IN THE HIGH COURT OF SOUTH AFRICA
WITWATERSRAND LOCAL DIVISION

Case No. 27484/2004

In the matter between:

**WARRICKER, GAIL LIYN NO** First Plaintiff
**MAJIETT, DONOVAN THEODORE NO** Second Plaintiff

and

**SENEKAL, JOHAN** Defendant

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**Judgment:**

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Horwitz AJ:

1. The plaintiffs are the joint trustees in the insolvent estate of one Nortjé. The defendant is a director of a company, NEW INVEST 29 (Pty) Ltd, which purchased an immovable property belonging to Nortjé at a sale in execution. Nortjé owed a creditor money and failed to pay. In consequence, the creditor obtained judgment against Nortjé and caused the property in question to be attached; hence the sale in execution. In compliance with its obligation under the conditions of sale, NEW INVEST 29 (Pty) Ltd (to whom I will henceforth refer as "the execution purchaser") paid the Sheriff a deposit of R25 000,00, the balance of the purchase price being payable against registration of transfer.

2. After judgment had been obtained and the sale in execution had taken place but before transfer of the immovable property to the execution purchaser was passed, Nortjé's estate was sequestrated. (I am unsure when the execution purchaser paid the deposit but that does not affect the outcome of the case.) In terms of sub-section 20(1)(c) of the Insolvency Act, No. 24 of 1936, upon the Sheriff's becoming aware of the sequestration of Nortjé's estate, he became obliged to stay execution, unless a Court order was obtained that the Sheriff proceed therewith[1]. (It is clear that no

[1] This is a summary of the provisions of sub-section 20(1)(c) of the Insolvency Act.

Court order was obtained.) That entailed that the Sheriff was precluded from passing transfer of the immovable property to the execution purchaser.

3. In terms of sub-section 20(2)(a) of the Insolvency Act, the sum of R25 000,00 which the Sheriff had received as payment of the deposit fell into Nortjé's estate so the Sheriff became obliged to pay that amount over, not to the execution creditor, but to the trustees (or provisional trustees, as they then were) of Nortjé's estate. Proceeding one step further, had the Sheriff in fact passed transfer of the property to the execution purchaser and received the full balance of the purchase price, he would likewise have been obliged to pay that to the trustees.

4. But things did not quite work out like that: they went somewhat awry. For reasons which no-one seems able to explain, the execution purchaser paid the Sheriff the deposit which it was obliged to pay in terms of the agreement of purchase and sale and, after Nortjé's estate had been sequestrated, the execution purchaser somehow managed to obtain transfer of the property into its name without having paid the balance of the purchase price. (I assume that the Sheriff passed transfer because the trustees had applied to the Master for, and obtained, permission in terms of section 80*bis* of the Insolvency Act, read with sub-section 18(3) thereof, to sell the property in question[2]. The agreement of sale for which they sought the Master's permission to sell the property was the very agreement in terms of which the Sheriff had sold the property to the execution purchaser at the sale in execution.)

5. The trustees therefore did not receive the proceeds of the sale, as they should have in terms of section 20 of the Insolvency Act – but for the deposit, there were in fact no proceeds for them to receive.

6. The trustees obviously scrutinised the agreement of sale and found a provision therein in terms of which the defendant had bound himself as surety and co-principal debtor for what the execution purchaser had been obliged to pay for the

[2] Section 80*bis* provides that prior to the second meeting of creditors, the trustee of an insolvent estate may recommend to the Master that property of the insolvent estate be sold and the Master may authorise such sale. Section 18(3) provides for the Master to grant a provisional trustee authority to sell property of an insolvent estate, without which a provisional trustee may not do so. For reasons which I enunciate below, I do not believe that those provisions were applicable, *in casu*.

property.[3] They therefore sued him for the outstanding balance. I was not told, and did not ask, why steps were not taken by the Sheriff against the execution purchaser but as the defendant's liability is co-extensive with that of the execution purchaser (having bound himself as surety and co-principal debtor) I did not concern myself with that aspect. Also, it does not appear from the particulars of claim what happened to the deposit of R25 0000,00 which the execution purchaser had paid; I assume that the Sheriff paid it to the trustees, but the fate of the deposit has no impact on the outcome of the case.

7. What I have set out above is all common cause. The parties led no evidence at the trial; instead, they drew up and agreed a set of facts and argued the matter as a stated case. The following is a verbatim transcript of what they agreed:

> "1. The First and Second Plaintiffs are the duly appointed joint trustees in the insolvent estate of Nario Nortjé ("Nortjé").
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> 2. Nortjé was the registered owner of immovable property described as Portion 319 of the farm Hartebeespoort C419, Registration Division JQ, North West Province, and held under title deed No. T175566/1966 ("the property").
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> 3. Nortjé was indebted to the Standard Bank of South Africa Limited ("the Bank") in a substantial amount.
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> 4. The Bank took judgment against Nortjé.
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> 5. Pursuant to the judgment:
>
> 5.1 the Sheriff of the High Court, Brits, conducted a sale of the property in execution on 17 March 2000;
>
> 5.2 and at the sale in execution the property was purchased by New Invest 29 (Pty) Limited ("the Purchaser").
>
> 6. The terms and conditions set out in Annexure "B" to the particulars of claim ("the conditions of sale") governed the aforementioned sale of the property to the Purchaser.
>
> 7. The Defendant signed the conditions of sale on behalf of the purchaser with knowledge of the contents of paragraph 17 thereof.
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> 8. Nortjé (*sic*) was provisionally sequestrated on 30 January 2001 and finally sequestrated on 6 March 2001.
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> 9. During April 2001 the Plaintiffs (at that stage as provisional trustees) applied in terms of the agreed bundle of documents handed in at the hearing of this matter, for an extension of powers in terms of Section 18(3) read with Section 80(*bis*)(1) of the Insolvency Act.

[3] The suretyship is contained in clause 17 of the conditions of sale and the relevant portion thereof provides as follows: "Indien die koper 'n maatskappy …… is, dan in sodanige geval, sal die persoon wat die voorwaardes onderteken homself verbind as 'n borg en medehoofskuldenaar vir al die verpligtinge van die koper ……." The defendant signed the conditions of sale on behalf of the execution purchaser.

10. On 9 July 2001 the Master of the High Court furnished a consent in terms of Section 18(3) read with Section 80(*bis*)(1) of the Insolvency Act, No. 24 of 1936. A copy of the Master's consent is at page 15 of the Pleadings Bundle.

11. Pursuant to the conditions of sale, the Purchaser took occupation of the property.

12. The property was registered in the name of the Purchaser on 1 July 2002. A copy of Deed of Transfer T78334/2002 is at pages 15 and following of the Notices Bundle.

13. The Purchaser paid the deposit of R25 000 but has failed to pay the balance of the purchase consideration, being the sum of R225 000."

8. The conditions of sale to which reference is made in paragraph 6 of the agreed statement of facts are signed by both the Sheriff and the execution purchaser. The Sheriff describes himself merely by his office without specifically stating who the seller of the property is. The document merely makes it clear that the property was being sold pursuant to a sale in execution. Clause 17 of that document, which contains the suretyship on which the plaintiffs rely, also does not in so many words state in whose favour the suretyship was given. It is therefore a matter of construction who the seller is and who the party is in whose favour the suretyship was given.

9. The gist of the argument advanced by Mr *Du Toit*, who appeared for the defendant, was when the sheriff sells property at a sale in execution, he acts as principal. In support of his argument he referred me to a number of reported judgments.[4] Accordingly, the Sheriff must be held to have been the party in whose favour the suretyship was given. His client, the defendant, did not bind himself in favour of any other party, in particular, the plaintiffs. Whatever other right they may therefore have had to claim the proceeds of the sale of Nortjé's property, they certainly had no right to claim anything from the defendant, who did not bind himself in favour of anyone other that the Sheriff.

10. Mr *Du Toit* then proceeded to develop his argument further as to what the law provides should happen in circumstances where insolvency intervenes to interrupt the execution process but I will deal with that later on in these reasons for judgment.

[4] *Sedibe and another v United Building Society and another* 1993 (3) SA 671 (T) at 676A-D; *Mpakathi v Kghotso Development CC and others* 2003 (3) SA 428 W) at 434 E-G; *Ivoral Properties (Pty) Ltd v Sheriff, Cape Town, and others* 2005 (6) SA 96 (C) at 118E-I

11. It is trite that for a suretyship to be valid and comply with the requirements of section 6 of Act 50 of 1956, it must identify, apart from the debt which is intended to be secured by it, the creditor, the principal debtor and the surety. The fact that it imposes the additional liability of a co-principal debtor on the surety does not detract from the intrinsic quality that a suretyship possesses.[5]

12. Ordinarily, when a contract contains a suretyship provision such as that found in the present agreement, it is taken that the person who binds himself as surety for the relevant debt of the principal debtor, does so in favour of the selfsame creditor identified in that agreement.

13. There does not appear to be any reason why the position should be different in the present case. I think that I can safely accept, therefore, that the defendant bound himself in favour of the Sheriff to make good any default by the execution purchaser in not paying the purchase price. As I have said, for a suretyship to be valid, it must identify a creditor in whose favour it is given. The Sheriff alone is the creditor of the execution purchaser and it follows that the suretyship was given in favour of the Sheriff and not in favour of Nortjé.

14. Unless I am able to find that upon insolvency, the trustee of the insolvent succeeds to the rights of the Sheriff in circumstances such as the present, this would appear to be the end of the matter. Mr *Massyn*, who appeared on behalf of the joint trustees of Nortjé, presented argument to persuade me that his clients did indeed succeed to the rights of the Sheriff and in support of his argument, he referred me to *Syfrets Bank Ltd and others v Sheriff of The Supreme Court, Durban Central; Schoerie NO v Syfrets Bank Ltd and others*[6]. Upon what basis, then, can the trustees in Nortjé's estate claim to be entitled to enforce the Sheriff's rights against the defendant?

15. It is a general principal of the law of insolvency that the trustees in an insolvent estate step into the shoes of the insolvent, subject to one important qualification: whilst the trustees acquire the right to enforce the insolvent's rights against third parties, third parties do not enjoy all the rights that they might otherwise have enjoyed against the insolvent, but for the sequestration of his estate. One such right (and possibly the only right) that they do not have is the right to obtain against the

[5] *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 623
[6] 1997 (1) SA 764 (D)

trustees an order for specific performance of any obligation that the insolvent had[7]. The reason for this is clear: in winding up the insolvent's estate, the trustees are obliged in terms of section 77 of the Insolvency Act to collect all debts owing to him. If however, they were obliged to carry out an obligation of the insolvent (such as the obligation to transfer immovable property), that would give the creditor entitled thereto a preference above other creditors of the insolvent's estate. Such a creditor must therefore make do with the other remedy which it otherwise has, namely, an action for damages against the insolvent. Upon quantification of the damages which the creditor claims to have suffered, the latter will receive no more than the same dividend that other creditors will receive in the winding up of the insolvent's estate[8].

16. As I have already stated, Mr *Massyn* submits that the trustees also step into the shoes of the Sheriff. In the *Syfrets* case[9] on which he relies, COMBRINK J said[10]:

> "This brings me to the second of the two interrelated questions posed earlier, namely whether the liquidator was entitled to repudiate the judicial sale of the property to the bank as he purports to have done. Having found that the liquidation which interposed between the conclusion of the judicial sale and transfer of the property to the purchaser terminated the *pignus judiciale* over the property which, in turn, resulted in the transfer of the custody and control of the property from the Sheriff to the Master and thereafter to the liquidator, it follows that the liquidator was entitled to abandon the sale and that he has lawfully done so. **The effect of the resultant assumption of custody and control over the property by the liquidator is that the liquidator takes the place of the Sheriff as seller of the property in relation to the sale in question**. As mentioned earlier, liquidation does not automatically terminate executory contracts entered into by the company before liquidation. The liquidator steps into the shoes of the insolvent company and has to decide, in the light of the interests of the general body of creditors, whether to abide by or abandon the contract. Should he choose to abide by the agreement, he would be required to perform all the obligations of the company under the contract. On the other hand, should the liquidator decide to abandon the contract the other party, for reasons explained earlier in this judgment, is precluded from enforcing specific performance of the contract against the liquidator, but has a concurrent claim for damages against the company in liquidation. Viewed in this way a fundamental flaw in the argument on behalf of the bank, as summarised earlier, is revealed. Granted that the bank purchased the property from the Sheriff acting *suo nomine* and pursuant to the sale looked to the Sheriff to effect registration of transfer thereof into its name under Rule 46(13) of the Uniform Rules of Court. **With the advent of liquidation, however, the custody and control over the property passed from the Sheriff to the liquidator, who, in discharge of the obligations which that office confers upon him, has to decide whether to allow the sale to proceed or to abandon it.**"

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[7] *Thomas Construction (Pty) Ltd (In liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 566J-567B

[8] See, for example, *Syfrets*, *supra*, at 774B-775D especially at 775D

[9] See note 6

[10] At 782F-783C

(The emphasis is mine.)

17. Whilst I recognise the differences between liquidation, on the one hand, and insolvency on the other[11], I have difficulty (with respect to the learned Judge) with the notion that upon the winding up of a company whose property the Sheriff has sold in execution but not yet transferred to the purchaser, the liquidator takes the place of the Sheriff in the executory agreement of sale. Granted, control of the property passes to the liquidator but I do not follow why that leads to the conclusion that the liquidator takes the place of the Sheriff in a contract in which the latter acted as principal. But even if I am incorrect on this score in relation to the liquidation of companies, in my view that certainly is not the position in relation to the sequestration of an individual's estate, because in such an instance, the provisions of sub-section 20(1)(c) of the Insolvency Act supervene.

18. Certainly in regard to the law of sequestration I cannot visualise any basis for Mr *Massyn's* submission. As I have said, the logic behind the trustees' stepping into the shoes of the insolvent is clear, but into the shoes of the Sheriff? I cannot see why in law or logic that should be so. There is no statutory endorsement for accepting this. The Sheriff had an obligation to recover the purchase price of the property from the execution purchaser. Upon sequestration of the debtor's estate, section 20 of the Insolvency Act obliged him to then pay the amount to the trustees. I cannot accept that the right of the trustees to receive this amount from the Sheriff somehow vested them with the right, which the Sheriff otherwise had, to enforce the provisions of the sale against the execution purchaser.

19. In support of his argument, Mr *Massyn* placed store also on certain remarks of KING J (as he then was) in *Sheriff, Magistrate's Court, Simonstown v Groll*[12]. This case concerned the taxation of fees in the Magistrate's Court. At 908F, the learned Judge said:

> "Thus item 14 caters for an execution completed by sale in contradistinction to item 12, which is concerned with an uncompleted execution arising out of an attempted sale of attached property not completed by sale by reason of the sequestration of the estate of the debtor. Here the property was not sold by reason of the decision of the trustees of the insolvent seller declining to give effect to the sale. Compare *Thomas Construction*

[11] Contrast sub-section 20(1)(c) of the Insolvency Act, No. 24 of 1936 with sub-section 359(1)(b) of the Companies Act, No. 61 of 1973.
[12] 1996 (1) SA 905 (C)

*(Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) at 566-567A."

20. I do not believe that the learned Judge, by stating something in the negative, intended to lay down a rule such as that for which the plaintiffs contend. The case is not authority for the proposition that it lies within the power of a trustee in a sequestration to take control of a sale in execution by the Sheriff of the property of the insolvent, where the sale took place prior to the insolvent's estate having been sequestrated.

21. Mr *Massyn* lastly referred me to *Shalala v Bowman NO and others*[13] in which BLUM AJ stated:

> "I can see no difference in principle between the position of a liquidator who has an election in respect of a contract concluded by the company but not performed prior to liquidation, and his position in respect of a sale in execution commenced but not completed when liquidation supervenes. Both contracts may be valid but, bearing in mind the interest of creditors, it seems that the liquidator must have the power to repudiate, even in the case of incomplete sales in execution, where the interests of creditors demand it."

22. With respect, I perceive a great difference between the two situations. In the case of the former, an election by a liquidator not to perform the obligations of the company of which he is the liquidator, where those obligations arise out of a pre-liquidation contract of the company, amounts to a breach of contract. That breach affords the other party an action for damages, which such party can prove as a creditor in the winding up of the company and that party is entitled to receive whatever dividend other concurrent creditors receive. In the case of a sale in execution which does not proceed[14] because of the liquidation of the company, however, there is no breach by the company. The creditor does not have an action for damages: the creditor must simply resort to the winding up procedure to prove and obtain satisfaction (to

[13] 1989 (4) SA 900 (W) at 907H

[14] The authorities are unclear as to the circumstances in which liquidation stays execution. Sub-section 359(1)(b) of the Companies Act, No 61 of 1973, provides that "any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void." The authorities are not harmonious as to whether the words "put in force" applies to every step taken along the way, that is, steps commenced before winding up as well as those taken thereafter. (See, e.g. Henochsberg on *The Companies Act*, Vol 1 page 759). There is no need for me to resolve the disharmony because if the sale in execution remains valid, the problem does not arise and *caedit quaestio*. If, on the other hand, the execution becomes invalid, it is because of the operation or law and the question of a breach by the company simply does not arise.

whatever extent other creditors receive it) of its original debt which was the subject of the execution process. The one process is substituted with another one.

23. I emphasise, however, that I am concerned with a differently worded provision, namely, sub-section 20(1)(c) of the Insolvency Act, which has no closely similar counterpart in company law. To the extent, therefore, that the *ratio* in the *Shalala* case is propounded with respect to the facts of the present case, I do not agree with it.

24. I conclude that the trustees did not succeed to the rights of the Sheriff under the agreement of sale. It follows that the trustees likewise did not acquire the Sheriff's right to claim payment from the defendant, the surety for, and co-principal debtor with, the execution purchaser for payment of the purchase price.

25. Does the grant of authority by the Master, to which reference is made in paragraph 10 of the agreed statement of facts, save the day for the plaintiffs? Both counsel appeared to agree that the provisions of the Insolvency Act referred to therein have no application in the present circumstances. Mr *Massyn*, however, submitted that whilst it was unnecessary for his clients to rely thereon, to the extent that the Master's authority could have vested the trustees with the rights for which they contend, the necessary authority was given.

26. Insofar as the trustees sought the Master's authority to sell the immovable property (and thereby implement and enforce the agreement which the Sheriff had concluded with the execution purchaser), it seems to me that the trustees invoked incorrect provisions of the Insolvency Act for the purpose of implementing and enforcing the sale by the Sheriff to the execution purchaser thereof: the Sheriff had concluded that agreement with the fullest authority of the law. Because insolvency then intervened, the Sheriff was precluded by operation of the provisions of sub-section 20(1)(c) of the Insolvency Act from performing under the agreement which he had concluded, unless the Court directed otherwise. The trustees or the Sheriff or the execution purchaser could have applied to Court for the latter's authority but I cannot grasp how the trustees could invoke section 80*bis* and sub-section 18(3) to obtain authority to enforce an agreement which they did not even conclude.

27. The authority under section 80*bis* and sub-section 18(3), on the one hand, and that under sub-section 20(1)(c), on the other hand, serve different purposes. The former serves to enable the trustee to sell property of the insolvent for the benefit of all his creditors. The latter provision, on the other hand, although it might hold benefits for the insolvent estate and therefore creditors thereof, also benefits someone in the position of a purchaser, who, having paid a deposit prior to the sequestration of the insolvent's estate and ordinarily should therefore only be a concurrent creditor for repayment of that amount, can receive the full benefit of the payment. While the Master can give authority for the former, only the Court can give authority for the latter.

28. In this context, I again allude to Mr *Massyn's* submission that the trustees step into the shoes of the Sheriff. I have already stated why I reject that submission but even if it were correct, it was in my view legally incompetent to invoke section 80*bis* and sub-section 18(3), as opposed to sub-section 20(1)(c), to obtain the necessary sanction for the implementation of the sale which the Sheriff had concluded[15].

29. In my view that is the end of the matter. Lest I might have missed something along the way, I proceed now to address Mr *Du Toit's* further argument in support of his submission that the trustees have no claim against the defendant.

30. In a nutshell, Mr *Du Toit's* submission amounts to this: Upon the sequestration of Nortjé's estate, section 20 of the Insolvency Act had the effect that the immovable property which the Sheriff had sold to the purchaser thenceforth vested in the trustees. The Sheriff was therefore precluded by operation of law from passing transfer of the property to the execution purchaser. Concomitantly, he lost the right to claim the purchase price from the execution purchaser. The erstwhile right to claim the purchase price did therefore not become an asset in the insolvent estate of Nortjé and there was no basis upon which the trustees could have claimed it from the execution purchaser. *Ergo*, they acquired no claim against any surety for that amount. For the reasons which I have enunciated above, section 80*bis* and sub-section 18(3) of the Insolvency Act did not ameliorate the position for the trustees.

[15] It will be recalled that in the case of section 80*bis* and sub-section 18(3), the Master's consent is required, whereas in the case of section 30(1)(c), the Court's consent is required.

31. The submission makes sense to me and I agree with it. Mr *Massyn* would have me hold that there is little difference, if any,[16] between the present type of situation (in which the Sheriff is the seller of the debtor's property prior to the sequestration of the latter's estate) and one in which the debtor himself is the seller prior to the sequestration of his estate (in which case the trustee has an election[17] whether or not to enforce the contract concluded by the insolvent). In the absence of some statutory sanction for such a view, I cannot subscribe to it. I am unaware of a common law rule to that effect.

32. In the circumstances the plaintiffs' claim is dismissed with costs.

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A.J. Horwitz
Acting Judge of the
High Court

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| Date of hearing: | 9 June 2006 |
| Date of judgment: | 13 October 2006 |
| Counsel for plaintiff: | T. Massyn |
| Attorneys for plaintiff: | Shaun Nel, Johannesburg |
| Counsel for defendant: | J.I. Du Toit |
| Attorneys for defendant: | Senekal Simmonds Inc, Bedfordview |

[16] See *Shalala's*, case, *supra*, at 907H

[17] I am unhappy with the terminology "election". The trustee does not have an election, *stricto sensu*, whether or not to proceed with the implementation of a contract. Should he decide not carry out the insolvent's obligations under a pre-sequestration contract, that decision amounts to a breach of contract with all its consequences, save that the creditor loses any right which it otherwise might have had to obtain an order for specific performance. That is really the only effect of the exercise by the trustee of his so-called election. (See the case in note 7 above.)