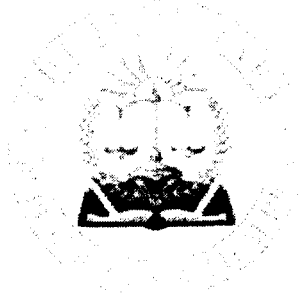


REPUBLIC OF SOUTH AFRICA




IN THE HIGH COURT OF SOUTH AFRICA,  
(GAUTENG DIVISION, PRETORIA)

5/4/2016

CASE NO: 49144/2010

49144/2010

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
<u>5 April 2016</u> DATE	
 SIGNATURE	

In the matter between:

**THE SHERIFF OF THE HIGH COURT, WITBANK**

Applicant

and

**KARIEN PETRU-AMORE WESSELS**

Respondent

*In re:*

**FIRST NATIONAL BANK, A DIVISION OF  
FIRSTSTRAND BANK LIMITED**

Plaintiff

and

**BAREND JACOBUS SMAL**

First Defendant

**KAREN LYNETTE SMAL**

Second Defendant

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## J U D G M E N T

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TEFFO, J:

[1] The applicant seeks an order in terms of Uniform rule 46(11) for cancellation of the sale in execution of the property situated at Holding 87 Jackaroo Agricultural Holding Extension 2, Registration Division J, S, The Province of Mpumalanga measuring 2,1474 (two comma one four seven four) hectares (*"the property"*). He also seeks an order that the property be put up for sale again. The other relief sought was that the respondent should be ordered to pay damages to the plaintiff, if any, suffered by the plaintiff, which shall be determined after the property has been sold and that the costs of the application and for arranging a new sale in execution should be deemed to be part of the damages suffered by the plaintiff, if any.

[2] The property was sold on 2 April 2014 to the respondent in execution of a judgment that was granted in favour of First National Bank (the "*bank*") against Mr and Mrs Smal (the "*defendants*").

[3] The bank and the defendants entered into a written home loan agreement in April 2007 and a mortgage bond was registered over the property in favour of the bank as security for the debt owed to it by the defendants.

[4] The defendants defaulted with their monthly obligations in terms of the agreement and the bank issued summons against them for payment of the amount due and payable to it together with interest and costs. The defendants did not defend the action and the bank obtained judgment by default against them on 2 November 2010. The bank also obtained an order in terms of Rule 46(1) authorising the registrar of this Court to issue a warrant of execution against the property in August 2011 after application thereof. Eventually a warrant of execution against the property was issued on 12 October 2011 and the property was sold at a public auction to the respondent on 2 April 2014.

[5] The defendants launched an application in terms of sections 86 and 87 of the National Credit Act 53 of 2005 (*the NCA*) at the Magistrate's Court, Witbank and a debt restructuring order was granted on 28 June 2013.

[6] On 2 July 2014 the defendants brought an application in this Court seeking an order setting aside the warrant of execution obtained by the bank on 12 October 2011 and the sale in execution of the property to the respondent.

[7] Both applications were opposed and were set down on the same day before me in the opposed motion. At the hearing of the two applications I was advised that the application by the defendants had been withdrawn by notice.

[8] Clause 4 of the conditions of sale reads as follows:

- "4.1 The purchaser shall on completion of the sale, pay a deposit of 10% of the purchase price immediately on demand by the sheriff.*
- 4.2 Payment shall be made in cash, by bank guaranteed cheque or by way of an electronic transfer, provided that satisfactory proof of payment is furnished immediately on demand to the sheriff.*
- 4.3 Should the purchaser fail to pay the deposit and the sheriff's commission on completion of sale, then the sale shall be null and void and the sheriff may immediately put the property up for auction again.*
- 4.4 The balance of the purchase price shall be paid to the sheriff against transfer and shall be secured by a bank guarantee, to be approved by the plaintiff's attorney, which shall be furnished to the sheriff within 21 days after the date of sale. Should the purchaser fail to furnish the sheriff with a bank guarantee within 21 days after the date of sale, the sheriff may in his/her sole discretion grant the purchaser a five day extension within which to provide the required bank guarantee. Should the purchaser fail to furnish the sheriff with a bank guarantee, which is approved by the plaintiff's attorney, within the required time, the sale may be cancelled."*

[9] It is common cause between the parties that the respondent paid the deposit of 10% of the purchase price on completion of the sale and the commission as required in terms of the conditions of sale referred to above.

[10] It is also common cause between the parties that the respondent failed to pay the balance of the purchase price or secure payment thereof by a bank guarantee to be approved by the bank's attorneys of record within 21 days of the sale in execution as required of her in terms of clause 4.4 of the conditions of sale.

[11] As a result a letter was sent to the respondent on 9 June 2014 demanding that she should comply with clause 4.4 of the conditions of sale within 5 (five) days of the letter and also alerting her of clause 8.1 of the conditions of sale. The respondent failed to respond to the letter.

[12] Clause 8.1 of the conditions of sale reads:

*"If the purchaser fails to carry out any of his obligations under these conditions of sale, the sale may be cancelled by a Judge summarily on the report of the sheriff after due notice to the purchaser, and the property may again be put up for sale, and the purchaser shall be responsible for any loss sustained by reason of his default, which loss may, on the application of any aggrieved creditor whose name appears on the sheriff's distribution account, be recovered from him under judgment of the Judge pronounced summarily on a written report by the sheriff, after such purchaser shall have received notice in writing that such report will be laid before the Judge for each purpose, and if he is already in possession of the property, the sheriff may, on 7 days' notice, apply to a Judge for an order ejecting him or any person claiming to hold him there from."*

[13] The respondent contends that because of the dispute between the bank and the defendants which resulted in the defendants launching an application for the setting aside of the warrant of execution and the subsequent sale, she could not finalise the inspection of the property and make any financial arrangements. She was accordingly denied access to the property by the defendants. I will deal with this aspect later in the judgment. It was also the respondent's contention prior to the withdrawal of the application by the defendants that she was not opposing their application and that should that application succeed, it would nullify the sale. In fact the respondent had wished that the present application should be postponed to allow the

application by the defendants to run its course. The respondent has always contended that should the applicant persist with the hearing of the present application prior to the hearing of the application by the defendants, she should not be held liable for any consequential costs or damages as according to her the sale in execution should not have been arranged. There is no merit in all these contentions as the application by the defendants has been withdrawn. It was argued on behalf of the respondent that the sheriff knew that the guarantees were due, that there were problems relating to the property and that the applicant and the bank should have applied their mind to the situation prior to arranging the sale in execution. This argument does not hold any water as no allegations to this effect have been made in the respondent's papers.

[14] The respondent does not oppose the cancellation of the sale. She only challenges the granting of the ancillary relief which includes an order that she should be held liable for damages occasioned by the cancellation of the sale in execution. It was submitted on her behalf that the ancillary relief prayed for by the applicant should be postponed for later determination. A submission, which the applicant opposed, was made that a proper hearing should be held to determine whether the respondent purchaser should be held liable for damages occasioned by the cancellation of the sale. Counsel for the respondent referred the court to the decision of *Rae v Sheriff of the High Court Kempton Park South and Others* [2014] JOL 32413 (GJ) and argued that the provisions of Rule 46(11) and the conditions of sale are discretionary and not peremptory. In the *Rae* matter the court said the following:

*“ Neither rule 46(11) nor clause 10.1 of the conditions of sale obliges the sheriff to cancel the sale in the event of non-compliance with any conditions; both the rule and the condition are expressed permissively.*

[15] Reference was made in the *Rae* matter above to the case of *Standard Bank of South Africa v Ndlovu* 2012 JDR 0524 (GSJ) where Sutherland J dealt with an election by the sheriff to effect a cancellation in terms of an identical clause 5.1 as follows:

*“A purchaser only has those rights that are to be found within the four corners of the sale agreement. If the guarantees are late, even though the purchaser may be blameless, there is no judicial basis on which to challenge the right of election vested in the sheriff in clause 5.1 of the sale agreement to effect a cancellation. In an ordinary contract a provision vesting a right to cancel upon the happening or non-happening of a specified event by a stipulated date is not susceptible to challenge. The election is not a breach of 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] Counsel for the applicant referred me to clauses 6.1 and 6.3 of the conditions of sale and argued that the purchaser of a property sold at a sale in execution purchases the property at his or her own risk. He pointed out that the respondent had to provide the guarantee by 23 April 2014 but failed to do so. The sheriff elected not to condone the late delivery of guarantees. He further submitted that the application by the defendants was only served a month and half days after the respondent was served with a demand. Accordingly, so it was argued, that the respondent was already in breach of the conditions of sale when the application by the defendants was launched. It

was also contended that the fact that there was an application by the defendants did not affect the execution of the judgment.

[17] Clauses 6.1 and 6.3 read:

*"6.1 The property shall be at the risk and profit of the purchaser after the fall of the hammer and the signing of the conditions of sale and payment of the initial deposit.*

*6.3 The plaintiff and the sheriff give no warranty that the purchaser shall be able to obtain personal and/or vacant occupation of the property or that the property is unoccupied and any proceedings to evict the occupier(s) shall be undertaken by the purchaser at his/her/its own cost and expense."*

[18] The facts in both the *Rae* and *Ndlovu* matters are distinguishable from the present matter. In the *Rae* matter above *Rae*, who was the judgment debtor against whom judgment was granted and as a result of which there was a sale in execution of the judgment, sought to challenge the condonation by the sheriff of the terms and conditions of sale by allowing the late delivery of the guarantees by the respondent purchaser of the property. The court found that because the sheriff had an election whether or not to cancel the sale where there was non-compliance with the conditions of sale, there was nothing that precluded him from condoning the late delivery of the guarantees by the purchaser of the property. In the present matter the respondent purchaser who had not delivered the guarantees, is not asking for condonation of the late delivery of the guarantees to enable her to comply with the conditions of sale. She agreed that the sale should be cancelled. She is only contesting that she should be held liable for the costs or damages



occasioned by the cancellation of the sale. The applicant in the *Ndlovu* matter sought to rescind a judgment in terms of Rule 46(11). The application was defective.

[19] The act of the sheriff by bringing an application in terms of rule 46(11) 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 judgment. 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 instance of the judgment debtor. This cancellation is the precursor to authorising, as contemplated by the Rule, a resale (see *Standard Bank of South Africa v Ndlovu* above)

[20] The sheriff's invocation of the Rule is to offer him 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 (see *The sheriff, South Johannesburg Re Sithole & Others, Case No 16822/2002 SGHC (unreported)*, *the Sherif, Hlabisa and Nongoma v Shobede* 2009 (6) SA 272 KZN).

[21] It is not disputed that the respondent has failed to deliver the guarantees as required in terms of clause 4.4 of the conditions of sale within 21 days of the date of sale.

[22] She was given an extension of 5 days in excess of the 21 days within which to deliver the guarantees to secure payment of the purchase price but still failed to do so. There was absolutely no reason why the respondent when she was afforded an opportunity at the time the demand was made, did not respond and/or explain her situation with regard to her being denied access to the property. The respondent's papers are silent as to why the fact that she was denied access to the property is only mentioned in the answering affidavit for the first time. No details as to how and when that happened, were given. In any event the respondent was not supposed to involve herself in the dispute between the bank and the defendant. The application by the defendants was only to set aside the warrant of execution and the sale. Even if it had succeeded, there was no application for the rescission of the default judgment granted in favour of the bank. That judgment still stands. I am of the view that it was within the bank's rights to proceed to execute the judgment that was granted in its favour.

[23] Based on the reasons advanced above I do not find any merit in the contention by the respondent that the sale in execution should not have been arranged and that the bank instructed the sheriff to proceed with the sale in execution of a property that had a cloud over it. For the same reasons and the fact that the procedure in terms of Rule 46(11) is *sui generis* on its own

and its purpose as highlighted in para [19] I am not inclined to accept the contention by the respondent that an order can be granted for the cancellation of the sale in execution provided that she is not ordered to pay damages and or costs occasioned by the cancellation. I do not accept her reasons for failure to comply with clause 4.4 of the conditions. I also do not see any point of postponing the granting of the other prayers as the issues are clear and straight forward. The approach adopted by the respondent is not what is envisaged in the purpose of a Rule 46(11) as articulated in *Ndlovu, the sheriff, South Johannesburg Re Sithole & Others*, and the sheriff, *Hlabisa and Nongoma v Shobede* matters above. The respondent breached the conditions of sale by failure to provide the guarantees as required of her in terms of clause 4.4. She had taken the risk of the property after the fall of the hammer, the signing of the conditions of sale and payment of the initial deposit. The sheriff elected to invoke the provisions of rule 46(11) for cancellation of the sale which the respondent is not contesting, to enable him to re-advertise and resell the property without delay and satisfy the bank's legitimate interests. The bank obtained judgment against the defendants. That judgment has not been rescinded and there is no application pending to rescind it currently. It is entitled to execution of that judgment.

[24] I am persuaded under the circumstances that the applicant is entitled to the relief sought.

[25] In the result I make the following order:

25.1 The sale in execution of the property situated at:

HOLDING 87 JACKAROO AGRICULTURAL HOLDING  
EXTENSION 2, REGISTRATION DIVISION J, S, THE  
PROVINCE OF MPUMALANGA MEASURING 2,1474 (TWO  
COMMA ONE FOUR SEVEN FOUR) HECTARES HELD BY  
DEED OF TRANSFER NO T55484/2007


held by the SHERIFF WITBANK on 2 April 2014 which was  
purchased by KARIEN PETRU-AMORE WESSELS in execution  
of a judgment of the above Honourable Court granted on 02  
NOVEMBER 2010 is hereby cancelled and the property should  
again be up for sale.

25.2 The respondent is ordered to pay damages to the plaintiff, if  
any, suffered by the plaintiff, which damages shall be determined  
after the property has been resold.

25.3 The costs of this application and the costs of arranging a new  
sale of execution are deemed to be part of the damages suffered  
by the plaintiff, if any.

25.4 The respondent should be given 10 days' notice per registered  
post of the plaintiff's claim for damages suffered, if any.

25.5 The applicant is authorised to hold the deposit paid by the respondent in an interest-bearing trust account, for the benefit of the respondent, until fulfilment of prayers 3 and 4 above, and to set off same against plaintiff's damages, if any.



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**M J TEFFO**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**(GAUTENG DIVISION, PRETORIA)**

FOR THE APPLICANT	A P ELLIS
INSTRUCTED BY	STRAUSS DALY INCORPORATED
FOR THE RESPONDENT	J H MOLLENTZE
INSTRUCTED BY	H J WESSELS ATTORNEYS
DATE OF JUDGMENT	5 APRIL 2016