REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/33229

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

28/2/2012
DATE

SIGNATURE

In the matter between -

STANDARD BANK OF SOUTH AFRICA LIMITED	PLAINTIFF
and	
NDLOVU, ARTHUR	1ST DEFENDANT
MNGADI, NOMSA PATIENCE	2ND DEFENDANT
In re -	
WILLEM CAREL VAN DER MERWE – SHERIFF, JOHANNESBURG SOUTH	APPLICANT
and	
KIBEL, BRAD	RESPONDENT
In re -	
KIBEL, BRAD	APPLICANT
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	1ST RESPONDENT
SHERIFF, JOHANNESBURG SOUTH	2ND RESPONDENT

JUDGMENT

SUTHERLAND J

[1] This is a case about the consequences of a cancellation of a sale in execution under the provisions of Rule 46(11) of the Uniform Rules of Court. The controversy arises from the grievance of the applicant, Brad Kibel, at the cancellation of a sale to him of fixed property. The relief sought is expressed thus:

> *"That the judgment in terms of Rule 46(11) granted against the Applicant/Execution Purchaser ... be rescinded."*

[2] Neither the Notice of Motion nor the Founding Affidavit invokes a rule of court under which the rescission application is brought. In argument, counsel invoked Rule 42(1)(a), which provides:

> "The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby"

[3] No reliance was placed in the common law or the inherent jurisdiction of the courts; however, because of the view I take of the matter, there would have been no difference had there been such reliance. There is no hitherto reported decision known to counsel illustrating a rescission of a cancellation of a sale in execution. I too am unaware of any decision.

[4] Rule 46 (11) provides:

> "(a) If the purchaser fails to carry out any of his or her obligations under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser, and the property may again be put up for sale.
>
> (b) The purchaser shall be responsible for any loss sustained by reason of his or her default, which loss may, on the application of any aggrieved creditor whose name appears on the said sheriff's distribution account, be recovered from him or her under judgment of the judge pronounced summarily on a written report by the said sheriff, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purpose.
>
> (c) If such purchaser is already in possession of the property, the said sheriff may, on 10 days' notice apply to a judge for an order ejecting him or her or any person claiming to hold under him or her therefrom."

[5] It is useful to trace the history of this matter. Regrettably, the court file containing the documents placed before a judge, in terms Rule 46(11), by the sheriff has been lost.

[6] What is extant is the Rule 46(11) Notice prepared by the Sheriff, to which is attached his report, a copy of a return of Sale-in-Execution and receipt of the deposit and the commission due, dated 10 May 2011, and a copy of the standard conditions of sale signed by the applicant and the Sheriff, to which is annexed the standard appendix containing the personal information and *domicilium citandi et executandi* of

the purchaser. What is missing is a letter, described as Annexure "C" in the report dated 14 July 2011 which was allegedly sent to the applicant, purportedly to demand performance. Also missing, or simply not attached, is the actual order made by the judge.

[7] The relevant facts are those set out in the applicant's founding affidavit. The material details are these:

7.1 On 15 May 2011 a sale in execution was held for Erf 959 Ridgeway. The Applicant sought to make something if the wrong date on the face of the notice; *ie* 10 May 2008. In my view this is a clear typographical error, demonstrably so, as the body of the report and the annexures give the correct information. The point is without substance.

7.2 The applicant successfully bid and concluded the standard sale agreement.

7.3 The material portion Clause 5.1(a) of the sale agreement provides:

> "The purchaser shall pay a deposit of ten percent of the purchase price ... . The balance of the purchase price is payable against transfer and is to be secured by a bank or building society guarantee to be approved by the execution creditors attorneys to be furnished to the sheriff within twenty one days after the date of sale. ... ..."

This clause exists to comply with Rule 46(8) and item 6(a) of Form 21A of the First Schedule to the Uniform Rules as to the peremptory terms to be provided for in the conditions of sale in execution.

7.4 The applicant paid the upfront deposit.

7.5 The guarantees were due 21 days after 15 May 2011.

7.6 The possibility of a breach of the sale agreement is provided for in clause 10:

> "If the purchaser fails to comply with any of the conditions of this agreement, the sale may be cancelled by a judge summarily on application by the sheriff after due notice having been given to the purchaser by way of **serving the application** on the purchaser at the address chosen by the purchaser as his *domicilium citandi et executandi.* In the event of the sale being cancelled as a result of the purchaser's default the property may again be put up for action and the purchaser will be liable for any loss or damage suffered by the plaintiff or the sheriff as may be determined by a judge … …"

As is apparent, this, clause echoes Rule 46(11) of the Uniform Rules of Court.

7.7 The applicant did not provide guarantees within the prescribed period.

7.8 The Report alleges that a letter, sent by registered post, putting him on terms to perform, was sent on 14 July 2011 to the applicant. This is the missing Annexure "C". The applicant does not dispute the sending, but alleges that he did not get it. In the absence of a rebuttal, the fact of non-receipt must be accepted.

7.9 Sometime in late September 2011 the applicant admits receiving, at the *domicilium*, service of the Rule 46(11) Notice as contemplated by clause 10 of the agreement and Rule 46(11). No certain date is alleged. The date the Sheriff signed the Rule 46(11) Notice is 12 September 2011. His report was attested to on 19 August 2011. Therefore, it can be inferred that that the applicant came into possession of it between 13 September and 30 September 2011.

7.10 The Notice, in plain terms, alerts the applicant of the intention of the sheriff to report to a judge that the sale ought to be cancelled. It does not expressly invite opposition.

7.11 The applicant explains his further conduct consequent upon having received the Notice. He contacted a member of the conveyancing attorneys firm who was apparently dealing with the matter. What the applicant does not do, upon receipt of the notice and reports in terms of Rule 46(11) is file or announce to the sheriff or the judgment creditor or

its conveyancers, any form of opposition, The Applicant says that he told one Ajodha, of the conveyancers, whose confirming affidavit is conspicuously absent, that he had sold the property to Oak Park Trading (Pty) Ltd, a company owned by the applicant's father. What exactly Ajodha said, if anything, at that stage, is not disclosed.

7.12 On 12 October 2011, a judge in terms of the Rule 46(11) cancelled the sale of 15 May 2011. This fact, says the applicant, was unknown to him until 1 December 2011.

7.13 On 13 October 2011, ABSA Bank issued an approval of a bond to Oak Park Trading (Pty) Ltd. This, the applicant says, was sent at once to the conveyancer, although no corroboration of when and how that occurred is offered.

7.14 Further contact with the conveyancers continued. The attorneys for Oak Trading (Pty) Ltd sent a letter to the sheriff's conveyancers. Nothing is said about any reply. On 11 November, Ajodha was told that the property had been again on-sold. Then, on 21 November, another letter was sent to the conveyancers offering further guarantees. Apparently, on this date applicant was told a Rule 46(11) application had been filed. Only on 1 December was applicant told the Rule 46(11) application had already been granted, as long ago as 12 October 2011.

[8] Several complaints are raised by the applicant about irregularities supposedly committed by the sheriff in processing the Rule 46(11) cancellation. The complaints are dealt with thus:

8.1 The South Gauteng Practice Manual was not complied with as regards the fate of the deposit: - Even if this were so, such non-compliance was self evidently condoned by the judge and in any event cannot give rise, *per se*, to a litigable issue.

8.2 The Sheriff did not initiate the Rule 46(11) application; rather, in truth, the judgment creditor inspired it: - No facts are set out to justify the assertion, but the fact can readily be accepted as likely. I expect that that is commonplace when a breach of the conditions of sale occurs.

8.3 The Rule 46(11) report is not given by the Sheriff, who is Mrs 'M Van der Merwe'; rather, the deponent, 'Carel Van der Merwe', who is merely the Deputy Sheriff, reported, and therefore the Rule 46(11) cancellation is void: - This is a silly point.

8.4 The report is full of allegations not in the personal knowledge of the deponent, and was really drafted by the judgment creditor who presented it to the Sheriff to slavishly sign:- There are no facts stated to

found an inference the Sheriff did not consider the relevant facts and did not seek to cancel the sale.

8.5 The applicant was never put in *mora* to perform: It may be supposed that the letter of 14 July 2011 was intended to warn the applicant to perform. However, there was no obligation on the part of the Sheriff to give such a letter because the date for performance, stipulated in clause 5.1, made this transaction an example of *mora ex re.* (See: *West Rand Estates v New Zealand Insurance Co* 1926 AD 173 at 195-196; contrast: *Vesailles Estates (Pty) Ltd v Ponisammy & Ano* 1972 (2) SA 566 (T).) The provisions of Rule 46(11) do not require the purchaser to be put in *mora.* All that is required is that notice be given of the provisions Rule 46(11) if they are to be invoked. It is admitted that this was indeed done in September, when service of the Rule 46(11) Notice was effected at the applicant's *domicilium*, at least some 12 days before the cancellation occurred.

8.6 The applicant is not in breach of the sale agreement: - This is patently incorrect as the first purported tender of guarantees took place on 13 October, about five months after the date of the sale, and long after the stipulated date for delivery. No novation is alleged. The breach is manifest.

8.7 The conveyancers misled the applicant into thinking the sale was always 'alive': - The assertions in the affidavit do not support this contention. There is a deafening silence about the conveyancers' responses, if any, to the overtures by the applicant. In addition, in the absence of a confirmatory affidavit, the thin account set out in the affidavit is unhelpful to the applicant's cause.

8.8 The judgment creditor seeks to achieve a better sale price by a sale out of the insolvent estate of the judgment debtor rather than in a sale in execution: - This, it is contended, is somehow unfair. The contention is meritless because the judgment creditor's motive is irrelevant to the issue in contention.

8.9 If any "indication of a dispute" exists a judge should refuse a Rule 46(11) application, and thus was not done: - It is true that any dispute should halt the Rule 46(11) process (see: *Sheriff, Hlabisa and Nongoma v Shobede* 2009 (6) SA 272 (KZN) per Wallis J). However, even on the applicant's own assertions, no such dispute was conveyed to the judge, let alone to the Sheriff.

[9] This account of the facts demonstrates the poverty of the case advanced for a rescission.

[10] However, even if there was some sort of case to be made out about the applicant being misled, the unavoidable fact is that there was non-compliance with the terms of clause 5.1 of the sale agreement. Moreover, any supposedly misleading behaviour occurred after the breach and in no way could have been causally connected to the breach. There is therefore no room to contemplate some form of waiver. (Contrast: *Sewpersath v Dookie* 2008 (2) SA 526 (D).) That breach gave the Sheriff the right under clause 10 to elect to invoke Rule 46(11) and effect a cancellation of the transaction. The purpose of the notice of such a step is to give the purchaser a chance to challenge the allegation of the breach. In this case, that is not even alleged.

[11] It was supposed by the applicant, in the launching of this application for rescission, that a cancellation of a sale agreement in terms of Rule 46(11) is a "judgment" susceptible to a "rescission" under Rule 42(1)(a). That, in my view, is incorrect.

[12] The act of the sheriff is not an "application" contemplated by Rule 6. The sheriff presents a report. The judge cancels the sale. The act of the judge in cancelling the sale in terms of Rule 46(11) is not a judgment in any conventional sense. The procedure is *sui generis*. Its function is to provide judicial oversight to the process of execution of judgments. The "cancellation", albeit a decision of the judge, defies forensic classification. It is not an approval of the sheriff's act; the judge *per se* effects the cancellation, albeit at the instance of the Sheriff and, doubtless, in turn, at the

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[13] In my view, once done, a cancellation in terms of Rule 46(11) cannot be undone. If the purchaser does not intervene prior to the cancellation then the cancellation is effective and irreversible. An offer to perform cannot trump a cancellation. (Eg; see: Moodley v Reddy 1985(1) SA 76 (D).)

[14] There are a number of policy considerations which bear on the purpose and effect of this summary procedure (See too, Sheriff, South Johannesburg RE Sithole & others per Splig J, Case No 16822/2002 SGHC (Unrep); Hlabisa (supra) at [9]).

14.1 The Sheriff's invocation of the Rule is to offer to the Sheriff the security of being able to re-advertise and resell without litigation interfering with the swift progress towards disposing of the property and of satisfying the creditor's legitimate interests.

[15] A purchaser has only those rights that are to be found within the four corners of the sale agreement. If the guarantees are late, even though the purchaser might be blameless, there is no juridical basis upon which to challenge the right of election vested in the Sheriff in clause 5.1 of the sale agreement to effect a cancellation. In any ordinary contract, a provision vesting a right to cancel upon the happening or no-happening of a specified event by a stipulated date is not susceptible to challenge. The election is not a breach of the contract. The mantle of judicial supervision over a sale in execution and its cancellation does not create more or better rights for the defaulting purchaser.

[16] If, speculatively, it may be supposed that an execution-purchaser has a cause of action against the sheriff or the judgment creditor or the conveyancers, arising from a cancellation in terms of Rule 46(11) it is unlikely that, as a rule, a proper case could be mounted for an order of specific performance because of the several policy factors mentioned, and the risk of hardship to one or more innocent third parties (see: *Benson v SA Mutual Life Assurance Co* 1996 (1) SA 776 (A)) The purchaser may, under such circumstances, pursue instead, a suit for damages against a delinquent party.

[17] The upshot is therefore:

17.1 On the facts alone, a clear breach of the sale agreement is evidenced entitling the sheriff to invoke Rule 46(11).

17.2 Proper notice as contemplated by the Rule was given.

17.3 No opposition thereto was registered.

17.4 The sale was lawfully cancelled.

17.5 In any event, a cancellation of a sale in execution cannot be revived by a rescission in terms of Rule 42(1)(a).

[18] In the circumstances, -

18.1 The application dismissed.

18.2 There is no order as to costs.

SUTHERLAND J

Hearing: 15 March 2012
Judgment: 28 March 2012

Applicant's Counsel	:	**Ms E Dreyer**
Applicants Attorneys	:	**NOA Kinstler, Sandton.**