EXECUTION SALE MUST ADVISE PURCHASER OF EXACT OUTSTANDING RATES

The Sheriff of Johannesburg North v Yellow Dot Property Investments (2013/26871)[2016] ZAGPPHC (4 March 2016)

In many jurisdictions it is practice that the Conditions of Sale in an execution sale reflect R nil in respect of the estimate of outstanding municipal rates. Then, once the property has successfully been auctioned, the execution creditor's conveyancers will obtain the figures and will advise the purchaser thereof. The court here questioned whether, in so doing, the Sheriff falls foul of his/her statutory duties.

FACTS

Yellow Dot Property Investments (Pty) Ltd (Yellow Dot) bought a property at a sale in execution in March 2014. The Conditions of Sale included the requirement that Yellow Dot pay a deposit (together with Sheriff's fees and commission) and provide a guarantee to secure the balance purchase price within a certain period. It also required Yellow Dot to pay all municipal rates and taxes as are required for the issue of a municipal clearance certificate in terms of section 118(1) of the Municipal Systems Act.

The Conditions of Sale did not reflect the amount payable in order to obtain the clearance and the amount was entered as a R0,00 estimate. (The court noted that the practice of estimating rates payable as R nil was not uncommon.)

The deposit was paid timeously but the guarantee and other amounts were all paid late.

In June 2014 the Sheriff lodged an application for the cancellation of the sale as a result of Yellow Dot's breach, but never proceeded with the application. In the intervening period, the initial guarantee that was provided, although belatedly, had lapsed and was only replaced in September 2015 with a further guarantee.

Regarding the late payment of rates, the facts showed that in December 2014 the Sheriff requested payment of the rates clearance amount. These were paid in January 2015, some three weeks after the stipulated period as provided for in the Conditions of Sale. Additional municipal rates clearance figures were presented to Yellow Dot on 1 February 2015 which were not paid, despite demand. So too in November 2015, a further payment of some R71,000.00 in respect of municipal rates was requested from Yellow Dot which was also not paid. It appeared that there was a dispute with regards to the amounts payable to the municipality arising from an alleged water leak resulting in the issuing of allegedly incorrect figures.

Due to the breach in the late furnishing of the guarantee, payment of the rates clearance amount, and failure to pay other required amounts within the stipulated time periods, the Sheriff again sought to cancel the agreement.

Yellow Dot disputed the Sheriff's right to cancel the sale. It argued that:

(i) in light of the incorrect rates figures provided initially, Yellow Dot was not obliged to pay the rates figures when the Sheriff demanded it. It relied on the judgment in *The Sheriff of the High Court, Johannesburg East v Chetty and Others:In re First National Bank Ltd t/a FNB Homeloans v Chetty* in the same division where the court held that (a) the amount due in respect of rates and taxes in the Conditions of Sale could not be a mere estimate, if regard is had to the provisions of section 118 of the Municipal Systems Act (i.e. that for a transfer clearance, only the past 24 months' municipal debt must be paid); and (b) that it was the duty of the Sheriff or judgment creditor to request clearance figures from which the exact amount owing appears, for inclusion in the Conditions of Sale.

(ii) It also raised the defence of *exceptio non adimpleti contractus* – that they could not be forced to perform in terms of the agreement where the Sheriff did not perform its obligations as required in Rule 46(13) of the High Court Rules. (This Rule provides that the 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 or 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.")

HELD:

Was the Sheriff entitled to claim cancellation in the circumstances?

- An agreement concluded pursuant to a sale in execution can only be cancelled by court order upon application by the Sheriff.

- Other than in respect of the municipal clearance amounts, the time period for the performance of each of the obligations by Yellow Dot was fixed in the Conditions of Sale. As Yellow Dot did not comply with these, the Sheriff was in principle entitled to cancellation.

- However, the Sheriff's conduct and the corresponding obligations in terms of the Conditions of Sale viewed against the backdrop of the rules regulating the Sheriff's duties in execution sales, must be considered. The following was relevant:

  (i) On the facts it appeared that the Sheriff and his legal representatives granted

Yellow Dot latitude notwithstanding consistent failures by Yellow Dot. The legal principle that a failure to cancel a contract within a reasonable time after the breach may provide evidence of an election to abide by the contract, was therefore applicable.

(ii) The role of the Sheriff in execution sales is that of an executive of the law. Rule 46 of the Uniform Rules of Court requires the Sheriff in this capacity to settle the conditions of sale together with the execution creditor and to give transfer, being empowered to do anything necessary to effect registration of transfer.

As such, knowing that a clearance certificate is required in law before registration of transfer may be effected, this requirements read with Rule 46 creates a statutory as well as a reciprocal obligation on the Sheriff to act positively to effect transfer. Yellow Dot's obligations must be interpreted against this background and as such, the Sheriff must show that he has complied with its obligations before it can demand performance from Yellow Dot. Regard must be had to the legal and financial implications of section 118 of the Municipal Systems Act (i.e. potential liability of a purchaser for historic debts on the property) which makes it imperative that the amounts payable in respect of the rates amounts are clearly stated in the Conditions of Sale.

- In this matter, there were a series of errors relative to the exact amount payable by Yellow Dot which left the Sheriff's case dissatisfactory.

The Sheriff's application was therefore unsuccessful.

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