

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Lekhethoa (33086/2019) [2023] ZAGPJHC 967 (28 August 2023) [2023] ZAGPJHC 967

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ford

CASE / FILE NUMBER

33086/2019

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG****Case Number: 33086/2019****NOT REPORTABLE****NOT OF INTEREST TO OTHER****JUDGES NOT REVISED****28.08.23****In the matter between:**

ABSA BANK LIMITED
Applicant
and
LEKHETHOA NTSHADI
BRIDGET
Respondent

JUDGMENT

FORD, AJ

Introduction

- [1] This matter concerns the reconsideration of a reserved price in terms of Rule 46(9).
- [2] The application comes pursuant to an unsuccessful sale of execution of the immovable property, owned by the respondent, previously declared executable[1], which was on auction on 23 November 2022, with a reserve price set at R 240 000.00.[2]
- [3] In the present application, the applicant seeks the following relief as per the notice of motion.[3]
1. That the applicant be authorised to instruct the Sheriff of the District in which the property described as:

SECTION NO. [...]as shown and more fully described on Sectional Plan no. SS270/1998 in the scheme known as CARON ROAD in respect of the land and building or buildings situated at [...] EXTENSION 12 TOWNSHIP, Local Authority: CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY of which section the floor area, according to the said sectional plan is 50 (fifty) square meters in extent, 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 said sectional plan, held under Deed of Transfer ST40169/2006, be sold without reserve, on public auction to the highest bidder in accordance with Rule 46 of the Uniform Rules of Court, prior [to] its amendment on 22 December 2017.

2. Costs only in the event that the respondent opposes the relief sought.
- [4] The respondent, after being served with the application personally[4], did not oppose the matter and the application proceeds on an unopposed basis.
- [5] The way in which the relief in the notice of motion is framed, is such that a property, sold without a reserved price, is capable of being auctioned for pittance. I am of the view, for reasons that appear later in this judgment, that unless judicial oversight is maintained in the execution of immovable property, such a possibility would undermine the ethos behind Rule 46A.

History of the matter

- [6] On 20 August 2020, this court granted an order in which inter alia, the property described in paragraph 3, was declared specially executable, and the Sheriff was authorised to sell the immovable

property on public auction with a reserve price set at R375 000.00.[5]

- [7] The property was put up for auction on 27 January 2022, but no bid was received, despite 30 prospective bidders attending the auction. The reason advanced by the Sheriff, was that the reserve price was higher than the market value, and the outstanding rates and levies of R22 048.00 and R100 000.00 respectively, were too high.[6]
- [8] As a result of the unsuccessful auction, and no bids having been received, the applicant approached this court on 11 August 2022 and obtained an order in terms of which the reserve price was reduced to R240 000.00.[7]
- [9] A second auction was held on 23 November 2022, subject to a new reserve price of R240 000.00, but this proved unsuccessful as well, as no bids of any amount were received from any of the registered bidders that were present at the auction.[8]
- [10] The applicant approached this court in the present application to authorise the sale of the immovable property without a reserve price.

Reconsideration of the reserve price in terms of rule 46(9)

- [11] The very purpose of Rule 46A is to avoid a homeowner's investment, in his or her property from being impinged upon, and to protect indigent debtors who are in danger of losing their homes, and ultimately give effect to Section 26 of the Constitution.
- [12] The court is tasked to take the factors set out in Rule 46A(9)(b) into account, in deciding (i.e. exercising discretion) whether to set a reserve price for the sale of immovable property, that was declared executable, on public auction.
- [13] In circumstances where the reserve price is not achieved at the sale in execution, the court is to proceed in terms of subrules 46(9)(c), (d), and (e), which provisions read as follows:
- (c) If the reserve price is not achieved at a sale in execution, the court must, on a reconsideration of the factors in paragraph
 - (b) and its powers under this rule, order how execution is to proceed.
 - (d) Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within 5 days of the date of the auction, which report shall contain—
 - (i) the date, time and place at which the auction sale was conducted;
 - (ii) the names, identity numbers and contact details of the persons who participated in the auction;
 - (iii) the highest bid or offer made; and
 - (iv) any other relevant factor which may assist the court in performing its function in paragraph (c).
 - (e) The court may, after considering the factors in paragraph (d), and any other relevant factor, order that the property be sold to the person who made the highest offer or bid.

- [14] In a judgement by Fisher J of our division, she attempted to address the lack of uniformity that arises, where a reconsideration of a reserve price is sought in terms of Rule 46A(9)(c), by providing procedural guidelines to be followed.[9]
- [15] The trigger for the reassessment / reconsideration, is that the reserve price has not been achieved at the sale of execution, and whilst a court is given a wide discretion under rule 46A(c) – (e), such discretion can only be exercised in accordance with the facts put forward by the parties, or one of them and the Sheriff.[10]
- [16] The reconsideration application works from the perspective, that there has been a change in the facts before the court. This change is found only in the fact that the property has been subject to the sale in accordance with the conditions of the court order, and there have been no bids at the reserve price set.[11]
- [17] The only new facts that really arise, and that can be put before court for the reconsideration of the reserve price, are the prima facie contents of the Sheriff's return of service, and the contents of his or her report, notifying the court of the fact that the reserve price was not achieved, and that it needs to be either reduced or set to zero.
- [18] In addition, the applicant, where in a position to do so, is to provide the court with the updated amounts pertaining to the arrears, rates, taxes and levies. The court, after considering the new facts, must, on a reconsideration of the factors in sub-paragraph
- (b) of Rule 46A, order how execution is to proceed.[12]
- [19] In practice, the lack of uniformity and a framework as to how the reconsideration must take place, was highlighted by Binns-Ward J, of the Western Cape division of this court in the matter of Standard Bank of South Africa Ltd v Tchibamba and Another[13] where the learned judge held as follows:
- [11] Van Loggerenburg, Erasmus, Superior Court Practice Vol 2 (Juta) observes '[p]aragraphs (c), (d) and (e) of subrule (9) are not clearly worded'. I regret to say that I have to agree. It is not so much that the individual paragraphs do not read clearly enough when each is considered on its own; it is that, read together, they fail, conspicuously, to provide any procedural framework in terms of which the mandatory reconsideration prescribed in paragraph (c) is to happen. As the current matter and others to which I shall refer illustrate, such a framework is plainly required.
- [12] The shortcoming in the subrule was recognised in Changing Tides 17 (Proprietary) Limited N.O. v Kubheka; Changing Tides 17 (Proprietary) Limited N.O. v Mowasa; Changing Tides 17 (Proprietary) Limited N.O. v Bucktwar; Changing Tides 17 (Proprietary) Limited N.O. v Horsley [2022] ZAGPJHC 59 (15 February 2022), in which Fisher J, sitting in the Gauteng Division (Johannesburg), in four 'applications' by a judgment creditor that were placed before her in chambers, sought to remedy the situation by providing some procedural guidelines to be followed in such cases in that jurisdiction. The learned judge recorded that in her own experience practitioners dealt with the means of obtaining the prescribed

reconsideration of a reserve price under rule 46A(9)(c) in a variety of ways that showed up an undesirable lack of uniformity.

- [20] Fisher J mentioned, in *Changing Tides* 17, that the reconsideration of a reserve price in terms of rule 46A(9)(c), should be sought by way of application in open court, and not by approaching a judge in chambers[14]. This is currently the practice in this division, however, being in the correct forum (i.e. open court) this is not an issue to be determined in this matter. The issue to be determined is the court's discretion to set no reserve price after considering the new facts before it.
- [21] Although Fisher J recognised, correctly in my view, the lack of uniformity in the application of Rule 46A in practice, she did not make any suggestions as to the approach to be taken in determining the new reduced reserve value.
- [22] The challenge, however, is the calculation or formula to be used to reduce the reserve price, to a new figure, or not to set a reserve price at all, especially in circumstances, such as the present, where the reserve price was already reduced on a previous occasion, and where the auction resulted in a "no bid no sale".
- [23] In *Nedbank Limited v Mabaso and Another*[15] Moultrie AJ relied on a statement made by the applicant in its affidavit. He stated as follows in paragraph 20 of his judgment:

In my view, the most sensible approach to the setting of the reserve price in the current matter is the statement in the founding affidavit that "the real-life scenario" that played out at the auction "is the clearest and most accurate indication yet of the property's value". I agree. The reserve price should be set at the amount of the highest bid submitted at that auction, namely R300,000.

- [24] When setting a reserve price at the initial hearing when the debtor's immovable property is declared executable, this division, to a great extent, adopted the so-called "Opperman formula" to set a reserve price, by taking the average of the market valuation and the municipal valuation, less 30%, less the outstanding municipal charges.
- [25] By the time the Court is approached in terms of Rule 46A(9)(c) for an order varying the previous orders, so as to allow the property to be sold in execution without a reserve price, the court will, in most instances, also be made aware of the updated outstanding rates, taxes and levies (if applicable), that have (in most circumstances) increased since the immovable property was declared executable, and the initial reserve price set.
- [26] As these types of applications are served on the execution debtors, they have an opportunity to place facts before court, which facts may also include submissions regarding the reserve price proposed by the applicant. If a debtor fails to place facts before the court despite being afforded the opportunity to do so, the court is bound to determine the matter without the benefit of the debtor's input.[16]

- [27] The applicant contends that, the court's discretion can only be exercised in accordance with the facts put forward by the parties, or one of them and the Sheriff. To this end, Rule 46A(9) (d) directs that the court must consider the facts disclosed by the Sheriff in its report, in exercising its discretion to order that the property be sold to the person who made the highest offer or bid.
- [28] In the matter before me, the Sheriff's return and report are clear on its inability to successfully auction the immovable property at the reserve price set by this court, on two different occasions.

Analysis

- [29] An order that a property be sold without a reserve price, has the effect and possibility of the property being sold for pittance, which defeats the purpose of the auction to begin with, especially in circumstances where the debtor will be held liable for the shortfall in any event.

- [30] In *Standard Bank v Mokebe and related cases*[17] , it was held:

The reasoning behind the amendments to rule 46A and the need for judicial oversight are to protect the constitutional rights guaranteed in s 26 and to inter alia ensure a person is not evicted from their home without an order of the court and after consideration of all of the circumstances relevant to a particular case.

- [31] The Supreme Court of Appeal in *Petrus Johannes Bestbier and Others v Nedbank Ltd*[18] held that:

Rule 46A was meant to protect indigent debtors who were in danger of losing their homes and give effect to section 26 of the Constitution. The sole purpose of judicial oversight in all cases of execution against immovable property is to ensure that the orders being granted did not violate section 26(1) of the Constitution and that the judgment debtor is likely to be left homeless as a result of the execution.

- [32] The applicant argues that the facts in support of the application to declare the immovable property in question executable, were taken into consideration when the initial reserve price of R375 000.00 was set. Further, that this court reduced the reserve price to R240 000.00, based on "new facts" made available to the court to enable it to exercise its discretion, namely; the facts flowing from the Sheriff's report as to what transpired at the first auction that was held on 27 January 2022.

- [33] It is unclear on what basis the court went about in reducing the reserve price from R375 000.00 to R240 000.00.

- [34] In the current application before me, the only new facts, that are presented in support of the relief sought are the following:

34.1. the Sheriff was again unable to obtain bids to satisfy or achieve the reserve price set as there were no bids, for the exact same reasons advanced at the first auction;

34.2. the outstanding rates and taxes increased from R 22 048,60 since the first auction to R 25 252.66;

34.3. the outstanding levies increased from R100 397.52 since the first auction to R 125 476,47.

[35] Due to the fact that no bids were received at the last auction, this court is not in a position to follow the approach by Moultrie AJ as alluded to above, by taking the highest bid at the auction into consideration, as the new proposed reserve price.

[36] The applicant and respondent for that matter, are faced with a situation where every time the applicant approaches the court for a reconsideration of the reserve price, the municipal charges, and the interest payable on the amount due by the respondent (execution debtor) have all increased. This is besides the Sheriff's costs associated with each (in this case) unsuccessful auction.

[37] Ultimately both the applicant and respondent are prejudiced by the delay in the applicant's inability to realise the property, more than two and a half years since the property was declared executable.

[38] The applicant contends further, that the likelihood of recovering its judgment debt decreases, as prospective buyers are already disinterested in the property due to the high municipal and body corporate amounts outstanding. On the other hand, the respondent's exposure and liability towards the applicant increases daily. This unfortunate situation will continue until such time that the immovable property is successfully sold at an auction.

[39] Aside from the aforementioned prejudice to be suffered by both parties, this court should also take the factors[19], already canvassed before this court in August 2020[20], (in the papers in terms of which the property was declared executable) into consideration, which supports the applicant's submission that the court's intervention, for a third or fourth time, resulting in a gradually reducing reserve price is, according to the

applicant, not tenable.

[40] It is submitted by Mr. Erasmus, that the Sheriff should be authorised to sell the property to the highest bidder at no reserve price.

[41] Prior to the introduction of Rule 46A, and this is public knowledge, in a number of instances, South Africans had their homes sold significantly below the true value of their properties.

[42] Nxazonke and Another v Absa Bank Ltd and Others[21] (Davis J) is but one example, where a sale in execution resulted in a home being sold for a disproportionately low price, compared to the true value of the property. In Nxazonke, the property was sold for R10, when the municipal value of the property was R81 000. In that instance, the court held that the

valuation of the property, and specifically the fact that it was sold for R10, inferred that there had been a simulated or fraudulent transaction, and that in the absence of any plausible explanation there had been an abuse of process. The court held:

The first argument of abuse of process runs along the following lines. It is common cause that in 2001, the municipal value of the property was R81 000,00. According to the papers which have been placed before this court, after the fifth respondent, in the form of Nedcor Bank, obtained the default judgment on 1 August 2001, the property was sold in execution to Nedcor Bank itself for R10,00. Mr Hathorn correctly characterised this sale as an abuse of process.

There is something disturbing about an act in which property, on a municipal valuation (which is obviously a conservative one), which is valued at R81 000,00 is sold for R10,00. Consider the consequences: Applicants owed approximately R28 000,00 to the bank. If the property had been sold for say R50 000,00, they would have been able to receive R22 000,00, which presumably would have allowed them to put a deposit down on another house. By virtue of the property being sold on the basis of what appears to be a simulated transaction, the rights which applicant may have enjoyed to any surplus, were destroyed. Absent any plausible explanation, this is an abuse of process.

[43] The fact that a property could be sold for R10 highlighted a serious and pervasive problem in the previous sale in execution process, prior to the enactment of Rule 46A.

[44] Where properties are sold without a reserve price, there still appears to be room for abuse, as properties could still be sold for unrealistically low prices. How does this court balance the fact that legitimate pursuits of a reserve price may prove difficult against the possibility of abuse as displayed in Nxazonke, especially when after the sale, the debtor will in all probability be left homeless, yet still be held liable for any shortfall on the mortgage debt?

[45] Rule 46A(9) provides that the court ‘may’ set a ‘reserve price’ for a sale in execution. The principle purpose behind the amendment was to ensure that debtors do not end up having their homes sold for extremely low prices. However, as Fischer J, correctly pointed out, when the sale in execution is scheduled and the reserve price is not achieved, such may be attributable to a myriad of reasons, not specifically related to the reserve price itself.

[46] Where a court considers whether or not to grant an order for a property to be sold by way of a sale in execution, without a reserve price, the court should take into account any relevant information, so as to retain judicial oversight, and such relevant information should include:

46.1. The report from the Sheriff, setting out:

46.1.1. the date, time and place at which the auction sale was conducted;

46.1.2. the names, identity numbers and contact details of the persons who participated in the auction;

46.1.3. the highest bid or offer made; and

46.1.4. any other relevant factor which may assist the court in performing its function in paragraph 46(9)(c);

46.2. A supplementary affidavit from the applicant setting out why the property is to be sold without a reserve price;

46.3. A supplementary affidavit from the respondent(s) setting out why the property should not be sold without a reserve price.

[47] Where the court, having regard to the papers before it, is not satisfied that an order be granted for the sale of the property without a reserve price, a further reserved price should be determined, depending on the circumstances of each case. The previous reserved price of R240 000,00 was not achieved. I have decided to apply, in line with the Opperman Formula, a further 30% reduction instead of granting a zero-rated reserve price, as prayed for by the applicant.

[48] I am not satisfied that there are sufficient facts before me to grant an order for sale of the property by sale of execution, without a reserve price.

[49] I do however note this court's special appreciation for the well written heads of argument drafted by Mr. Erasmus. The heads were insightful, well-researched and extremely helpful.

[50] In the result, I make the following order:

Order

1. SECTION No. [...] as shown and more fully described on Sectional Plan no. SS270/1998 in the scheme known as CARON ROAD in respect of the land and building or buildings situated at [...] EXTENSION 12 TOWNSHIP, Local Authority: CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY of which section the floor area, according to the said sectional plan is 50 (fifty) square meters in extent, 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 said sectional plan, held under Deed of Transfer ST40169/2006, be sold by the Sheriff of this Court, on public auction at a reserve price of R192 000.00 (ONE HUNDRED AND NINETY-TWO THOUSAND RAND) in accordance with Rule 46 of the Uniform Rules of Court
2. The applicant is ordered to advise the respondent in writing (by way of personal service) of the scheduled date and time of the sale of execution.
3. The sale in execution may be set aside, in the event that the respondent settles what is owed to the applicant in full, prior to the date of the sale in execution.

B. FORD

Acting Judge of the High Court

Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 28 August 2023 and is handed down electronically by circulation to the parties/their legal representatives by e mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 August 2023

Date of hearing: 3 May 2023

Date of judgment: 28 August 2023

Appearances:

For the applicant:

Adv. C. Erasmus

Instructed by:

Smit Sewgoolam Incorporated

For the respondent:

No appearance

- [1] Court Order dated 20 August 2020 declaring property executable at p.003-1
 - 003- 3;
- [2] Court Order dated 11 August 2022 p. 001-30; The original reserved price of R 375 000.00 was reduced to R240 000.00 by this Court in an application similar to this application, granted on 11 August 2022, during oral argument.
- [3] Notice of motion, p. 001 -15 - 001-17;
- [4] Sheriff's return of service, p. 002-1;
- [5] Court Order of 20 August 2020 declaring the property executable at p.003-1
 - 003-3;
- [6] Sheriff's return of service and report marked "MA3" and "MA4" to the Founding Affidavit CaseLines p 001-28 - 001-29;
- [7] Court Order of 11 August 2022 marked "MA5" to the Founding Affidavit CaseLines p 001-30 - 001-32;
- [8] Sheriff's return of service and report marked "MA7" and "MA8" to the Founding Affidavit p 001-35 - 001-36;

- [9] Changing Tides 17 (Proprietary) Limited N.O. v Kubheka; Changing Tides 17 (Proprietary) Limited N.O. v Mowasa; Changing Tides 17 (Proprietary) Limited N.O. v Bucktwar; and Changing Tides 17 (Proprietary) Limited N.O. v Horsley [2022] ZAGPJHC 59 (15 February 2022) para 28 [2022] ZAGPJHC 59 (15 February 2022). (hereinafter referred to as "Changing Tides 17 -matter").
- [10] Changing Tides 17 -matter- para 28. Own emphasis.
- [11] Changing Tides 17 -matter -para 31.
- [12] Rule 46A(9)(d).
- [13] 2022 (6) SA 571 (WCC) (2 September 2022).
- [14] Changing Tides 17 -matter- para 26.
- [15] Nedbank Limited v Mabaso and Another (2019/17887) [2022] ZAGPJHC 782; 2023 (2) SA 298 (GJ) (14 October 2022). In this matter counsel referred to the "usual formula". Para 20
- [16] Absa Bank Limited v Mokebe and Related Cases 2018
- (6) SA 492 (GJ) para 59.
- [17] 2018(6) SA 492(GJ) para 12
- [18] Case No 150/2021 [2022] ZASCA 88 (13 June 2022)
- [19] '(c) If the reserve price is not achieved at a sale in execution, the court must, on a reconsideration of the factors in paragraph (b) and its powers under this rule, order how execution is to proceed.
- [20] Founding Affidavit p02-28 - 02-29 para 12.9.1 to 12.9.10;
- [21] (WCC) (unreported case no 18100/2012, 4-10-2012) unnumbered para 13 - `4

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Prepared on 13 October 2026 · Esheria