

# REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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DATE

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SIGNATURE

CASE NO: 2009/3673

In the matter between:

**THE SHERIFF OF THE HIGH COURT,  
JOHANNESBURG EAST**

Applicant

And

**CHETTY: NAYANDRAN**

First Respondent

**CHETTY: LYNETTE MUNSAMI**

Second Respondent

**CHOPDAT: HABEEBAH**

Third Respondent

**FIRSTRAND BANK LIMITED (trading inter alia as  
FNB HOME LOANS) (formerly FIRST NATIONAL BANK  
Of SOUTHERN AFRICA LIMITED)**

Fourth Respondent

**IN RE:**

**FIRSTRAND BANK LIMITED (trading inter alia as  
FNB HOME LOANS (formerly FIRST NATIONAL BANK  
OF SOUTHERN AFRICA LIMITED)**

**And**

**CHETTY: NAYANDRAN**

First Defendant

**CHETTY: LYNETTE MUNSAMI**

Second Defendant

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**J U D G M E N T**

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**MBONGWE, AJ**

[1] The applicant, who is the Sheriff and officer of this Court, launched this application in terms of the provisions of Rule 46 (11) of the Rules of the Court and seeks an order cancelling a sale in execution of an immovable property that was concluded on the 23<sup>rd</sup> January 2014 between him and the third respondent. He also seeks ancillary relief, inter alia, an order authorising him to retain the deposit of R46 100.00 paid by the third respondent for the purpose of recouping costs incurred on an attorney and own client scale as well as for the settlement of amounts that may be due to other parties consequent to the cancellation of the sale.

[2] This application comes before this Court unopposed owing to the third respondent's failure to serve and file an answering affidavit subsequent to his service and filing of a notice of opposition on the 23<sup>rd</sup> May 2014. The applicant has cited three other respondents: the first and second respondents, who

are the erstwhile owners of the property concerned and judgement debtors, and the fourth respondent, the bank in whose favour a mortgage bond over the property was registered in 2007 and the judgement creditor. There are no costs sought against the first, second and fourth respondents. It is alleged that the fourth respondent waived its right to service of this application on it.

[3] Prior to considering the merits of this application, I deem it necessary, in the light of the circumstances of this case, to reiterate the purpose and intention of the provisions of Rule 46(11). These are to expedite the sale of attached immovable property primarily for the benefit of the judgement creditor and other interested parties. While it is not the purpose of this rule, an expeditious sale of attached immovable property may incidentally curtail a continued growth of the financial burden already faced by the judgement debtor in respect of the property.

[4] In considering an application in terms of Rule 46(11), the Court is reliant on the report by the Sheriff. Consequently, it is imperative that the Sheriff discloses all relevant facts in the founding affidavit particularly where, as is the case here, orders for the cancellation of prior sales had been granted. In this regard it is noted that more often than not the Sheriff, amongst the prayers sought, seeks an order authorising him to retain the deposit that had been paid by the purchaser for the purposes already stated above. The Court will naturally be reluctant to grant any subsequent application in terms of Rule 46(11) unless the Sheriff :

4.1 has declared in the founding affidavit that he had served the previous cancellation order on the respondent affected thereby and attached

proof of such service;

4.2 has declared and attached all relevant proof, including a taxed bill of costs, of the costs he had deducted from the deposit he had previously retained, where the sale concerned had occurred more than twelve months prior to the one sought to be cancelled or where another sale had been concluded prior to the lapse of the period of twelve months;

4.3 has attached proof of payment of any balance due to the previous respondent (purchaser).

It follows that an application for an order cancelling a sale of immovable property in terms of Rule 46(11) will not be granted unless the Sheriff can show that he is not keeping more than one deposit that had been paid in respect of the same property.

[5]. Although in respect of the previous applications in this case the Court had granted only orders of cancellation of the sales in execution, but remained silent on the prayers for the retention by the applicant of the deposit he had received, copies of those orders should have been served on the parties affected thereby for them to appreciate the process and be able to follow up on the balance of the deposits they had paid to the Sheriff.

[6] Subsequent to the fourth respondent obtaining a default judgment against the first and second respondents in June 2010 for the payment of the total balance due on the property in the sum of R1 463 044.82 and an order declaring the property described as Portion 1 of Erf 280 Lombardy East

Township, Registration Division I.R, The Province of Gauteng measuring 2024m<sup>2</sup> and held under Deed of Transfer T104560/2007 specially executable, the applicant eventually attached the property on the 15 February 2011.

- [7] The applicant has alleged that he had published the notices of sale in execution of the immovable property by public auction scheduled for the 25<sup>th</sup> January 2014 in both the Government Gazette and the Citizen Newspaper (Paragraph 11 of the founding affidavit), but no proof of such publications is attached to the founding affidavit. The property was sold to the third respondent on the 23<sup>rd</sup> January 2014. The relevant conditions of sale now sought to be cancelled were signed by the third respondent on the 23<sup>rd</sup> January 2014 and by the applicant seemingly on the 3<sup>rd</sup> January 2014. Further, the allegations in paragraphs 10 and 11 of the founding affidavit are misleading for creating a false impression that the sale to the third respondent was the first since the property was attached on the 15<sup>th</sup> February 2011. Documentation in the court file, which include previous cancellation orders, show that this particular property had been sold at least thrice since its said attachment and prior to it being sold to the third respondent as follows:

7.1 sold to a Lebea V.T on the 4<sup>th</sup> November 2011. There is no document in the file showing what the purchase price was nor the amount of the deposit that was paid. However, the fact that this particular sale was cancelled by an order of this Court on the 13<sup>th</sup> December 2011 suggests that a valid agreement of sale had been concluded and the required 10% deposit and commission paid ;

7.2 sold to Ingolex Proprietary Limited on the 19<sup>th</sup> July 2012 for the amount

of R630 000.00 and a deposit of R63 000.00 and the Sheriff's commission paid. This sale was cancelled by an order of this Court on 7 December 2012 on application by the Sheriff;

7.3 sold to Ismail Dawood Jassat and Muhammad Chothia on the 11<sup>th</sup> April 2013 for R630 000.00. A deposit of R63 000.00 and the applicant's commission was paid (Paragraphs 13 and 14 of the then founding affidavit in support of the application for an order for the cancellation of the said sale). In addition to seeking an order for the cancellation of that sale, an order was sought for the applicant to retain the deposit for the purpose already stated earlier in this judgment. There is neither a document showing that this application was ever set down and heard nor a Court Order in the file relating to the outcome of the application in this particular instance.

[8] It is noted that the original court file got lost at some stage and could not be traced and that the present file is a duplicate reconstructed by the applicant's attorneys. However, the loss of that file and contents is of no consequence in the present application and to the sales referred to in the preceding paragraph as they occurred after the duplicate file had been opened.

[9] Of further and primary concern to this Court is the absence in the court file of any proof that bills of costs were taxed in respect of the previous applications and cancellation orders. This is despite the Sheriff's prayers in those applications that he be authorised to keep each deposit paid for at least twelve months or until a subsequent sale of the property. The cancellation orders in the file were granted longer than twelve months ago and there had

been subsequent sales of the property. It is, consequently, uncertain whether the Sheriff has ever accounted fully to the relevant respondents for the deposits he had retained. I find that this situation cannot be allowed to persist and ought to be eradicated for it opens the Rule 46(11) procedure to abuse. For this reason I direct that a copy of this judgment be served on the Board of Sheriffs.

- [10] In the present application the property was sold to the third respondent on the 23<sup>rd</sup> January 2014 for the sum of R461 000.00. A deposit of R46 100.00 together with the Applicant's commission was paid on the same date (Paragraph 13 and 14 of the founding affidavit). The balance of the purchase price in the amount of R414 900.00 was paid by the third respondent on the 26<sup>th</sup> February 2014 (Paragraph 16).
- [11] The applicant's ground for seeking cancellation of the sale agreement is the third respondent's failure to pay the estimated amount of R142 612.00 due to the Municipality as well as the transfer costs of R13 604.00 in terms of the conditions of sale. The applicant further seeks an order authorising him to retain the deposit of R46 100.00 paid from which to recoup his costs on an attorney and own client scale, inter alia. It is curious that the applicant is silent on how he intends to deal with the balance of the purchase price in the sum of R414 900.00.
- [12] With regard to payment of the Municipal balance estimated at R142 612.00, I do not believe that the Sheriff has done his best to comply with his obligations in terms of the conditions of sale as he alleges. Stating an estimated amount in clause 4.8.1 is, in my view, not sufficient particularly

when regard is had to the provisions of Section 118(3) of the Local Government Municipal Systems Act 32 of 2000 in terms of which the third respondent becomes liable to pay only the debt due to the Municipality which was incurred during the period of two years prior to the date the request for a clearance certificate is made. The estimation by the Sheriff falls short of meeting the provisions of the said section. It is, in my view, the duty of the Sheriff or judgment creditor to request a clearance certificate from which the exact amount owing appears for inclusion in the conditions of sale as required. The importance of establishing the debt to the Municipality and the period during which it was incurred was as recently as the 8<sup>th</sup> September 2014 reiterated in the judgment of the Gauteng Division of the High Court in PERREGRINE JOSEPH MITCHELL v CITY OF TSHWANE METROPOLITAN MUNICIPAL AUTHORITY, CASE NO. 48313/2013 (unreported). In the result, I find that the estimated balance due to the Municipality renders the provisions of clause 4.8.1 of the conditions of sale invalid. Thus this application stands to fail.

[13] It is also important in this judgment to state that the alleged yet unconfirmed waiver by the fourth respondent of the right to be served with this application constitutes non-compliance with the rules especially as the fourth respondent is a major role player in this case.

[14] Consequent to the findings in this judgment, the following orders are made:

1. The application is dismissed.
2. The applicant is ordered to serve a copy of this judgment on the



respondents and, in respect of the third respondent, to also serve proof of the exact amount due to the municipality and call upon the third respondent to settle such amount and transfer costs within 30 days from the date of service on him of this judgment which date shall also serve as the date on which the conditions of sale became effective for purposes of determining any breach of the conditions of sale.

3. The applicant is ordered to submit to the Registrar of this Court an affidavit with relevant proof relating to the deposits held by him in respect of the sales in execution concluded on the 4<sup>th</sup> of November 2011, 19 July 2012 and 11 April 2013.
4. It is ordered that a copy of this judgment be served on the Board of Sheriffs.
5. The applicant is ordered to pay the costs of this application.

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**M. MBONGWE, AJ**

ACTING JUDGE OF THE HIGH COURT OF SOUTH  
AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

#### APPEARANCES

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|-----------------------------|-----------------------------------------|
| Counsel for the Applicant   | : Adv. M. De Oliveira                   |
| Attorneys for the Applicant | : Van Hulsteyns Attorneys, Johannesburg |
| Date of hearing             | : 22 <sup>nd</sup> September 2014       |
| Date of judgment            | : 27th November 2014                    |

