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

CASE NO: 2022-15465

1. Reportable:
2. Of interest to other judges:
3. Revised:

6 October 2025

LINDEQUE AJ

In the application between:

THE SHERIFF, SOWETO EAST

Applicant

and

THABO TSATSI

Respondent

In re:

NEDBANK LIMITED

Plaintiff

and

NHLAPO, JABULILE PEARL

Defendant

JUDGMENT

LINDEQUE AJ

1. The applicant (hereinafter “the Sheriff”) brought an application in accordance with Rule 46(11) of the Uniform Rules of Court, signed 20 July 2023 on notice to the respondent (hereinafter the “Purchaser”) to cancel a sale in execution held on 28 June 2023, in respect of Erf 6[...] Mofolo North Township.
2. The Sheriff further seeks authorisation to resell the property and for the Purchaser’s deposit to be retained by the Sheriff in trust pending the quantification of loss sustained and the granting of judgment in relation thereto in terms of Rule 46(11)(b), provided that if no claim for loss sustained has been lodged within a period of 120 days from the date of cancellation of the sale, such deposit shall be refunded to the Purchaser.
3. The Purchaser received notice of the application as is evident from his notice to oppose the application signed on 31 July 2023.

DEFAULT JUDGMENT AND PROPERTY DESCRIPTION

4. On 10 November 2022 and under this case number, default judgment was granted by Pretorius AJ against the defendant in favour of the plaintiff for payment of the sum of R618 069,40 (SIX HUNDRED AND EIGHTEEN THOUSAND AND SIXTY NINE RAND AND FORTY CENTS) and all the right, title and interest in the leasehold in respect of Erf 1[...] Mofolo North Township, Registration Division IQ, The Province of Gauteng in extent 201 (Two Hundred and One) square metres held by certificate of registered leasehold No TL6625/2006 ("the property") was declared to be specially executable with a reserve price set in the amount of R400 000,00.
5. As a result, the property was sold in execution by the Sheriff on the instructions of the judgment creditor, namely the plaintiff on 28 June 2023, to the Purchaser who was the highest bidder at the auction for an amount of R500 000.00.
6. The Purchaser signed the Conditions of Sale, paid the Sheriff's commission and the deposit, being 10% of the purchase price.
7. The heading of the Conditions of Sale refers to the High Court of South Africa, Gauteng Division with the same case number as this application

and the default judgment granted by Pretorius AJ with the plaintiff being referred to as the judgment creditor and the defendant as the judgment debtor.

8. However, it refers to Erf 680 instead of Erf 1680 as the property sold and is dated 28 June 2022 instead of 28 June 2023.
9. It is clear that these are typographical errors as it is evident from the default judgment application and order granted by Pretorius AJ on 10 November 2022 that the correct property description is Erf 1[...] and it is further common cause that the auction was held on 28 June 2023.
10. The Conditions of Sale correctly reflects that the certificate of registered leasehold is No T66265/2006 and that the auction was held on 28 June 2023.
11. For purposes of this judgment, I therefore accept that the application to cancel the sale in execution is in respect of the right, title and interest in the leasehold of Erf 1[...] Mofolo North Township held by certificate of leasehold No TL66265/2006 and that in as far the Sheriff's application refers to Erf 6[...] that same are typographical errors.

RULE 46(11) : CANCELLATION OF SALE IN EXECUTION

12. Sutherland J (as he then was) held in *Standard Bank of South Africa Ltd v Ndlovu* 2012 JDR 0525 (GSJ) at par [12] that *“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 instance of the judgment creditor. This cancellation is the precursor to authorising, as contemplated by the Rule, a resale.”*
13. In terms of the Practice Manual of the Gauteng Division, Johannesburg, if an application in terms of Rule 46(11) is opposed, the application will be heard in open court as was done in this instance.

BREACH OF CONDITIONS OF SALE

14. Clause 4 of the conditions of sale provides *inter alia* as follows:

“4. PAYMENT OF PURCHASE PRICE

4.1 *The Purchaser shall pay to the sheriff a deposit of the purchase price in cash, by a bank guaranteed cheque or by way of an electronic funds transfer, immediately on the fall of the hammer or in any customary manner and provide proof thereof to the satisfaction of the sheriff.*

4.2 *The deposit will be deposited immediately by the Sheriff into the trust account held in terms of section 22 of the Sheriff's Act 90 of 1986.*

4.3 *The balance shall be paid against transfer and shall be secured by a bank guarantee issued by a financial institution approved by the Execution Creditor or its attorney, and shall be furnished to the Sheriff within 21 days.*

4.4 *After the date of sale or after the date of confirmation of the sale by the court. Should the Purchase (sic) fail to furnish the sheriff with a bank guarantee or fail to pay the balance of the purchase price to the sheriff within the stipulated time period, the sheriff may in his/her sole discretion grant the purchaser a 5-day extension within which to provide the required bank guarantee or make such payment.”*

15. The Sheriff reports that the Purchaser breached the material terms of the conditions of sale in that he had failed to pay the balance of the purchase price or furnish the required guarantees within the period of 21 days.
16. He also deals with the fate of the deposit paid by the Purchaser as required in the Practice Manual in the event of the sale being cancelled, namely that the deposit shall be retained by him in trust for such period that is stipulated in the order in terms of Rule 46(11) or if no such period is stipulated therein, until such time that the property has been sold to a third party and the execution creditor's damages have been quantified and judgment had been granted.

17. The Purchaser admits that the auction was properly conducted and that he signed the Conditions of Sale, paid the Sheriff's commission and the deposit, being 10% of the purchase price.
18. In the answering affidavit, the Purchaser denies that he did not comply with the conditions of sale and states that he was awaiting a third party guarantee from the bank for approval, which bank requested additional documents to complete the bond that was eventually granted to the third party for the purchase of the said property.
19. He also contends that the delay was not his fault, but the delay on the bank's part to approve the bond was the problem and that when he informed the Sheriff of his predicament, that the Sheriff informed him that he does not accept third party guarantees but wants a guarantee from the Purchaser.
20. The Purchaser alleges that the Sheriff's application is malicious in that the Sheriff wants to cancel the sale in order to earn double commission when the Purchaser buys to the property again, which will be financially prejudicial to himself. He further states that he is in the business of buying properties, developing same and selling same at a profit.

21. According to the Purchaser, the guarantees that he provided to the applicant were those of a client who had agreed to buy the property and as such the Sheriff was not prejudiced in any way. He further alleges that the guarantees were sent to the conveyancers, DRSM Attorneys, on 20 July 2023 and that they confirmed receipt of same. He alleges that the Sheriff then demanded that the guarantees be furnished to him, despite the fact that they were already with the transferring attorneys and that there is no requirement in law that the guarantees have to be sent to the Sheriff.
22. The Purchaser also contends that the Sheriff was supposed to have put him on terms if he wanted to rely on the fact that there was a delay in the submission of the guarantees, but that the guarantees were nevertheless sent to the attorneys within the stipulated time and that there was no delay on his part.
23. The Purchaser attaches copies of what he calls "*the approved guarantees for the purchase of the property marked annexure 'TET1'.*"
24. The Sheriff's contends in his replying affidavit that although he generally does not accept third party guarantees, that if same is acceptable to the

execution creditor, he has no issue with same. He denies the allegations that he is endeavouring to cancel the sale in order to earn another commission from the purchaser.

25. Annexure “TET1” which the Purchaser attached to his answering affidavit and upon which he relies as “*approved guarantees for the purchase price of the property*”, consists of two documents, the first being from ABSA Bank and the second from Nedbank, both addressed to a Mr Kgwahla.
26. The ABSA document reads that Mr Kgwahla’s home loan has been conditionally approved in the amount of R626 164,00 and that “*This offer is based on the information that you have provided, which will need to be validated and is subject to a valuation of the property.*” This ABSA document has no reference to the property and is undated.
27. The Nedbank document is also undated with a heading “*HOME LOAN CREDIT APPROVAL*” with reference to the property as Erf 6[...] Mofolo North Soweto. The letter *inter alia* reads as follows:

“*We are delighted to let you know that we can offer you a loan of R612,000.00 at an interest rate of 12.85% over 300 months, on condition*

that you meet our bank criteria, which means your main transaction bank account must be a qualifying Nedbank account.

...

Approval of this loan is subject to the following:

- *A satisfactory valuation of the property that will be mortgaged as security.*
- *The satisfactory verification of the information and documentation provided to us that includes, among other things, information about your income and employment.*
- *No new information becoming known to us and there being no change to relevant factors that would negatively affect the approval of your application.*
- *Should the property valuation be successful, we will send you a quotation for your consideration. This quotation contains the*

approved loan amount, interest rate and key terms and conditions of the loan.”

28. In **Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd & Another 2008 (5) SA 159 (SCA)** at paragraph [24] the Supreme Court of Appeal said the following in respect of a bank guarantee in relation to the sale of immovable property:

“[24] *The nature of bank guarantees in relation to the sale of immovable property is explained in various authorities as follows: In a sale of movables payment and transfer should take place pari passu. In a sale of land, where large sums of money are usually involved, it is obviously desirable to achieve the same result, since the seller will be reluctant to part with ownership of his land until he has the money and the purchaser will be reluctant to part with his money until he has ownership of his land. It is thus necessary to resort to a device in order to achieve as nearly as possible, the desired reciprocity of payment and transfer. The standard device is the furnishing by the purchaser, when called upon to do so by the seller’s conveyancers who are ready to*

lodge the necessary documentation, of a bank guarantee payable on registration of transfer, normally a revocable guarantee unless the contract expressly calls for an irrevocable guarantee. Generally guarantees are required to be provided by a date in advance of registration because the date of registration is not precisely predictable.”

29. It is clear that the documents relied upon by the Purchaser in his answering affidavit are not bank guarantees, but at most conditional pre-approvals that Mr Kgwahla qualifies for a loan in the event that the conditions, *inter alia* the valuation of the property, are met to the satisfaction of ABSA and/or Nedbank.
30. In light of thereof I do not have to decide the issue whether the Sheriff had to accept a valid third party bank guarantee as the guarantees relied upon were not bank guarantees.
31. Furthermore, the Purchaser alleges that the ABSA and Nedbank documents were sent to the conveyancing attorneys within the stipulated time on 20 July 2023 and that they confirmed receipt of same.

32. The 21 days to have sent bank guarantees to the Sheriff or conveyancing attorneys expired on 19 July 2023. There is furthermore no evidence that the conveyancing attorneys accepted the loan pre-approvals for Mr Kgwahla as bank guarantees and to the contrary the Purchaser states that when he contacted the attorneys on an unknown date he was told that they were no longer dealing with the matter and that another attorney was handling the file.

33. Clause 17.1 of the Conditions of Sale provides as follows:

“17.1 If the purchaser fails to carry out any obligation due by the purchaser 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.”

34. The Purchaser only has those rights that are to be found within the four corners of the sale agreement. If the guarantees are non-existent or late, even though the purchaser may be blameless, there is no juridical basis upon which to challenge the right of election vested in the Sheriff in clause 17 of the sale agreement to effect a cancellation. In any 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 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.¹

35. When the matter was argued before me, Advocate Neshavi on behalf of the Purchaser, conceded that the ABSA and Nedbank documents were not bank guarantees.
36. He then proceeded to argue that the Purchaser stopped obtaining proper bank guarantees because the Sheriff informed him that he was not going to accept third party guarantees and that the Sheriff's application should therefore be dismissed and the 21 days in which to furnish bank guarantees be revived in my order.
37. This was not the case made out in the Purchaser's answering affidavit, wherein he relied on the fact that proper bank guarantees were furnished timeously.

¹ Standard Bank of South Africa Ltd v Ndlovu *supra* at [15].

38. I therefore find that the Purchaser did not furnish bank guarantees timeously or at all to the Sheriff or the execution creditor in terms of the Conditions of Sale.
39. Furthermore I find that in as far as the Purchaser contends that the Sheriff was supposed to have put him on terms if he wanted to rely on the fact that there was a delay in the submission of the guarantees, that Clause 4.4 of the Conditions of Sale provides that the Sheriff may in his sole discretion grant the Purchaser a 5-day extension to provide the required bank guarantee or make payment and that there was therefore no contractual duty on the Sheriff to have provided the Purchaser with more time to have furnished same.
40. The Purchaser's allegation that the Sheriff's application is malicious to earn double commission is baseless and stands to be rejected.
41. I therefore find that the sale in execution of the property on 28 June 2023 is to be cancelled due to the Purchaser's failure to have furnished the Sheriff or the plaintiff with a bank guarantee in respect of the balance of the purchase price timeously or at all.

COSTS

42. At the hearing of the matter on 29 July 2025, Mr Mac Donald Khumalo of Khumalo Attorneys, who was the Sheriff's attorneys of record, withdrew as the Sheriff's attorney of record in court and the Sheriff, whose surname is also Khumalo, although not related to Mr Mac Donald Khumalo proceeded to argue the matter at his own insistence. According to the Sheriff's replying affidavit he is an admitted attorney and conveyancer of this court.
43. The Sheriff furthermore seeks an order of attorney and client costs against the Purchaser.
44. I do not believe that the circumstances justify an attorney and client costs order as the Purchaser seems to genuinely have believed that the loan pre-approvals for Mr Kgwahla were valid bank guarantees.
45. The Sheriff was represented by Khumalo Attorneys throughout these proceedings, except on the day of the hearing.

46. In **The Sheriff of the High Court Johannesburg South v Sithole and Three Similar Cases 2013 (3) SA 168 (GSJ)** at paragraph [37], Spilg J held:

“[37] While it is difficult to contemplate the need for a formal application save in cases where the defaulting purchaser intends opposing, exceptional circumstances cannot be ruled out. The starting point, as pointed out in Hlabisa² at paras 9 and 11, is that rule 46(11) itself does not contemplate an application-type procedure. Save in the case of dispute, or possibly some exceptional situation which may require it, the practice in this division is for the sheriff to prepare and serve a notice authorising the cancellation and resale, supported by an accompanying affidavit. On filing, the registrar refers the matter to a judge in chambers.”

47. In this case, the Sheriff rightly anticipated opposition as is evidenced by the notice of intention to oppose and answering affidavit filed on behalf of the Purchaser.

² Sheriff, Hlabisa and Nongoma v Shobede 2009 (6) SA 272 (KZP).

48. Accordingly, I believe that the appropriate order in this case should allow for costs in favour of the Sheriff on the party and party scale to be taxed or agreed between the parties.

WHEREFORE I make the following order:

1. The sale in execution held on 28 June 2023, in respect of the property referred to in paragraph 2 below is set cancelled.
2. The applicant is authorised to again sell in execution the immovable property, all the right and title and interest in the leasehold in respect of Erf 1[...], Mofolo North Township, Registration Division I.Q., the Province of Gauteng, held by Certificate of Registered Grant of Leasehold No TL66265/2006 ("the property").
3. The deposit paid shall be retained by the applicant, in trust, pending the quantification of loss sustained and the granting of judgment in relation thereto in terms of Rule 46(11)(b), provided that if no claim for loss sustained has been lodged within the period of 120 days from the date of this cancellation of the sale, such deposit shall be refunded to the respondent.

4. A copy of this order is to be served personally on the judgment debtor/defendant, as soon as is practicable after the order is granted but prior to any future sale in execution, provided that if personal service is not possible after three attempts of service, the applicant is authorised to affix a copy of this order at the property mentioned herein.
5. The judgment debtor/defendant is advised that as a result of the order referred to in paragraph 1, the provisions of section 129(3) and (4) of the National Credit Act 34 of 2004 (the NCA) apply to the judgment granted in favour of the judgment creditor. The judgment debtor may prevent the sale of the property referred to in paragraph 2 above if she pays to the judgment creditor all of the arrear amounts owing by the judgment debtor to the judgment creditor together with all enforcement costs and default charges prior to the property being sold in execution.
6. The arrear amounts and enforcement costs referred to in paragraph 5 above may be obtained from the judgment creditor. The judgment debtor is advised that the arrear amount is not the full amount of the judgment debt, but the amount owing by the judgment debtor to the judgment creditor, without reference to the accelerated amount.

7. A copy of this order is to be served on the judgment creditor.
8. The respondent is to pay the costs of this application on the party and party scale.

I M LINDEQUE
Acting Judge of the High Court
Gauteng Division, Johannesburg

DATE OF HEARING: 29 JULY 2025

JUDGMENT DELIVERED: 6 OCTOBER 2025

APPEARANCE FOR THE APPLICANT:

In person.

ATTORNEYS FOR THE APPLICANT PRIOR TO THEIR WITHDRAWAL:

Khumalo Attorneys

APPEARANCE FOR THE RESPONDENT:

Advocate Neshavi

ATTORNEYS FOR THE RESPONDENT:

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