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**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 23325/2010**

**DATE: 24 AUGUST 2016**

In the matter between:

**MARCO BERNABEI**

Plaintiff

And

**EMMA BERNABEI**

Defendant

In re:

**SHERIFF JOHANNESBURG EAST**

Applicant

And

**KUMALO GLADNESS**

Respondent

**JUDGMENT**

**MOTHLE J**

1. This is an application in terms of Rule 46(11) of the Uniform Rules of Court, wherein the Applicant seeks to have cancellation of a purchase and sale agreement arising out of an execution sale.

2. The Applicant seeks an order as follows:

2.1               *“That the sale in execution that took place on 30 April 2015, in respect of immovable property known as Section No. 8 as shown and more fully described on Sectional Plan No. SS 34..... in the scheme known as Allan Ridge in respect of the land and building or buildings situated at Erf 6....., B..... T....., Local Authority of City of Johannesburg Metropolitan Municipality, of which section the floor area, according to the said sectional plan is 61 (sixty one) square metres and an undivided share in the common*

*property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the sectional plan, in accordance with the sale of execution issued by the Registrar, be cancelled in terms of the provisions of Rule 46(11) of the High Court Rules;*

**2.2**            *That the Respondent is ordered to pay:*

**2.2.1**            *The costs of this application; and*

**2.2.2**            *The costs incurred by the Plaintiff in respect of the sale in execution by way of public auction, which costs will include:*

**2.2.2.1**            *The costs of preparation and scheduling of the sale in execution; and*

**2.2.2.2**            *The Sheriff commission relating to the sale in execution;*

**2.2.3**            *Any other loss sustained by the Plaintiff as a consequence of the Respondent's default in respect of her obligations relating to the sale in execution.*

**2.3**            *Authorising the Sheriff with appropriate jurisdiction to evict the Respondent and/or any other person who might occupy the property that was sold in execution in accordance with the provisions of the Practice Directive 6 of 2011;*

**2.4**            *Further and/or alternative relief. ”*

**3.** It is a general practice of this Division of the High Court that applications in terms of Rule 46(11) are heard a Judge in

chambers. This particular application came before me, following the same route.

4. It appears from the file and prayer 1 of this application that the auction sale occurred in 2015. This application has been presented before other Judges before it came to me.
5. Upon receipt of the application, I noticed that service had been effected on the Respondent's address by affixing the documents on the entrance of her residence. There was no indication whether she had received the application and was aware of the relief sought. There was also no indication whether she intends to oppose the application. I noticed that the agreement contained her telephone numbers and requested my clerk to contact her and ascertain if she intends to oppose the application. Before I could consider the application, the Respondent came to the High Court and informed my clerk that she does not oppose the application but would like to have a refund of her deposit, minus the necessary costs that applicant has incurred. My clerk explained to her to file an affidavit and also serve it on the Applicant.
6. I have now had sight of the Respondent's affidavit as well as e-mail annexures which reveal the following:

6.1 After purchasing the property on auction, she could not get further financial assistance to complete the transaction;

6.2 She had informed the Sheriff by e-mail dated 4 May 2015, which e-mail is attached to her affidavit, that she is unable to proceed with the sale agreement and would like to have a refund of the deposit;

6.3 In her affidavit before me, she deposes to the fact that she needs the refund urgently pay for her daughter's school fees. She further deposes to the fact that she has never taken occupation of the property.

7. It seems to me that the Respondent, on her own version, does not oppose the cancellation of the purchase and sale agreement pursuant to the sale in execution. The only concern she raises is a claim for a refund of her deposit. Further, considering that this transaction took place in May 2015, it is now more than a year and this matter has not been finalised.

8. It would seem that generally the process of refunding the purchaser what is due after all costs have been considered in a collapsed sale in execution, are very often a subject of considerable delay. The relief sought by the Respondent in this matter calls for an expeditious process, considering the delay that has already occurred in this matter.

9. Having regard to what is stated above, I make the following order:

1. The sale in execution which took place on 30 April 2015 in respect of the immovable property described in prayer 1 of the notice of application is hereby cancelled;
2. The deposit paid by the Respondent as part of the purchase price shall be held in trust by the sheriff and be dealt with as shall be directed by the Court hearing this application;
3. The Applicant is ordered to quantify the costs incurred in respect of the sale in execution, which costs should include;
  - 3.1 The costs of preparation and scheduling of the sale in execution;
  - 3.2 The Sheriffs commission relating to the sale in execution;
  - 3.3 Any loss sustained by the Plaintiff and/or the Applicant as a consequence of the Respondent's default in not proceeding with the sale in execution;
4. The quantification of these amounts must be stated in an affidavit by the Applicant, including all necessary documentation in support thereof, which affidavit must be delivered (served and filed) within 10 calendar days from the date of this order;
5. The Respondent may deliver an opposed affidavit in respect of the

said amounts within 10 calendar days from receipt of the Applicant's affidavit and thereafter the Applicant may reply thereto within 10 calendar days.

6. This application is referred to open Court for adjudication and the Registrar of this Court is directed to provide a preferential date in the opposed roll, being not later than 2016. The applicant must obtain the date of hearing from the Registrar and notify the Respondent of the date in writing and also by telephone, not later than 15 days before the hearing;

**S P MOTHLE**  
**Judge of the High Court**  
**Gauteng Division**  
**Pretoria**