Unexecuted Contract or Merely a Stay of Execution?: *Warricker NO & Another v Senekal*

ANDRÉ BORAINE
University of Pretoria

ALLAN WEST
Justice College
Pretoria

1 Introduction

The judgment in *Warricker NO & Another v Senekal* (2008 JOL 21161 (W); 2007 JDR 1190 (W)) deals, among other things, with the treatment of unexecuted (unperformed) contracts of sales in execution of immovable property of a judgment debtor by the sheriff subsequent to the sequestration of the judgment debtor's estate. Since the facts agreed upon by the parties are not comprehensively reported, some had to be obtained from an enquiry at the Deeds Registry. (See in general M Kelly 'Proceeding with Transfer Where an Execution Sale Took Place Prior to Sequestration or Liquidation' (2000) 12 *SA Merc LJ* 369 for a discussion of the relevant case law prior to *Warricker v Senekal* (supra).)

The remarkable facts and the eventual outcome of *Warricker v Senekal* (supra) require further consideration. This note will thus mainly address two aspects:

- the position of the sheriff, the trustee and the purchaser of immovable property with regard to the execution procedure after the sequestration of the estate of the judgment debtor, more specifically regarding the treatment of unexecuted pre-sequestration sales after sequestration, with a few comparative remarks regarding the same position following winding-up; and
- the effect of the transfer of immovable property subsequent to sequestration, in terms of an unexecuted pre-sequestration sale in execution.

2 The Facts of *Warricker v Senekal*

In *Warricker v Senekal* (supra) the facts were as follows: the first and second plaintiffs were the joint trustees in the insolvent estate of Nario Nortjé ('the judgment debtor'). 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'). Nortjé was indebted to the Standard Bank of South Africa Limited ('the judgment creditor') in a substantial amount. The judgment creditor obtained judgment against the judgment debtor.

Cite as: (2008) 20 *SA Merc LJ* 544–553.

Pursuant to the judgment, the Sheriff of the High Court, Brits, conducted a sale of the property in execution on 17 March 2000. At this sale the property was purchased by New Invest 29 (Pty) Limited ('the purchaser'), for which a deposit was paid over to the sheriff. The terms and conditions of the sale included a surety clause whereby a director of the purchaser, the first defendant in this case, bound himself as surety in the matter. The first defendant signed the conditions of sale on behalf of the purchaser, with full knowledge of the surety clause. In the conditions of sale, the sheriff described himself merely by his office, without specifically stating who had sold the property. It was evident that the property was sold pursuant to a sale in execution.

The estate of the judgment debtor was sequestrated provisionally on 30 January 2001 and finally on 6 March 2001.

In April 2001 the plaintiffs – the trustees in the insolvent estate (and at that stage the provisional trustees) – applied to the Master of the High Court for an extension of powers in terms of s 18(3), read with Section 80*bis*(1) of the Insolvency Act 24 of 1936 that would permit them to sell the property. The sheriff, however, allowed the property sold in execution prior to sequestration to be transferred after sequestration, but without the court's consent in terms of s 20(1)(*c*) of the Insolvency Act. (Although this information does not appear from the judgment, it is assumed that the trustees probably agreed that the transfer should proceed in view of the Master's authority as stated above.)

The sheriff paid the deposit of the purchase price over to the trustees in view of s 20(2)(*a*) of the Insolvency Act, but the balance of the purchase price was not collected from the purchaser. The trustees therefore sued the defendant because he had bound himself as surety for the balance of the purchase price.

On the basis that the sale in execution amounted to an unexecuted contract whereby the trustee would step into the shoes of the insolvent party, the trustees attempted to claim the balance of the purchase price from the surety even though the sheriff sold the property on behalf of the judgment creditor and effected transfer, after sequestration, into the name of the purchaser.

The Court ruled that in view of s 20(1)(*c*) of the Insolvency Act, the whole execution procedure, including the sale, was stayed as from the moment of sequestration, and that this procedure could only be proceed with, with the consent of the court. In view of this section, the trustees had no authority whatsoever to allow the sale and the eventual transfer to succeed. So the principles concerning unexecuted contracts would not apply, and the trustees did not take over the obligations and rights of the sheriff regarding the sale in execution and had no locus standi to claim the balance of the purchase price.

3 The Position of a Sheriff to Proceed with an Execution after Sequestration of the Estate of the Judgment Debtor

3.1 The Legal Consequences of Sequestration on Pre-sequestration Execution

It is trite that a sheriff must stay an execution following judgment against a judgment debtor as soon as he or she becomes aware of the sequestration of that judgment debtor's (the insolvent's) estate. The execution may not proceed without the court's consent (see s 20(1)(*c*) of the Insolvency Act). All property of the insolvent, including that in the hands of the sheriff at the date of sequestration, vests in the Master and subsequently in the trustee as from his or her appointment (see s 20(1)(*a*) of the Insolvency Act).

In this regard, it is to be noted that such execution may be at different stages following the judgment. At the time of sequestration, judgment might have been granted without the sheriff's being mandated to proceed with the execution, or after that person's being mandated, but before he or she has taken any steps in execution to sell the property. Perhaps the sale in execution has been advertised or, as in this instance, the sale in execution has been concluded but the property has not yet been transferred to the purchaser. Taken literally, s 20(1)(*c*) of the Insolvency Act does not differentiate between these various stages of execution following judgment. It must therefore be accepted that any of these stages will be deemed to be stayed as forming part of the execution, and that the court may authorise the sheriff to proceed with the execution during any of these stages (see *Ex parte Eastern Province Building Society* 1939 WLD 102 at 105).

Where the execution sale has been concluded but transfer has still to be effected, the question may nevertheless arise whether the trustee may treat the unexecuted sale in execution as an unexecuted contract and thus apply the general principles in this regard: namely, to continue with the contract when the required consent is obtained, or to repudiate the sale. These powers must be exercised with the concursus creditorum in mind, and the trustee must act in the best interests of the creditors.

In *Warricker v Senekal* (supra), it appears as though the provisional trustees attempted to obtain permission from the Master to sell the property and to rely on such authority to allow the sale and the transfer of the property to proceed. Although this fact is not clear from either the judgment or the documents in the Deeds Registry, the sheriff, however, proceeded with the transfer after sequestration, but without the court's consent. The property was registered in the name of the purchaser, but the purchase price remained unpaid.

The Court specifically ruled (in par 30) that this property, because it had not been transferred to the purchaser at the time of sequestration, would vest in the trustee, and the sheriff was thus prevented by operation of law from transferring the property to the purchaser (see also *Simpson v Klein NO & Others* 1987 (1) SA 405 (W) at 412D-G). Only the court may thereafter sanction the further execution thereof, in this case the transfer.

Consequently, the trustee cannot step into the shoes of the sheriff, as is the case where the insolvent debtor has sold the property in his or her own name prior to sequestration. (Contrary to this view, the Court held in *Shalala v Bowman NO & Others* 1989 (4) SA 900 (W) at 907H-I that the liquidator of a company in liquidation will have the right to repudiate such an unexecuted pre-liquidation sale in execution. See also *Syfrets Bank Ltd & Others v Sheriff of the Supreme Court, Durban Central, & Another; Schoerie NO v Syfrets Bank Ltd & Others* 1997 (1) SA 764 (D) at 782F-783C. These cases deal with the position in winding-up, however, which is not necessarily the same as that in sequestration: see par 4 below.)

In *Warricker v Senekal* (supra), Horwitz AJ specifically distinguished the present facts from those of *Syfrets Bank Ltd v Sheriff of the Supreme Court* (supra), because *Warricker* dealt with sequestration and *Syfrets Bank Ltd* with winding-up. In an obiter dictum (*Warricker v Senekal* supra in par 17) he also stated that he had great difficulty in accepting that the liquidator even in winding-up takes the place of the sheriff in the case of an unexecuted pre-liquidation sale in execution. Nevertheless, s 20(1)(*c*) of the Insolvency Act that required the court's consent, as explained above, settled the matter for him in the case of sequestration (see also par 18).

The judge also differed from the view expressed in *Shalala v Bowman* (supra) that there is no difference between an ordinary unexecuted sale of land and an unexecuted execution sale. He explained that repudiation by the liquidator in the first instance would give rise to a claim of damages for breach of contract by the purchaser whilst, in the latter, it would not amount to breach of contract if the execution did not proceed after it had been stayed (*Warricker v Senekal* supra in par 22). The judge, however, also accepted that s 20(1)(*c*) of the Insolvency Act had no similar counterpart in the Companies Act 61 of 1973. He nevertheless conceded that the legal position regarding the stay was less clear in the case of winding-up, but held that it was not necessary for him to resolve the disharmony of the relevant statutory provisions in this regard (see par 22, read with fn 14).

The authors of *Meskin* consider that the *Warricker* case is correct in its interpretation of s 20(1)(*c*) of the Insolvency Act, and that only a court may allow the unexecuted contract of a sale in execution to proceed and thus to authorise the transfer thereof after sequestration (see Philip Meskin *Insolvency Law and its operation in winding-up* (1990-, loose-leaf) edited by PAM Magid, André Boraine, Jennifer A Kunst & David A Burdette in par 6.1). In essence, the fact that the sale is a sale in execution places it squarely within the ambit of execution, and so the doctrine of unexecuted contracts will not apply at all.

In spite of this approach, it may be argued that it might be a less expensive procedure and even be to the ultimate benefit of the creditors to allow the trustee or perhaps the Master to allow the pre-sequestration sale to proceed. Where the property has fetched a good price at the sale in execution, a further court order to obtain the required consent in terms of s 20(1)(*c*) of the

Insolvency Act may be a rather unnecessary expense, and would also take some additional time that may not be in the best interests of the creditors and the administration of the estate as a whole.

From the purchaser's point of view, it is not clear what his or her position will be if the court's consent is not obtained in order to allow the transfer to proceed. It seems that the effect will be that the sale in execution is terminated if this consent is not obtained. The purchaser will then merely be allowed to reclaim any performance that he or she has rendered, but will otherwise not have a claim for breach of contract against either the sheriff or the trustee, because the termination will then follow by operation of law. (Where the construction of the unexecuted contract applies, the purchaser will in general retain an unliquidated claim for damages against the trustee in view of the trustee's repudiation of the contract that amounts to breach of contract as indicated in *Warricker v Senekal* supra in par 22.)

In the absence of a specific statutory provision or a judgment by the Supreme Court of Appeal in this regard, it seems that uncertainty may continue.

4 The Position of Unexecuted Sales in Execution and Winding-up Compared

In the winding up of a company (or a close corporation), the property does not vest in the liquidator, but the control of the property merely passes to the trustee (s 361 of the Companies Act 61 of 1973). It is also important to note that the insolvency law, including the Insolvency Act, will apply mutatis mutandis to a company or close corporation that is unable to pay its debts (see s 339 of the Companies Act and s 66 of the Close Corporations Act 69 of 1984).

Meskin states (op cit in par 6.2) that where, prior to the commencement of the winding-up, property has been sold in execution and after such commencement the property is delivered to the purchaser, the provisions of s 359(1)(*b*) of the Companies Act do not in themselves operate to invalidate the delivery. However, *Meskin* then states that delivery may be impeachable at the instance of the liquidator. However, where delivery has not occurred at the stage of winding-up, delivery is precluded. The reason given is the concursus creditorum, and the purchaser's personal right to obtain delivery as against the sheriff is enforceable only within the limits arising from such institution. Although the authority for the view that the liquidator has this right to decide whether to allow the sale to proceed or to abandon it is acknowledged, *Meskin* supports the conclusions of Horwitz AJ in *Warricker v Senekal* (supra). The point is made that the concursus creditorum causes the control of the property to vest in the liquidator, and the sheriff is thus precluded by operation of law from passing transfer of the property to the purchaser in execution.

As the Companies Act contains its own provisions in this regard, it is clear that case law relevant to this position cannot be adopted directly for the

purposes of s 20(1)(*c*) of the Insolvency Act. In fact, the Supreme Court of Appeal decided in a majority judgment in *Legh v Nungu Trading 353 (Pty) Ltd & Another* (2008 (2) SA 1 (SCA) at 6G) that s 339 of the Companies Act does not render s 20(1)(*c*) of the Insolvency Act applicable to a company in winding-up. (In his minority judgment in *Legh v Nungu Trading 353 (Pty) Ltd* supra at 7C-E, Heher JA preferred to leave open the question whether s 20(1)(*c*) of the Insolvency Act, read in conjunction with s 339 of the Companies Act, is to be treated on the same footing as the rest of s 20(1) of the Insolvency Act. Nevertheless, he arrived at the same conclusion. See also Kelly op cit at 373, whose view is in line with the majority judgment.)

Meskin (op cit in par 6.2) states that in such an instance, where the execution procedure was put into force prior to winding-up but without delivery taking place, then it must be treated as a civil proceeding that must be stayed in terms of s 359(1)(*a*) of the Companies Act. The problem remains, however, that s 359(1)(*b*) of the Companies Act does not allow the court explicitly to authorise the continuance of a pre-liquidation sale in execution as does s 20(1)(*c*) of the Insolvency Act. And as s 20(1)(*c*) of the Insolvency Act does not apply to a company in winding up, the court cannot be approached to sanction a subsequent transfer of the property. (See Kelly op cit note at 374, stating that the court has no such power.) This is probably the reason that various courts have held that the liquidator in winding-up may treat the unexecuted pre-liquidation contract of sale in terms of the ordinary rules of the unexecuted contract.

5 Law Reform

With reference to cl 11(6)(*b*) of the Draft Bill contained in the Report of the South African Law Commission Project 63, Review of the Law of Insolvency (2000), cl 11.7 of the Explanatory Memorandum seems to accept the judgment in *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central* (supra) on the point that a liquidator may repudiate, cancel or withdraw from a sale in execution if the assets have not been delivered or transferred by the date of liquidation. The Memorandum then goes on to state that it is unnecessary to spell out the rights of the liquidator to repudiate a sale in execution, because this right is not expressly provided for in the case of sales in general. It is clear from the above discussion, however, that this position is not so clear any longer. It is thus submitted that the whole issue of unexecuted sales in execution must be revisited, either by allowing the Master to authorise the continuation of such a sale under all circumstances, or by revising cl 11(5)(*b*) by granting such a power to the Master or the liquidator. (It is to be noted that the Draft Bill intends to deal with both sequestration and winding-up, and the position regarding such unexecuted sales in execution should then be the same.)

Clause 11(5)(*a*) of the Draft Bill basically repeats the current s 20(1)(*c*) of the Insolvency Act. However, clause 11(5)(*b*) of the Draft Bill is a new

provision granting the Master the power to authorise the continuation of a sale in execution where costs in connection with this sale have already been incurred when the execution is stayed. As envisaged in clause 11(5)(*a*) of the Draft Bill, the Master may on the application of the liquidator and on the conditions that he or she finds just, and subject to the confirmation of the sale price by the Master or by resolution of the meeting of creditors of the estate, approve the continuation of the sale for the benefit of the insolvent estate, in which case the costs of the sale before or after liquidation shall be deducted from the proceeds.

6 The Wrongful Transfer of the Property and the Balance of the Purchase Price

6.1 Inspection in the Deeds Registry

From a closer inspection of the land registers at the Deeds Registry, the following facts appear: Portion 319 of the farm Hartebeestpoort C419 was registered in the name of Mario Nortjé, married out of community of property, by virtue of deed of transfer T17566/1998.

On 1 July 2002, transfer of this farm was passed by the Sheriff of the High Court, Brits, to Newinvest 29 (Proprietary) Limited, in terms of Deed of Transfer T78334/2002. The power of attorney given by the sheriff mandating the conveyancer, in terms of s 20 of the Deeds Registries Act 47 of 1937, to appear before the Registrar to pass transfer was dated 24 July 2000.

The causa or recital of the transfer of the land indicated that Standard Bank of South Africa was the plaintiff and Trakprops 157 (Proprietary) Limited together with Mario Nortjé were the defendants. By virtue of a writ of execution, issued by the Registrar of the High Court of South Africa (WLD), on 13 October 1990, the land was attached by the sheriff and sold by public auction on 17 March 2000, for R250 000,00.

From further inspection of the Deeds Registry records, it was also observed that a sequestration order was served on the Registrar of Deeds and noted against the said Mario Nortjé on 2 March 2001, under S3503/2001.

When the transfer was examined by the Registrar of Deeds to determine its registrability, as provided for in s 3(1)(*b*) of the Deeds Registries Act, the deeds examiner raised the following query: 'Certify re S3503/2001'. The conveyancer instructed to pass transfer of the land responded as follows: 'I certify that the above-mentioned insolvency does not apply'. The note was duly purged by the examiner and the deed registered into the name of the purchaser.

6.2 Responsibility for Correctness of Transfer

From the point of view of registration, it seems that both the Registrar of Deeds and the conveyancer erred. Both the conveyancer (see s 15A read with Regulation 44A of the Deeds Registries Act) and the Registrar (see s 3(1)(*b*)

of the Deeds Registries Act) were required to determine whether the 'owner' of the land had passed transfer, and whether a person acting in a representative capacity had acted within the powers conferred upon him or her by law.

From a reading of the sequestration order noted in the Deeds Registry, it is abundantly clear that the sequestration was applicable to the registered owner. The Registrar of Deeds should not have requested the conveyancer to certify whether the sequestration was applicable. Instead, the Registrar ought to have refused registration on the grounds of the sequestration in the absence of a court order authorising such a transfer.

Furthermore, the conveyancer's certificate that the sequestration was not applicable can be questioned in view of the sequestration of the estate of the registered owner and the absence of the court's consent for the sheriff to pass transfer of the land.

6.3 Who Should Have Passed Transfer?

Section 20(2)(*a*) of the Insolvency Act provides that all property of the insolvent as at the date of sequestration 'including property or the proceeds thereof which are in the hands of the sheriff' shall vest in the Master and subsequently in the trustee of the insolvent estate (see also *Simpson v Klein* supra).

In *Simpson v Klein* (supra) it was held, among other things, that immovable property sold in execution but not yet transferred at the date of sequestration vests in the Master and subsequently in the trustee. From the relevant case law, read with s 20 and the definition of 'owner' in s 102 of the Deeds Registries Act, it is clear that, except where the court, in exceptional circumstances, orders the sheriff to proceed with the sale and transfer of the immovable property, the trustee is the proper person to pass transfer of the immovable property from an insolvent estate (see, for instance, *Unie Spoorweg Onderlinge Begrafnisgenootskap v Druker NO* 1961 (1) SA 266 (W); *Simpson v Klein* supra at 412D-G).

From the facts of *Warricker v Senekal* (supra), it is clear that the sheriff did not approach the court for authorisation to proceed with the sale and transfer. However, the provisional trustee and trustee did approach the Master for authorisation in terms of s 18(3) and 80*bis* of the Insolvency Act, to transfer the land. It thus seems that the trustee attempted to elect to proceed with the contract in view of this authorisation. Such an authorisation was clearly inadequate, though, and even if it were the correct procedure, the trustee should have passed transfer of the immovable property concerned. It is clear that something went wrong with the subsequent procedure.

The faulty registration that followed could possibly be ascribed to a lax examination of the deed by the Register of Deeds, and/or the subsequent certification by the conveyancer following the query by the deeds examiner. (It could not be established whether the trustees did in fact authorise the

registration of the transfer as such, but such an authorisation would have been meaningless in view of s 20(1)(*c*) of the Insolvency Act.)

Furthermore, it is common practice that a conveyancer will not pass transfer of immovable property if the financial obligations of the transaction are not fully paid or secured. The balance of the purchase price should have been paid in full or been secured before the transfer of the land was proceeded with. In this regard, it is also not clear whether the sheriff had proper guarantees regarding the balance of the purchase price or whether the trustees did in fact consent to the transfer taking place.

6.4 The Effect of Error in Registration

The sheriff clearly did not have the capacity to pass transfer of the land, given the rule that no one can transfer more rights to another than he himself has (nemo plus iuris ad alium transferre potest quam ipse haberet). So the transaction is in principle subject to cancellation in terms of s 6 of the Deeds Registries Act. The trustees thus seem to be able to apply to court for the cancellation of the transfer. A claim for damages arising from an erroneous transfer may in principle lie against the sheriff, the conveyancer and the Registrar of Deeds (see in general *Barclays Bank DCO v Minister of Lands* 1964 (4) SA 284 (T) and *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A)).

7 Conclusion

In the first place, *Warricker v Senekal* (supra) raises the question of how to deal with an execution sale that has not yet been performed at the time of sequestration. It seems that the stay of execution rule as embodied in s 20(1)(*c*) of the Insolvency Act will trump the notion of the unexecuted contract in this regard, thus causing the property sold as such to vest in the trustee of the insolvent estate.

Although there is a difference of opinion in this regard, the view that the sale in execution is stayed and may only be performed on the authority of a court order seems to be more sound than to apply the election of the trustee by treating the sale in execution as a mere unexecuted contract in view of the wording of s 20(1)(*c*) of the Insolvency Act. The essence of this point of view is basically that if the court's consent to proceed with the sale is not obtained, the execution sale is terminated and the purchaser will have no claim for damages against the insolvent estate similar to the case of an ordinary unexecuted contract and where the trustee has elected not to proceed with the contract. Obviously, if the sale does not proceed, the purchaser should have the right to claim restitution of any performance that he has rendered, such as the partial payment of the purchase price. If such money were still with the sheriff, the claim would lie against the sheriff. (These consequences are not spelt out by the Insolvency Act and, since it is not treated as a repudiated unexecuted contract, the principles of breach of contract will not apply.)

It would appear that s 20(1)(*c*) of the Insolvency Act does not apply in a similar situation where the judgment debtor (the insolvent) is a company (or close corporation), because the Companies Act contains its own provisions in this regard (ss 358 and 359 of the Companies Act). In spite of case law to the contrary, the outcome should ideally (de lege ferenda) be the same as under s 20(1)(*c*) of the Insolvency Act. Parliament should at least make this position clearer by amending the Companies Act by inserting a provision similar to s 20(1)(*c*) of the Insolvency Act. (See Kelly op cit note at 380, where she states that 's 359(1)(*a*) and (*b*) should be amended to extend the authority of the Court in exceptional circumstances'.) It is thus unfortunate that because of unclear provisions in the Companies Act, the result in sequestration may be different from the result in winding-up.

It seems that this set of issues have not been adequately addressed in the Draft Insolvency Bill. It is submitted that this matter needs further attention since, in view of the current proposal, the Master will only in a limited instance have the discretion to allow the sale in execution to proceed in the concursus creditorum. The policy decision to make in this instance must be revisited: namely, whether an unexecuted sale in execution should be dealt with by the trustee or liquidator in terms of the principles of unexecuted contracts, or by the Master or rather by the Court as provided for in s 20(1)(*c*) of the Insolvency Act.

The unexecuted-contract construction may be the better alternative, because it will grant the trustee or liquidator the power to decide whether to continue with or to repudiate the contract. Then, however, the consequences of such an election whether or not to proceed must also be regulated. It will also become a policy decision whether the purchaser should enjoy a claim for damages should the trustee or liquidator decide not to continue with the contract in these circumstances. There is also no reason that the rule in the case of sequestration and winding-up should not be identical in this regard. To some extent, this is yet another example of the consequences, sometimes illogical, where different pieces of legislation deal with the same kind of problem but in respect of different types of debtors.

With regard to the issue of deeds registration brought about by the set of facts in *Warricker v Senekal* (supra), it seems that the trustees will have to apply for the cancellation of the erroneous transfer by the sheriff and/or consider instituting a claim for damages against the sheriff, the conveyancer and the Registrar of Deeds. If the trustees allow the transfer of the property, the creditors may well consider suing them for any damages suffered by the estate.