

SOUTH AFRICA / JUDGMENT

Nedbank Limited and Another v Eldin and Others (40418/2017) [2024] ZAGPJHC 758 (16 August 2024)

[2024] ZAGPJHC 758

COURT

South Gauteng High Court, Johannesburg

BEFORE

N.J. Graves

CASE / FILE NUMBER

40418/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION,

JOHANNESBURG

CASE

NO: 40418/2017

1.

REPORTABLE: YES/NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED.

In

the matter between:

NEDBANK
LIMITED
First
Applicant
GOLD
REEF SANDS BODY CORPORATE
Second
Applicant
and
HASSAN
MOHAMED ALI GAMAL ELDIN
First
Respondent
CHUKWU,
OZAHHEME JOHN
Second
Respondent
SHERIFF
OF THE HIGH COURT JOHANNESBURG WEST
Third
Respondent
CITY
OF JOHANNESBURG
Fourth
Respondent
MISTY
LAKE SECTIONAL TITLE AND MANAGEMENT SERVICES (PTY) LIMITED
Fifth
Respondent
In
re: the action between:
NEDBANK
LIMITED
(Registration
number: 1951/000009/06)
Plaintiff
and
HASSAN
MOHAMED ALI GAMAL ELDIN
Defendant

JUDGMENT**GRAVES AJ:**

- [1] The First Applicant (“Nedbank”) and the Second Applicant (“the Body Corporate”)[1] seek an order against the First Respondent (“Mr Hassan”) in accordance with Uniform Rule 49A(9)(e) read with (d). This subrule governs the situation where a Court has previously ordered execution against the primary residence of a judgment debtor and has set a reserve price (Rule 46a(8)(d) and (e)), and the reserve price is not achieved at a sale in execution. In these circumstances the Sheriff must submit a report to the Court within five days of the date of the auction containing various details concerning the conduct of the auction (Section 46A(9)(d)). Thereafter, the Court may order that the property be sold to the person who made the highest offer or bid (Section 46A(9)(e)).
- [2] The order sought by the First and Second Applicants is that the sale of the property previously concluded (as detailed below) be set aside and that a new auction be held, alternatively that the sale be confirmed.
- [3] At the commencement of the hearing before me Mr Hassan, who appeared in person, requested a postponement of the application. Although there was no substantive application before me Mr Hassan submitted that he was in the process of applying for voluntary surrender of his estate in terms of Section 3 of the Insolvency Act, 24 of 1936. He provided no proof of this process and conceded that no court order for the surrender and yet been granted. He said further that his attorney of record had withdrawn and he had not been able to obtain another attorney represent him.
- [4] I dismissed request for a postponement and indicated that my reasons would be set out in my judgment. These are my reasons:
- [4.1] judgment declaring the immovable property executable was granted almost 6 years ago;
- [4.2] the sale conducted by the Sheriff pursuant to this Order was conducted on 1 October 2019;
- [4.3] as set out below the outstanding amounts owed by Mr Hassan Nedbank, the Body Corporate and other entities have continued to accrue in the intervening period, without outcome for the parties;
- [4.4] as pointed out to me by counsel representing Nedbank, Mr Hassan’s attorney served a notice of withdrawal on 13 September 2023, after which there is no evidence of any further attorney being appointed, nor any attempt to do so before the hearing;
- [4.5] during the September 2019 Mr Hassan had launched an application for the rescission of the original judgment granted against him on 18 December 2018 which declared the property executable. After papers were filed by Nedbank opposing the recession Mr Hassan on 21 November 2022 delivered a notice withdrawing the rescission application;

[4.6] when I asked Mr Hassan why he had withdrawn the precision application his sole response was that this was on the advice of his attorney;

[4.7] Mr Hassan failed to satisfy me that he was entitled to a postponement of this long-running matter, or that it would be in the interests of justice to require Nedbank and the Body Corporate further to be delayed in the final execution against the property.

[5] The relevant history is now recounted.

[6] On 18 December 2018 default judgment was granted against Mr Hassan by Mudau J declaring executable a property registered in the name of Mr Hassan, described as Section no. 29 of the scheme known as Gold Reef Sands and in respect of the land and buildings situate at Ormonde Extension 8 Township, Local Authority: City of Johannesburg, with a floor area of 69 m², together with an undivided share in the common property of the scheme, held by deed of transfer no. ST80393/2006 ("the property"). A reserve price of R600 000,00 was determined by the Court and the Registrar was directed to issue a writ of attachment to enable the Sheriff to attach the property in satisfy of the judgment debt, interest and costs owed to Nedbank. As noted below, the reserve price was not achieved which gave rise to the application by Nedbank (later supported by the Body Corporate) referred to in paragraph 1 above. The background to the application before me is set out in Nedbank's founding affidavit as follows:

[6.1] when the application for attachment was heard during December 2018 the amount owing by Mr Hassan to Nedbank on his home loan agreement as at 10 October 2018 was R281 264,83, with arrears of R65 517,56 as at 18 December 2018. Outstanding rates and taxes owed by Mr Hassan came to R31 927,30 and he owed outstanding levies to Gold Reef Sands Body Corporate, the Second Applicant of R240 451,28;

[6.2] the market value of the immovable property, according to Nedbank's March 2018 valuation was R700 000,00 and the municipal value as at July 2018 was R622 000,00;

[6.3] it was stated (and not disputed by Mr Hassan in his answering affidavit) that the property was not his primary residence;

[6.4] the sale in execution was scheduled for 1 October 2019 at the premises of the Sheriff, Johannesburg West. On this occasion no bid that matched or exceeded the reserve price was achieved. The property was subsequently sold to the Second Respondent, Mr O.J. Chukwu for the sum of R201 000,00. Mr Chukwu signed the Conditions of Sale on 1 October 2019.

[6.5] One of the conditions of the sale was that Mr Chukwu was liable to pay on demand, inter alia, all levies due to the Body Corporate in terms of the Sectional Titles Act, no. 95 of 1986 and all amounts due to a homeowners or other association which renders services to the property;

[6.6] as the reserve price was not met the Sheriff filed a report in accordance with Rule 46A(9)(d) containing the requisite details as set out in that subrule, including the highest offer made in the sum of R201 000,00. Subrule (9)(c) provides that if the reserve price is not achieved at the sale in execution the Court must, on reconsideration of the various factors set out in subrule (9)(b) and its powers under the rule, order how execution is to proceed; [2]

[6.7] the Sheriff gave notice that he sought an order that the sale conducted on 1 October 2019 should be cancelled, that amounts paid by the purchaser should be refunded and that a further sale should proceed without reserve;

[7] During November 2022 the Body Corporate applied for leave to intervene as the Second Applicant. In its founding affidavit the deponent (the Fifth Respondent on behalf of the Body Corporate) said that the unpaid levies owed by Mr Hassan to the Body Corporate was creating prejudice to the other property owners because necessary repairs and upgrades could not be attended to, due to lack of funds. The finalisation of the execution process would permit a standard condition to be inserted into the conditions of sale requiring the purchaser to settle all outstanding levies on the property owed to the Body Corporate.[3] An Order permitting intervention was granted on 2 March 2023.

[8] Nedbank filed a supplementary affidavit providing an update on the financial position as follows:

[8.1] outstanding arrears on the home loan account at 26 November 2019, R125 501,93;

[8.2] total outstanding balance on the home loan account on this date, R331 150,08;

[8.3] rates and taxes due as at 11 November 2019, R52 012,57;

[8.4] municipal valuation of the property at 11 November 2019, R622 000,00;

[8.5] levies and other dues payable to the Fifth Respondent (on behalf of the Body Corporate), responsible for sectional title administration and management services rendered to the scheme, R286 596,83.

[8.6] the last payment made by Mr Hassan on the bond account was the sum of R3 241,64 paid on 3 August 2017.

[9] Nedbank said that the progressive increase in outstanding amounts resulted in there being no equity in the property and that it was improbable that an offer higher than that already received would be achieved;

[10] Nedbank sought an order first for the setting aside of the sale and permitting a further auction to be held, without reserve, and in the alternative an order confirming the sale and confirming the bid received. This was supported by the Body Corporate.

- [11] Mr Hassan's answering affidavit in the application in terms of Rule 49A(9)(e) and (d) was delivered out of time and he sought condonation, which was not opposed by Nedbank or the Body Corporate. The affidavit raised procedural complaints of non-joinder, jurisdiction of the Court regarding Rule 46A(9)(c) and complained that the alternative orders conflicted. I am satisfied that none of these objections have merit.
- [12] On the merits of Nedbank's application Mr Hassan raised the following:
- [12.1] the sale conducted by the Sherif was fraudulent and illegal, because the Sheriff failed to disclose what other bids were made; [He did not identify any such bids.]
- [12.2] his representative who attended the sale confirmed that there was no bid and no sale on 1 October 2019; [The Sheriff's report contained a list of nine individuals who participated in the auction.]
- [12.3] the property is occupied by illegal occupiers, apparently claiming occupation through Mr Chukwu; [I deal with this below.]
- [12.4] the failure to transfer the property has resulted in Mr Hassan's obligations increasing, to which is added his forfeiture of rental income of between R6 800.00 and R7 200.00 [I deal with this below].
- [13] Relevant to the above factual traverse is an application launched by Mr Hassan during September 2019 in which he sought rescission of the judgment granted against him on 18 December 2018. Answering papers were filed by Nedbank opposing the rescission. The documents filed on caselines suggest no serious effort made by Mr Hassan to progress this application, which resulted in an Order granted during June 2022 directing Mr Hassan to deliver his heads of argument, reflecting that the matter was then on the opposed motion court roll. I need not dwell on the rescission application because by notice dated 14 November 2022, Mr Hassan withdrew the rescission application, in consequence of which an Order was granted by this Court on 28 November 2022, directing him to pay the costs of this application on the scale as between attorney-and-client.
- [14] When Mr Hassan addressed me on his objection to the order now sought regarding the sale concluded I pointed out to him that a significant delay had been occasioned by his abortive rescission application. When I questioned him on the reason for the withdrawal of the application, his answer was that this was on the advice of his attorney. I am satisfied that Mr Hassan's complaint regarding his increasing indebtedness to Nedbank and to the Body Corporate is occasioned by his payment default and the delay caused by his abortive rescission application. I am similarly satisfied that his complaint about a loss of rental income is without foundation in the light of the withdrawal of his rescission application. The property has been declared executable by order of this Court granted on 18 December 2018 and no basis was placed before me whereby Mr Hassan would be entitled to place tenants in the property for his own benefit (which I repeat was not a residential dwelling).

[15] During April 2023, the Body Corporate filed a supplementary affidavit in which it:

[15.1] provided an update to the amounts owed by Mr Hassan to the Body Corporate (R739 951,35) and to the City of Johannesburg (the Fifth Respondent) R105 774,80;

[15.2] pointed out the prejudice to the Second Respondent as a consequence of its inability to proceed with necessary maintenance and security for the complex due to its inability to recover the outstanding levies. It was noted that this placed an unfair burden on the remaining owners;

[15.3] supported Nedbank's intent either to confirm the sale, alternatively for a cancellation and a further sale to be held without delay.

[16] On 31 July 2023, Nedbank delivered a further supplementary affidavit:

[16.1] denying the allegation regarding the irregularity of the sale in execution and providing documentary evidence of proper advertising and details of attendees;

[16.2] indicating that the indebtedness of Mr Hassan to Nedbank was R448 128,31, including arrears of R288 601,88, plus interest on the outstanding amount.

That is the end of the lengthy, procedural traverse.

[17] Nedbank and the Body Corporate were both represented by counsel and Mr Hassan appeared in person. Nedbank's position is that the delays in finalisation of the execution process are largely occasioned by Mr Hassan launching his abortive rescission application. Nedbank has provided an updated valuation report and municipal value, as well as an update of the arrears. [4] Nedbank refers to communications with Mr Chukwu who has confirmed that he is desirous to continue with the purchase of the

incumbent property; as indicated above this would require him to settle the arrears owing to the Body Corporate. Nedbank's

preference is for the sale with Mr Chukwu to be approved.

[18] The Body Corporate expresses its concerns about the impact of non-payment of levies for the property in question and asks for either of the alternates set out in Nedbank's notice of motion dated 13 December 2019. It supported the wish for the property to be disposed of as soon as possible, and the preference that the existing sale be confirmed. This was for largely practical reasons, including the desire to avoid the further costs of a second sale in execution conducted by the Sheriff and the increasing charges against the property, as referred to above.

- [19] Mr Hassan resisted confirmation of the sale, pointing out that the sale to Mr Chukwu was far below the reserve price of R600 000,00. He said that a 3-bedroom, 1-bathroom unit of this type should attract a sale price of at least R730 000,00, but provided no evidence of this valuation. He then suggested that a forensic exercise would permit a better perspective to be achieved on the possible selling price of the property, but conceded that he had taken no such steps to procure such an exercise.

His final contention was that as he was in the process of applying for voluntary surrender of his estate in terms of Section 3 of the Insolvency Act, 24 of 1936, his curator bonis could intervene. On questioning it became apparent no notice of surrender, as contemplated by Section 4 of the Insolvency Act had been published. In the absence of any evidence regarding the progression of this intended surrender this does not constitute a basis further to delay the process of execution.

- [20] I was referred to a recent reported judgment of Fisher J dealing with the process of reconsideration under Rule 46A(9)(c), being the judgment of Changing Tides. I respectfully agree with the following statements regarding the reconsideration process:

“[6] The determination of the reserve is a delicate judicial task which has as its central endeavour the balancing of the respective rights of the parties. This task is impossible without the Court being reliably told what the market value of the property is under

circumstances of a forced sale and the debts that will have to be paid in order for the transfer of the property to be effected – i.e. municipal rates or levies and amounts for which the property is mortgaged.

- [7] The determination also entails a consideration of the likelihood of the proposed reserve price being achieved and the respective prejudice to the interested parties if it is not achieved. Thus, the prospect of the execution process not yielding the price set is a feature in the evaluation from the beginning of the process.” [5]
- [21] As I have outlined above both Nedbank and the Body Corporate have placed evidence before me regarding the previous sale process, the growing unpaid charges concerning the property and the prejudice to all parties, including Mr Hassan, if the sale is further delayed. Mr Hassan’s contentions regarding the likelihood of an increased price being achieved on a forced sale are unsupported. Having taken all factors into account I am satisfied that it is in the best interests of all parties that an order be granted confirming the sale and directing that Mr Chukwu’s bid of R201 000,00 should be accepted on the basis of the Conditions of Sale signed by him on 1 October 2019.
- [22] In the draft order sought by Nedbank and the Body Corporate I was asked also to direct in the event of any of the conditions of sale not being met and Nedbank been liable to Institute an application in accordance with Rule 46(11), that any subsequent sale in execution should be subject to no reserve price. I do not believe that it is either necessary or desirable to make such an order which may have the effect of fettering the discretion of a subsequent court. Rule 46(11) makes provision for the eventuality of conditions not being met, but requires the

intervention of a judge.

[23] I am satisfied that Body Corporate was justified in seeking intervention as an applicant to provide evidence on the impact of the growing arrears on other property owners within the complex, and it is entitled to costs against Mr Hassan, albeit on the party and party scale.

[24] Accordingly, the following order will issue:

- [1] In terms of Rule 46A(9)(e), the Sheriff is authorised to accept the highest bid which was achieved in the amount of R201 000,00 at the sale in execution conducted on 1 October 2019 in respect of the immovable property, which has already been declared specially executable, with property description:
- (a) Section No. 29 as shown and more fully described on Sectional Plan No.: SS391/2006 in the scheme known as GOLD REEF SANDS in respect of the land and building or buildings situate at ORMONDE EXTENSION 8 TOWN-SHIP, LOCAL AUTHORITY: CITY OF JOHANNESBURG, of which section the floor area, according to the said sectional plan is 69 (sixty-nine) SQUARE METRES in extent; and
 - (b) 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 ST80393/2006;

[2] Cost of the First Applicant are to be paid by the First Respondent on a scale as between attorney and client.

[3] Costs of the Second Applicant are to be paid by the First Respondent on the party and party scale as follows:

[3.1.1] from the date on which the order granting the First Applicant leave to intervene, until 11 April 2024; and

[3.1.2] from 12 April 2024 on the Scale B of the tariff set out in Uniform Rule 69, as amended.

N.J. GRAVES

Acting Judge of the High Court of

South Africa

Gauteng Local Division Johannesburg

APPEARANCES:

Date of hearing: 30 July 2024 Date of judgment: August 2024 Counsel for First Applicant: ADV. C.L.

MARKRAM Instructed by: Hack Stupel & Ross Inc. Counsel for Second Applicant: Attorney R.

KOK De Pinho Attorneys First Respondent: M. HASSAN – In Person

[1] The intervention of the Body Corporate is explained below.

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- [2] Subrule (9)(b) relates to the reserve price previously set by a Court having regard to factors such as the market value, the amounts owing in rates, levies or mortgage bonds and various other features there set out
- [3] Such a condition appears in the sale concluded with the Second Respondent.
- [4] See in this regard *Changing Tides 17 (Pty) Ltd NO v Kubheka and Others*, 2022 (5) SA 168 (GJ), at para [38]
- [5] It should be pointed out that the judgment dealt with a number of matters placed before the learned judge in chambers, which were

materially lacking in relevant information

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