

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**  
**(REPUBLIC OF SOUTH AFRICA)**

**Case No: 68847/2012**

**DATE: 12 MARCH 2014**

**NOT REPORTABLE**

**NOT OF INTEREST TO OTHER JUDGES**

In the matter between:

THE SHERIFF OF THE HIGH COURT, **VANDERBILJPARK**

Applicant

and

**KENNETH MUKWENA**

Purchaser/ Respondent

In re:

**FIRST RAND BANK LIMITED**

Plaintiff

and

**WILLIAM MZAEFÁNE MAQEKENI**

Defendant

**JUDGMENT**

JANSE VAN NIEUWENHUIZEN J

[1] This is an application in terms of rule 46(11) for the cancellation of a sale in execution.

LEGAL PRINCIPLES:

[2] I will first of all deal with the legal principles pertaining to the relief claimed herein. Rule 46(11) reads, *inter alia*, as follows:

*"46( 11)(a) if a 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 sheriffs 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 or such purpose.*

(c)....." (own emphasis)

[3] In *Sheriff, Habisa and Nongoma v Shobeda* 2009 (6) SA 272 KZP, the court held that:

- the rule does not contemplate a formal application by the sheriff;
- the rule does not empower a judge to grant a cost order in favour of the sheriff and
- the question of loss can only be determined once the court is in possession of a report of the sheriff

FACTS:

[4] The applicant seeks an order in the following terms:

*"1. The Sale in Execution which took place on 8th November 2013 in respect of the property described as ERF [...] L[...] TOWNSHIP, REGISTRATION DIVISION: I.Q. PROVINCE OF GAUTENG, MEASURING: 223 (TWO HUNDRED AND TWENTY THREE) SQUARE METRES, HELD BY DEED OF TRANSFER T[...]cancelled;*

*2. The Purchaser be held liable for the loss sustained by reason of their (sic!) default, which loss may be recovered by the Applicant from the Purchaser by order hereof;*

*3. That the purchase be ordered to pay the cost of this application."*

[5] As stated *supra*, the applicant did not file a report in terms of the provisions of rule 46(11)(a), but chose to appoint attorneys to launch the present application. The course chosen by the applicant has resulted in the incurring of unnecessary costs, which costs will not form part of any loss to be recovered from the respondent.

[6] No facts are contained in the application to justify an order in terms of rule 46(11)(b) and consequently I am not in a position to grant the relief claimed in prayer 2 of the notice of motion.

## ORDER

I make the following order:

1. An order is granted in terms of prayer 1 of the notice of motion.
2. Prayer 2 is postponed *sine die*.
3. Prayer 3 is dismissed.

**JANSE VAN NIEUWENHUIZEN J**

**JUDGE OF THE NORTH AND SOUTH GAUTENG HIGH COURT**

**PRETORIA**