Uniform Rules of Court, specifically when the Sheriff is instructed to stay or cancel the sale just prior to the Sheriff reading the conditions of sale at the auction to potential buyers. Put differently, once property has been placed under attachment, can the sale be stayed or cancelled by the execution creditor?

10. Rule 46(4) explains that attachment of immovable property must first take place by the Sheriff and once attachment has taken place a sale in execution will follow. Rule 46(4) provides as follows:

"(4) (a) After attachment, any sale in execution shall take place in the district in which the attached property is situate[d] and be conducted by the sheriff of such district who first attached the property: Provided that the sheriff in the first instance and subject to the provisions of paragraph (b) of subrule (8) may on good cause shown authorise such sale to be conducted elsewhere and by another sheriff.

(b) Upon receipt of written instructions from the execution creditor to proceed with such sale, the sheriff shall ascertain and record what bonds or other encumbrances are registered against the property together with the names and addresses of the persons in whose favour such bonds and

encumbrances are so registered and shall thereupon notify the execution creditor accordingly." [Our emphasis]

11. It is apparent from subparagraph (b) of rule 46(4) that in order for the Sheriff to proceed with the sale in execution of immovable property, written instructions must be given by the execution creditor to proceed with such sale.

12. After the Sheriff has set a date and place for the sale in execution of the immovable property, the conditions of sale must be prepared. Rule 46(8) provides as follows in this regard:

"(8) (a) (i) The conditions of sale shall, not less than 20 days prior to the date of the sale, be prepared by the execution creditor corresponding substantially with Form 21 of the First Schedule, and the said conditions of sale shall be submitted to the sheriff conducting the sale to settle them.

(ii) The execution creditor shall thereafter supply the said sheriff with two copies of the conditions of sale, one of which shall lie for inspection by interested parties at his or her office and the sheriff conducting the sale shall forthwith furnish a copy of the conditions of sale to all other sheriffs appointed in that district....".

13. Subrule (8) thus requires that the conditions of sale must correspond with Form 21 of the first schedule and that the conditions of sale must be submitted by the execution creditor to the Sheriff in order to be settled.

14. Rule 46(10) authorises the Sheriff to sell the property via public auction. Rule 46(10) thus provides that "[i]mmovable property attached in execution shall be sold by the sheriff by public auction".

15. Rule 46(12) in respect of the sale of the immovable property by the Sheriff provides as follows:

"(12) Subject to the provisions of subrule (5)³, the sale shall be without reserve and upon the conditions stipulated under subrule (8), and the property shall be sold to the highest bidder." [Our emphasis]

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(5) No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless—

(a) the execution creditor has caused notice, in writing, of the intended sale to be served by registered post upon the preferent creditor, if his address is known and, if the property is rateable, upon the local authority concerned calling upon them to stipulate within ten days of a date to be stated a reasonable reserve price or to agree in writing to a sale without reserve, and has provided proof to the sheriff that the preferent creditor has so stipulated or agreed, or

16. The Uniform Rules of Court appears to be silent with regards to the stay or cancellation of a sale in execution.

17. However, in this regard reference must be made to ***Syfrets Bank Ltd and Others v Sheriff of the Supreme Court Durban Central and Another: Schoerie N.Q. v Syfrets Bank Ltd and Other***,⁴ where the Court in considering the position of the Sheriff with regards to property sold in execution explained that "[w]hen 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...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."⁵ [Our emphasis]

18. In ***ABSA Bank v Universal Pulse Trading and others***,⁶ the Court considered the position of the Sheriff when bidding has already commenced and an instruction is received to cancel the sale. It is worth mentioning that the sale in execution in this case was without reserve. The Court observed that the Uniform Rules of Court are silent in this regard.⁷ The Court however referred to "*sales without reserve*" Silke, De Villiers and Macintosh, *The Law of Agency in South Africa*, 3rd edition, where the following was stated:

"As to withdrawal of goods from sale, this can be done at any time before the sale; or in a sale with a reserve well after bidding has begun; but not in a sale without reserve, once the article has been put up And vice versa, the bidder may withdraw in a sale with a reserve, but not, it seems, in a sale without reserve."⁸
[Our emphasis]

19. At paragraph 18, the Court opined that the Sheriff was correct in refusing to accede to the request [to cancel the sale] directed to him by the applicant. The Court then found, at paragraph 21, that "[o]nce the bidding process had commenced in an

(b) the sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this rule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in paragraph (a) of this subrule within the time stated in such notice.

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1997 (1) SA 764.

Page 773 E.

2011(5) SA 80 (WCC).

Page 5 para 11.

Page 6 para 12.

auction without reserve, as was the case here, it is no longer possible to withdraw therefrom."

20. A distinction must therefore be made between sales with a reserve and sales without reserve in deciding whether a sale in execution may be stayed or cancelled by the Sheriff.

21. In ***Lukas Marthinus De Wet and another v The Sheriff, High Court, Culinan and others***⁹ the Court considered whether a sale in execution can be stopped by the Sheriff before commencement of the auction. With reference to regulation 19(3) of the CPA regulations, the Court observed that any goods may be withdrawn at any time prior to the commencement of the auction.¹⁰ The Court further observed that the Sheriff is not an unstoppable runaway train once the sale has commenced.¹¹ On page 10, the Court stated as follows:

"It is clear from the judgment and the authorities relied upon that the sheriff cannot stop a sale in execution once the bidding has started, and by necessary implication that he can do so before the commencement of the bidding. I also wish to emphasise that all the judgments concerned consider the position after the bidding has started, as distinct from the stage when the conditions of sale are read out, at which stage there is no suggestion that the sale cannot be stopped. In the present case it was common cause that the instruction to stop was given while the sheriff was reading out the conditions of sale.

22. The Court then concluded as follows:

"The instruction to stop the sale was clearly given during the reading out of the conditions of sale and before bidding had commenced. In my view the sheriff was wrong in refusing to stop the sale when instructed to do so and the question posed to me must be answered in the favour of the applicants."¹² [Our emphasis]

23. It is thus clear from the ***Lukas Marthinus*** judgement that a sale in execution may be stayed or cancelled prior to the commencement of the bidding by the Sheriff.

24. Regard should also be had of the Consumer Protection Act which was enacted in order to, amongst others, "promote a fair, accessible and sustainable marketplace for

⁹ Unreported under case number 29378/14.

¹⁰ Page 7.

¹¹ Page 9.

¹² Page 11.

consumer products and services and for that purpose to establish national norms and standards relating to consumer protection".¹³

25. Section 45 of the Consumer Protection Act to the extent applicable to the matter at hand provides as follows:

"Auctions

45. (1) *In this section, "auction" includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction.*

(2) *When goods are put up for sale by auction in lots, each lot is, unless there is evidence to the contrary, regarded to be the subject of a separate transaction.*

(3) *A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in any other customary manner, and until that announcement is made, a bid may be retracted.*

(4) *Notice must be given in advance that a sale by auction is subject to—*

- (a) *a reserved or upset price; or*
- (b) *a right to bid by or on behalf of the owner or auctioneer, in which case the owner or auctioneer, or any one person on behalf of the owner or auctioneer, as the case may be, may bid at the auction.*

(5) *Unless notice is given in advance that a sale by auction is subject to a right to bid by or on behalf of the owner or auctioneer—*

- (a) *the owner or auctioneer must not bid or employ any person to bid at the sale;*
- (b) *the auctioneer must not knowingly accept any bid from a person contemplated in paragraph (a); and*
- (c) *the consumer may approach a court to declare the transaction fraudulent, if this subsection has been violated.*

(6) *The Minister may prescribe requirements to be complied with by an auctioneer, or different categories of auctioneer, in respect of—*

- (a) *the conduct of an auction;*
- (b) *the records to be maintained with respect to property placed for auction; and*
- (c) *the sale of any such property by auction.* [Our emphasis]

26. We have also considered the CPA regulations. The definition of "auction without reserve" is of particular importance. Regulation 18 of the CPA regulations, defines "auction without reserve as follows:

"auction without reserve" means an auction at which—

- (a) goods are sold to the highest bidder without reserve;
- (b) the auction does not require a minimum bid;

¹³

Long title Consumer Protection Act.

- (c) the auction does not allow competing bids of any type by the seller or an agent of the seller; and
- (d) the seller of the goods cannot withdraw the goods from auction after the auction is opened and there is public solicitation or calling for bids;[Our emphasis]

27. In terms of regulation 19(3) "[a]n auctioneer must for purposes of subregulation (1) advertise the auction of a particular item or lot at least 24 hours prior to the commencement of the auction, but (a) any goods may be withdrawn at any time prior to the commencement of the auction; (b) in the event of an auction where goods offered for sale include immovable property, this period must exceed five business days".

28. It is therefore clear from the Consumer Protection Act read with its regulations that in respect of auctions without reserve the seller cannot withdraw the goods from auction after the auction has commenced with the obvious implication that goods may be withdrawn at any time prior to the commencement of the auction.

29. With regard to the matter at hand it has been stated that the Banks' attorneys would call the Sheriff while the Sheriff is just about to start reading the conditions of sale and instruct that the sale must be cancelled. It is therefore imperative that it be determined whether the auction is one with a reserve or without reserve and further whether the auction has commenced.

30. The case law cited in this opinion confirms that once the bidding process has commenced in an auction without a reserve it is not possible to withdraw therefrom. However, the auction may be cancelled prior to the commencement of the bidding. It is therefore apparent that the Sheriff would be obliged to stay or cancel the sale should an instruction be received from the execution creditor prior to the commencement of the bid. Should the auction be with a reserve an instruction to stay or cancel can be given at any time.

EXECUTIONS AGAINST MOVABLE PROPERTY

31. The Board has also requested our opinion on situations where the attorney would dispose of movable property whilst still under attachment by, for example, selling the movable property to Cash Converters.

32. The process of sales in execution against movable property is regulated by rule 45 of the Uniform Rules of Court.

33. Rule 45(3), (5) and (6) of the Uniform Rules of Court provides as follows:

"(3) Whenever by any process of the court the sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself or by his assistant proceed to the dwelling-house or place of employment or business of such person (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached) and there—

- (a) demand satisfaction of the writ and failing satisfaction,
- (b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the said writ, and failing such pointing out,
- (c) search for such property.

Any such property shall be immediately inventoried and, unless the execution creditor shall otherwise have directed, and subject to the provisions of subrule (5), shall be taken into the custody of the sheriff: Provided-

- (i) ...
- (ii) ...

(5) Where any movable property has been attached by the sheriff, the person whose property has been so attached may, together with some person of sufficient means as surety to the satisfaction of the sheriff, undertake in writing that such property shall be produced on the day appointed for the sale thereof, unless the said attachment shall sooner have been legally removed, whereupon the sheriff shall leave the said property attached and inventoried on the premises where it was found. The deed of suretyship shall be as near as may be in accordance with Form 19 of the First Schedule hereto.

(6) If the judgment debtor does not, together with a surety, give an undertaking as aforesaid, then, unless the execution creditor otherwise directs, the sheriff shall remove the said goods to some convenient place of security or keep possession thereof on the premises where they were seized, the expense whereof shall be recoverable from the judgment debtor and defrayed out of the levy. [Our emphasis]

34. The process of attachment as provided for under subrule (3), (5) and (6) above contemplates an inventory of the movable property by the Sheriff and the retention of the said movable property by the Sheriff, unless the judgment debtor together with some other person provides surety to the satisfaction of the Sheriff that the goods will be produced on the day of the sale.

35. In *South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd*,¹⁴ the Supreme Court of Appeal explained with regards to the attachment of property as follows:

"[20] The need to attach the debt is self-evident. An attachment in execution creates a *pignus judiciale*, the effect of which is that control of the property attached passes from the judgment debtor to the officer entrusted with the execution of the writ, the dominium of the debt remaining with the judgment debtor ...".

36. Therefore, once the movable property has been attached the control of the property passes from the judgement debtor to the Sheriff. However, ownership would remain with the judgement debtor who can up to the last moment before the sale in execution redeem the attached property.¹⁵

37. Rule 45(7) of the Uniform Rules of Court authorises the Sheriff to sell the movable property which has been attached, by public auction. Rule 45(7) provides as follows:

"(7) (a) Where any movable property is attached as aforesaid the sheriff shall where practicable and subject to rule 58 sell it by public auction to the highest bidder after due advertisement by the execution creditor in a newspaper circulating in the district in which the property has been attached and after expiration of not less than 15 days from the time of seizure thereof.

(b) Where perishables are attached as aforesaid, they may with the consent of the execution debtor or upon the execution creditor indemnifying the sheriff against any claim for damages which may arise from such sale, be sold immediately by the sheriff concerned in such manner as seems expedient.

(c) The sheriff shall not later than 15 days before the date of sale either in terms of paragraph (a) or paragraph (b), forward a notice of sale to all other sheriffs appointed in that area." [Our emphasis]

38. The sale in execution by public auction of the movable property is the next step in the execution process after attachment. The effect of subrule (7) of rule 45 is that it

¹⁴ 2012 (5) SA 125 SCA.

¹⁵ *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court Durban Central and Another: Schoerie N.Q. v Syfrets Bank Ltd and Others* 1997 (1) SA 764.page 773 B-D.

requires the Sheriff himself or herself and not an agent of the judgment creditor to sell the property at the auction.¹⁶

39. It would therefore appear that the Sheriff would in the ordinary course of events obtain control and possession of the movable property, unless surety has been given in terms of rule 45(5) of the Uniform Rules of Court, in which case the debtor keeps possession of the movable property.

40. We have been advised that the attorney of the execution creditor would organise a private sale with "cash converters" thereby disposing of the property whilst still under attachment. It would seem in such a case that the judgment creditor and the debtor would be acting contrary to section 46(a) and (b) of the Superior Courts Act which deals with offences relating to execution. Section 46(a) and (b) of the Superior Courts Act provides as follows:

"Offences relating to execution

- 46.** Any person who—
- (a) obstructs a sheriff or deputy sheriff in the execution of his or her duty;
 - (b) being aware that goods are under arrest, interdict or attachment by a Superior Court, destroys or disposes of those goods in a manner not authorised by law, or knowingly permits those goods, if in his or her possession or under his or her control, to be destroyed or disposed of in such a manner;
 - (c) being a judgment debtor and being required by a sheriff or deputy sheriff to point out property to satisfy a warrant issued in execution of judgment against that person—
 - (i) falsely declares to the sheriff or deputy sheriff that he or she possesses no property or insufficient property to satisfy the warrant; or
 - (ii) although knowing of such property, neglects or refuses to point out that property or to deliver it to the sheriff or deputy sheriff when requested to do so; or
 - (d) being a judgment debtor, refuses or neglects to comply with any requirement of a sheriff or deputy sheriff in regard to the delivery of documents in his or her possession or under his or her control relating to the title of immovable property under execution,
is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year."

¹⁶

Van der Walt v Kolektor (Edms) BpK 1989 (4) SA 690 (T) page 694A and HJ Erasmus, Erasmus Superior Court Practice Juta Available at <http://juta/NXT/gateway.dll?f=templates&fn=default.htm> [accessed 25 April 2017].

41. In addition to rule 45(7) which requires the Sheriff to sell the movable property by public auction to the highest bidder, it would seem therefore that the creditor may have also violated section 46(a) and (b) of the Superior Courts Act.

CONCLUSION

42. In view of our discussion above, we conclude as follows:

(a) With regard to immovable property and as confirmed by the case law above, should a sale in execution be with a reserve, the auction may be stayed or cancelled at any time. However, if the sale in execution is without reserve then an instruction to stay or cancel the sale by the attorney for the execution creditor can be given any time prior to the commencement of the auction. The process in respect sales in execution of immovable property as listed in rule 46 of the Uniform Rules of Court are not the same as the process for sales in execution of movable property as provided for in rule 45 of the Uniform Rules of Court. It is for this reason that immovable property can be sold privately once the auction has been stayed or cancelled. This has created a certain degree of uncertainty with regard to the sale of immovable property once the auction has been stayed or cancelled.

(b) In respect of movable property, possession and control of the movable property in terms of rule 45 of the Uniform Rules of Court lies with the Sheriff unless security has been given to the satisfaction of the Sheriff that the goods will be produced on the day of the sale, in which case the property will remain with the judgement debtor. Where the property is disposed of by someone else other than the Sheriff, that would be contrary to rule 45(7) of the Uniform Rules of Court and section 46(a) and (b) of the Superior Courts Act.

Yours sincerely

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**for ACTING CHIEF STATE LAW ADVISER
A Arnold/ B Lufundo/T Hercules**