

SOUTH AFRICA / JUDGMENT

Changing Tides 17 (Pty) Ltd N.O v Srivastava and Others (D1067/2025) [2025] ZAKZDHC 49 (6 August 2025) [2025] ZAKZDHC 49

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D1067/2025

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D1067/2025

In

the matter between:

CHANGING
TIDES 17 (PTY) LTD
N.O.
APPLICANT
(Registration
No. 2001/009766/07)
and
MAYANK
SRIVASTAVA
FIRST RESPONDENT
(Identity
Number 7[...])
RAJESHNEE
BHAGRATI

SECOND RESPONDENT

(Identity

Number 6[...])

eTHEKWINI

MUNICIPALITY

THIRD RESPONDENT

In

re:

CHANGING

TIDES 17 (PTY) LTD

N.O.

PLAINTIFF

MAYANK

SRIVASTAVA

FIRST DEFENDANT

RAJESHNEE

BHAGRATI

SECOND DEFENDANT

Coram:

Mossop J

Heard:

6 August 2025

Delivered:

6 August 2025

ORDER

The

following order is granted:

1.

The order of this court dated 8 October

2021, in terms of which a reserve price of R660 000 was fixed in
respect of the sale

of the immovable property described in the

applicant's notice of
motion as being:

'Portion

3[...] of erf 5[...] V[...] Registration Division FU, Province of
KwaZulu-Natal, measuring 951 (nine hundred and fifty
one) square

metres, held by Deed of Transfer T50123/2004, subject to the
conditions therein contained or referred to'

(the property), is hereby

reconsidered and is set aside.

2.

It is directed that that the proposed third

sale in execution of the property shall occur without reserve.

3.

There shall be no order as to costs.

JUDGMENT

Mossop J:

Introduction

[1] This is an ex-tempore judgment.

[2] On 8 October 2021, my brother, Olsen J, granted judgment in favour of the applicant against the first and second respondents for payment of the amount of R501 879.81 (the order). In addition, certain immovable property owned by the first and second respondents was declared to be specially executable. That immovable property had a formal description of:

‘Portion 3[...] of erf 5[...] V[...] Registration Division FU, Province of KwaZulu-Natal, measuring 951 (nine hundred and fifty-one) square metres, held by Deed of Transfer T50123/2004, subject to the conditions therein contained or referred to.’

[3] I shall refer to this immovable property as ‘the property’.

[4] Olsen J further ordered that the sale of the property was to be subject to a reserve price of R660 000.

A brief factual history

[5] Consequent upon the granting of the order, the applicant put the property up for sale at a public sale in execution on 4 July 2022. The sheriff of Inanda District 2 conducted the auction and, after it was concluded, delivered a report in terms of Uniform Rule 46A(9)(d) in which he reported as follows:

‘The property was put up for auction at the reserve price being R660,000.00. There was no bid attracted towards the reserve price.

The property was further put up for auction below the reserve price, there was no bid, hence there was no bid received.’

[6] The applicant thereafter made application to this court for an order in terms of Uniform Rule 46A(9)(c) for a variation of the reserve price fixed by Olsen J. That application was enrolled for hearing on 8 February 2023. Surprisingly, the application was dismissed by Msiwa AJ. No reasons appear to have been provided by the acting judge for that decision as none are to be found in the court file. This is most unfortunate, and highly undesirable, for the acting judge’s thinking on the

matter is nowhere to be discerned.

- [7] Unable to vary the reserve price but obliged to attempt to sell the property, the applicant's attorneys were compelled to arrange a second sale in execution where the property would again be put up for sale, subject again to the same reserve price. There could have been no realistic expectation that a different result would present itself and the outcome of this sale was accordingly entirely predictable.
- [8] The second sale occurred on 19 February 2024, and the same sheriff rendered the same report again in terms of Uniform rule 46A(9)(d). When I say the same report, I mean exactly that: in what appears to have been a classic case of copy and paste, the exact same words previously used to describe what occurred at the first sale in execution were used to describe what happened at the second sale in execution. Again, no bids were received. The result is that the property simply cannot be sold. The applicant contends that this is because of the reserve price fixed by this court.

The approach to be adopted

- [9] Uniform Rule 46A(9)(c) reads as follows:

'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.'

- [10] In embarking on this reconsideration exercise, the court continues to perform its original duty of determining the terms upon which the property is to be disposed of. It does not commence a new, separate and discrete inquiry into the adequacy of the reserve price but takes all the facts adduced on the issue into account, including the most recent facts that led to the reserve price not being achieved.
- [11] Having performed that exercise, the court may, in the exercise of its discretion, adjust the reserve price or even abandon it entirely. To assist the court in coming to its conclusion, the parties are at liberty to make fresh submissions to the court, and the sheriff is required to render his report on what transpired at the unproductive sale in execution. The provision of all available relevant information to the court is essential to enable it to assess what, if anything, needs to be done to the reserve price.

The applicant's case

- [12] The applicant has taken advantage of the opportunity to place further facts before the court. It has submitted that the total amount owed by the first and second respondents to it is now the amount of R824 270.16, of which the amount of R375 773.67 constitutes arrear instalment payments. At the time that the application for judgment against the first and second respondents was made by the applicant, the first and second respondents' arrears amounted to R55 942.13. This equates to arrear instalments of approximately 30 months, a substantial period in anyone's book. The arrears have accordingly increased dramatically and substantially in the period between the granting of judgment and the bringing of this application.

- [13] In addition to this, the debt owed by the first and second respondents to the third respondent, the eThekweni Municipality, as of March 2024, was the eye-watering amount of R412 842.61.[1] It is safe to assume, given the fact that this figure is now more than a year old, that the debt due to the third respondent has since increased, rather than diminished.
- [14] The applicant submits that the current assessed market value of the property is the amount of R1 350 000, with a forced sale value of R1 050 000. The third respondent has placed a value of R920 000 on the property.
- [15] The applicant submits that if the property is again to be sold at a reserve price of R660 000, when the substantial debt owed by the first and second respondents to the third respondent is added to the reserve price, any purchaser would, in effect, be paying more for the property than the value ascribed to it by the third respondent. That is unlikely to attract many, if any, bidders.
- [16] The applicant submits that the reason that it has not been able to sell the property at the two previous sales in execution that it has set up is because of the existence of the reserve price. It consequently submits that it should be permitted to put up the property at a third sale in execution without a reserve price being fixed.

The first and second respondents' case

- [17] The respondents have been given notice of the applicant's intention to vary the reserve price and the first respondent, who is not represented, has delivered an answering affidavit in which he sets out his attitude to these proceedings and asks:

'... that this Honourable Court dismiss the application under case D476/2021 with costs, on the basis that it is procedurally redundant,

improperly motivated, unsupported by a verified judicial record, and premised on an abuse of process.'

- [18] The second respondent, who apparently is the spouse of the first respondent, and who is also unrepresented, has compiled and delivered a document that purports to be an affidavit, but she has not signed it. While the uncommissioned document has somehow found its way into the court file, its contents cannot, in the circumstances, be considered.
- [19] The first respondent, unsurprisingly, has paid scant, if any, attention to the provisions of Uniform Rule 46A(9)(c). He has busied himself in his answering affidavit with advancing facts and reasons as to why the applicant was not entitled in the first place to obtain the order that it obtained against him and the second respondent. He has accordingly not attempted to make any submissions regarding the true issue, namely what should be done about the reserve price. This is, perhaps, understandable given the fact that he and the second respondent are not represented.

[20] In keeping with his (incorrect) understanding of proceedings, the first respondent states in his answering affidavit that the applicant has already attempted to set aside the reserve price and has failed in that endeavour. Thus, he concludes:

‘The repetition of denied relief constitutes an abuse of process.’

Analysis

[21] I have some doubts over whether the only reason that the property has not sold is because of the existence of the reserve price. I say this because the sheriff’s identical reports for each of the two unsuccessful sales in execution reveal that after the property was put up for sale subject to the reserve price and no bids were received, it was again put up for sale ‘below the reserve price’ and yet it still did not attract any bids. I assume that this means the property was put up without reserve.

[22] When attempting to fashion a realistic reserve price, the market value of the property is an obvious starting point. The market value of a property may usefully be considered to be the estimated amount for which it should change hands on the valuation date between a willing buyer and a willing seller in an arm’s length transaction. The difficulty, however, with sales in execution is that the seller is, generally, not a willing participant in that transaction. Such sales generally are forced sales, are not widely or attractively marketed, and they infrequently achieve their aim, resulting in re-consideration applications such as the present one.

[23] The purpose of a court fixing a reserve price is an attempt to ensure that a home is not sold for less than its true value. In the past, there were unfortunate instances where homes were sold for negligible amounts. The introduction of Uniform Rule 46A which, inter alia, provides for the fixing of a reserve price, was an attempt to ensure that debtors’ homes were not lawfully sold for a pittance.

However, there is much to be said for the proposition that the true value of a property is determined by what actually happens at the sale in execution.[2]

[24] The focus of the applicant’s application is Uniform Rule 46A(9)(c), already quoted. It seems to me that this sub-rule is simply a procedural tool to enable the establishment of a way forward where the fixed reserve price of a property declared specially executable has not been achieved. As was stated by Binns-Ward J in *Standard Bank of South Africa Limited v Tchibamba and Another*: [3]

‘It does not appear to have been appreciated by any of the parties that the reconsideration prescribed by rule 46A(9)(c) is a procedural requirement; it is not a process that can be opposed. It is a process in which the court must consider any relevant evidence put before it, but the process is not an adversarial one.’

It seems to me that this is a correct understanding of the rule.

[25] In opposing the applicant's application, the first respondent has taken a position at odds with the view expressed in *Tchibamba*. I would doubt whether he has ever heard of that matter and his failure to consider it is, again, accordingly understandable. The

first respondent, in making submissions that are directed against the propriety of the order, fails to appreciate that until the order itself has been lawfully struck down, it binds the respondents, and this court.[4] This court has no power to override the order. No attempt has been made by the respondents to appeal it. It was granted more than three years ago, and it thus stands, as does the order permitting the sale of the property.

[26] The first respondent makes the claim that what the applicant is doing in presenting this application to court is an abuse of process. In this, the first respondent is incorrect. Uniform Rule 46A(9)(c) makes it plain that a court must order how execution is to occur where a reserve price cannot be achieved. There is no limitation on how many times a court may be approached for this form of relief, nor could there realistically be, for what will occur in the future is not known to mortal man. A reserve price is simply a reasonable estimation of what a property must achieve at a forced sale based upon limited known facts. It is not a guarantee of that price being achieved nor is it incapable of being varied if it is not achieved. In seeking again to have the reserve price reconsidered, the applicant is accordingly acting within its rights, and the first respondent's pointed objection must be dismissed.

[27] There can be no doubt that delays in selling a property in execution benefits none of the parties. The debt continues to grow through the running of interest, as does the debt to the municipality for the consumption of services that the respondents appear to have no ability to pay, but are not content to do without. The fact that further legal proceedings must occur also inevitably adds unnecessary additional costs to the burden that the respondents, ultimately, must bear.

[28] I do not consider the reserve price initially fixed by Olsen J to be inappropriate, on paper. Mathematically, it appears to have factored in all the necessary considerations that a court acting prudently should consider. But the lived reality is that the attempted sales of the property have elicited no interest from those who habitually attend these sales. That failure is attributed by the applicant to the reserve price. While I have earlier expressed some misgivings about this conclusion, I cannot say with any certainty that the fixing of the reserve price has not had some effect on the outcome of the two sales in execution that have been held.

[29] The applicant is in possession of an order permitting it to sell the property, but it has not been able to sell it. Something must change to permit that order to be given effect to. It appears to me that the only factor that can be changed is the reserve price. The true issue is whether the reserve price should be reduced to a lower level or whether the property should be put up for sale with it. Considering the lapse of time since the granting of the order by Olsen J (a period of nearly four years), and the inexorable

and steadily worsening indebtedness of the first and second respondents to the applicant and the third respondent, it appears to

me to be imperative that the property be disposed of as quickly as possible. To ensure this occurs, I am prepared to order the sale to proceed without reserve.

Costs

[30] In the exercise of the discretion that I have regarding costs, and to soften the financial impact upon the respondents, I direct that there shall be no order as to costs.

Order

[31] I accordingly grant the following order:

1. The order of this court, dated 8 October 2021, in terms of which a reserve price of R660 000 was fixed in respect of the sale of the immovable property described in the applicant's notice of motion as being:

'Portion 3[...] of erf 5[...] V[...] Registration Division FU, Province of KwaZulu-Natal, measuring 951 (nine hundred and fifty one) square metres, held by Deed of Transfer T50123/2004, subject to the conditions therein contained or referred to',

(the property) is hereby reconsidered and is set aside.

MOSSOP J

APPEARANCES

Counsel for the applicant: Ms A G Mnguni Heads drawn by Mr G J M Randles Instructed by: Strauss Daly Incorporated 9th Floor, Strauss Daly Place 41 Richefond Circle Ridgeside Office park Umhlanga Counsel for the first and second respondents: Both in default

[1] At the time of the granting of the order, the amount owed to the third respondent was R105 484.94.

[2] Nedbank Ltd v Mabaso and Another 2023

(2) SA 298 (GJ) para 20.

[3] Standard Bank of South Africa Ltd v Tchibamba and Another 2022

(6) SA 571 (WCC) para 29 (Tchibamba).

[4] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004

(6) SA 222 (SCA) para 26.

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