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

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

23 March 2021
DATE

SIGNATURE

CASE NUMBER: 13040/2019

JOHN KARABO KGASOANE

First Applicant

LERATO GIFT KGASOANE

Second Applicant

and

NEDBANK LIMITED

First Respondent

**THE SHERIFF OF THE HIGH COURT
JOHANNESBURG SOUTH**

Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email.

Summary: Variation of a court order in terms of Rule 42(1) – Necessity to include reserve price — Judicial oversight imperatives under Rule 46A – Sale of primary

residential property for recovery of outstanding bond repayments — Constitution, section 26.

JUDGMENT

ROME AJ:

INTRODUCTION AND ISSUES

[1] This is an application by the first and second applicants, Mr and Mrs Kgasoane

(collectively, “the Kgasoanes”) for the rescission alternatively variation of a final order granted in default of their appearance. By the time the matter was argued before me the Kgasoanes’ confined the relief sought to that of variation of the default order.

[2] Whilst the facts are relatively straight forward, the adjudication of the application

for variation gave rise to the following somewhat complex legal issue.

[3] Where a judgment creditorⁱ seeks execution in respect of immovable property which is also the primary residence of an individual debtor –

(a) Do the Rules of Court and in particular the provisions of Rule 46A now prescribe that, barring exceptional circumstances, an order of special executability must invariably provide for a reserve price below which the property cannot be sold in auction?

(b) Can a party against whose home an order of special executability was granted by default, obtain a variation of that default order if the order does not provide for a reserve price?

[4] The first question has been comprehensively answered by a Full Bench of this

Division. The second question is addressed in this judgment.

THE FACTS

The main application and the default order

- [5] In 2019 the first respondent, Nedbank, as creditor and mortgagee of the Kgasoanes, brought a consolidated application (“the main application”) for a monetary judgment and a special order of executability. In the main application, Nedbank sought payment of a first amount of R3,966,454.08 and a second amount of R1,445,977.43 from the Kgasoanes (the first and second respondents in the main application) and from a third respondent, Nhlamulo-Hosi Investment CC. This entity’s liability to Nedbank was as surety for the indebtedness of the Kgasoanes. Since this entity has not sought to rescind or vary the default order I need mention it no further.
- [6] The Kgasoanes’ above indebtedness to Nedbank arose from their conclusion of two written loan agreements with Nedbank. Neither the conclusion of the loan agreements, nor the amounts of the capital advanced thereunder are in dispute.
- [7] The larger amount of the Kgasoanes’ above debt (R3,966,454.08) arose from a loan agreement dated 22 September 2015. In terms of this agreement, Nedbank had lent and advanced the amount of R3,925,700.00 (“the first capital amount”) to the Kgasoanes. The Kgasoanes’ obligations to repay the first capital amount, and interest accrued thereon was secured by a mortgage bond which the Kgasoanes registered on 17 December 2015 in favour of Nedbank. This mortgage bond is registered over immovable property described as [...] (“the [...] property”).
- [8] The second amount owed by the Kgasoanes (R1,445,977.43) pertains to a loan

agreement also dated 22 September 2015. In terms of this agreement, Nedbank had lent and advanced the amount of R1,4 million (“the second capital amount”) to the Kgasosanes. The Kgasosanes’ obligations to repay the second capital amount and interest accrued thereon was also secured by a mortgage bond which they registered on 31 July 2015 in favour of Nedbank. This mortgage bond is registered over another immovable property described as [...] (“the [...] property”).

[9] Subsequent to Nedbank’s advance of the first and second capital amounts, and

as set out in the main application, the Kgasosanes breached their obligations to pay the monthly instalments due under the loan agreements. As a result, Nedbank as it was entitled to do, elected to recover the full amount owed in respect of its loans (and interest thereon) and simultaneously sought a special order of execution as against both the [...] property and the [...] property.

[10] In its founding affidavit, Nedbank set out the attempts it had made prior to issuing the main application, to reach a repayment plan with the Kgasosanes and that these attempts had come to naught. Nedbank further drew the Kgasosanes’ attention to the applicable provisions of the National Credit Act (section 129(3)) and their rights thereunder.

[11] In respect of the [...] property, Nedbank stated that to the best of its knowledge this property is owned by the Kgasosanes and is used by them as their primary residence. Nedbank, per the contents of its founding affidavit, advised the Kgasosanes of their constitutional right to housing and of the procedural provisions available to protect such right. Specifically, Nedbank informed the Kgasosanes that if they believed that the execution process would infringe on their right to housing, it was incumbent on them to place information before the Court supporting such claim and to place information

and submissions before the Court in relation to Rule 46(1)(a)(ii) of the Uniform Rules of Court.

- [12] Nedbank in its founding affidavit further stated that if the Court would deem it necessary to set a reserve price. It would suggest that an appropriate reserve price would be for an amount of R2.8 million being 50% of the market value of the [...] property, which amount took into account the average selling price in the area and the various expenses which a prospective buyer would have to pay at a public sale in execution including such factors as the Sheriff's commission, transfer costs, outstanding rates and taxes, outstanding levies, the eviction and escalation costs.
- [13] In regard to the [...] Property, Nedbank in its founding affidavit, stated that the Kgasoanes acquired this property as an investment property and that as such this property was not occupied by them as their home. Nonetheless, as with the [...] property, Nedbank drew the Kgasoanes' attention to their constitutional right to housing and to their rights to place information supporting any claim by them that the order for execution would infringe it. Given the stated nature of the Kgasoanes' use of the [...] property, Nedbank's founding affidavit unsurprisingly makes no mention of any reserve price being appropriate in regard to a sale in execution of this property.
- [14] The Kgasoanes did not enter an appearance to oppose the main application. Nedbank then obtained default judgment against the Kgasoanes per an order of this court dated 8 August 2019 ("the default order").
- [15] In terms of the default order, the Kgasoanes jointly and severally, the one paying the other to be absolved, were directed to pay Nedbank the abovementioned amounts of R3,966,454.08 and R1,445,977.00. The default order further declared both the [...] and [...] properties to be specially executable and it did not provide for the inclusion of a reserve price in respect of the sale of either property.

The application for rescission, alternatively variation

[16] On 25 February 2020, the Kgasoanes issued the present application. In this application, the Kgasoanes sought the rescission of the entirety of the default order. In the alternative, they sought an order that this court *mero moto* consider the inclusion in the conditions of sale of the properties of a reserve price of R6 million for the [...] property and a reserve price of R1,850,000.00 for the [...] property.

[17] The Kgasoanes' supporting founding affidavit, deposed to by Mr Kgasoane, can

at best be described as underwhelming. It contains numerous legal submissions dealing with the right to housing and the need for the procedural protection of that right when a judgment creditor seeks execution as against the debtor's home or primary residential property. The Kgasoanes' affidavit is further replete with paragraphs that do no more than paraphrase at length the contents of the Kgasoanes' notice of motion. Rather than setting out detailed facts, the Kgasoanes' affidavit contains lengthy quotations from certain judgments dealing with the right to housing. The affidavit also, and at some length, needlessly restates trite legal principles pertaining to rescission under Rule 31(2)(b), the common law and Rule 42(1).

[18] By contrast in proffering a reason for their default, Mr Kgasoane in one short paragraph states that –

“The Applicant's [sic] reasons for not opposing the application comprehensively at the first instance and the Applicant's [sic] reasons for not applying for relief at an earlier stage; were also because of financial constraints that resulted in the Applicant [sic] unable to properly instruct legal representation timeously and/or further at the given period. Hence the Applicant as an individual consumer that he is, only recently after securing the necessary legal resources (fees); has launched this application. This is in order for her [sic] place relevant and concrete facts before the Honourable Court.”

[19] Despite the use of the word “also” in the above extract from his founding

affidavit, Mr Kgasoane failed to furnish any other facts in regard to the alleged impediment of not being able to obtain legal assistance. Mr Kgasoane further proffered no facts to support the Kgasoanes' submission that they lacked funds to brief a lawyer timeously and that this alleged impecuniosity caused their default. Further Mr Kgasoane's affidavit contains no details of any efforts the Kgasoanes might have made to "timeously" obtain legal representation. Their affidavit moreover does not provide any explanation as to when and how the Kgasoanes' circumstances altered so as to allow them to have now obtained obtain legal representation. Finally, the affidavit is entirely silent as to why the Kgasoanes themselves could not have, despite the real disadvantage of lacking legal representation, taken any steps personally to oppose Nedbank's application.

[20] In her heads of argument, counsel for Nedbank, Ms Kabelo, correctly pointed out that the Kgasoanes had failed to provide an explanation for their default. Ms Kabelo submitted that on this basis alone the Kgasoanes' application fell to be dismissed. In response to these contentions and prior to my hearing the rescission application, the Kgasoanes then made an oral application to this Court from the bar for a postponement to introduce evidence/further evidence explaining their default. After hearing argument, I dismissed the Kgasoanes' postponement application. When the rescission application was thereafter heard, the Kgasoanes indicated that they were no longer persisting with an application for rescission but that they in effect sought a variation of the default order so as to provide for a reserve price of some R5,2 millionⁱⁱ in respect of the [...] property and some R1,7 million in respect of the [...] property.

[21] The Kgasoanes submissions were that this Court has the necessary jurisdictional facts before it *mero motu* to enquire into the issue of the reserve price and to decide whether the default order requires variation so as to include the reserve prices suggested by them. They contended that their affidavit contains sufficient evidence to sustain the submissions advanced by

them as to the appropriate amount of the reserve price being set for each property.

Rule 42

[22] As the application before me thus evolved into one for variation of the default order so as to provide for a reserve price, a brief review of the requirements for a variation of an order under Rule 42 is required. It is also necessary to consider whether Rule 42's strictures can be softened in circumstances where an application for variation pertains to the imperative requirements of Rule 46A.

[23] Rule 42(1) deals with both the rescission and variation of an order of court. It provides that:

"The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; ..."

[24] The Kgasoanes contended that the Court's failure to set a reserve price when granting the default order resulted in the order being erroneously sought or granted and also constituted an omission within the purview of Rule 42. These contentions however ignored the narrow ambit of the Rule and what in the context of the Rule, is meant by an "omission".

[25] The cases of *First National Bank of SA Ltd v Jurgens and Others* 1993 (1) SA 245 (W) and *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) illustrate how the courts have understood and applied the ambit interpreted the

purpose of Rule 42 and the nature of the error that may found an application under this Rule.

[26] In *Bakoven*, the Court succinctly explained that (at 471F):

“An order or judgment is ‘erroneously granted’ when the Court commits an ‘error’ in the sense of ‘a mistake in a matter of law (or fact) appearing on the proceedings of a Court of record’ (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was ‘erroneously granted’ is, like a Court of Appeal, confined to the record of proceedings.”

[27] In *First National Bank of SA Ltd v Jurgens*, Leveson J explained the meaning of the word “omission” in Rule 42 as follows (at 247D-E):

“I am unable to perceive how an omission can be categorised as something erroneously sought or erroneously granted. I consider that the Rule only has operation where the applicant has sought an order different from that to which it was entitled under the cause of action as pleaded.”

[28] In the present matter there is nothing in the record of the proceedings to even remotely suggest that Nedbank had sought or obtained an order to which it was not entitled under the “cause of action as pleaded”. The absence of any manifest error in the record of proceedings combined with the Kgasoanes’ failure to provide an adequate explanation for their default would, but for the considerations pertaining to immovable home properties, have led me to dismiss the application. However, there are countervailing considerations. A dismissal of the variation sought on the somewhat perfunctory basis that it does not fall within the strictures of Rule 42 may be inconsistent with the values and purports underpinning the provisions of Rule 46A.

Rule 46A

[29] Nedbank both in the main application and in its answering affidavit in the

present application, has informed the Court that it was (and is) not averse to a reasonable reserve price being set for the sale of the [...] property. Nedbank's concession that a reasonable reserve could be set for the [...] property did not however find its way into default order. There is also nothing in the record to indicate why in granting the default order the Court omitted to provide for a reserve price for the [...] property.

[30] Rule 46A mandates increased judicial oversight in the execution process where

that process may effect and even negate the relevant judgment debtor's right to housing. Accordingly, to assess whether notwithstanding the shortcomings of the Kgasoanes' application, the default order may still be varied to take into account Nedbank's acceptance that a reserve price could have been provided for, it is necessary to refer to the context in which Rule 46A was introduced into the Uniform Rules.

[31] The introduction of specific Rules of Court to enhance judicial oversight in the execution process gained momentum as a result of several appeal judgments commencing with *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) and *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 CC.

[32] In *Jaftha*, the unanimous Constitutional Court (per Mokgoro J) stated (para 28):

"Section 26(3) [of the Constitution] is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the State may not interfere with such access unless it would be justifiable to do so."

- [33] In *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC), the Constitutional Court, again unanimously (per Froneman J) summarised the effect of *Jaftha* and *Chief Lesapo v North West Agricultural Bank* thus (para 41):

“The combined effect of these two cases is that execution may only follow upon judgment in a court of law. And where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, further judicial oversight by a court of law of the execution process is a must.” (Footnote omitted.)

- [34] The constitutional imperative for further and improved judicial oversight in the execution process then led to the promulgation of Uniform Rule 46A which came into effect on 22 December 2018. The principle underlying Rule 46A is that, when adjudicating on an application for an execution order against a debtor’s primary residence, a court must consider whether the debtor can satisfy the debt in an alternative way so as to avoid a sale of the debtor’s home. In furtherance of this precept, Rule 46A specifically provides that an execution order will only be justified as against the debtor’s home if, a Court upon considering all relevant factors, has determined that such execution is “warranted”.

- [35] Rule 46A therefore contains detailed provisions regarding the form and content

of the notice of application, the content of the supporting affidavit, information to be evidenced by supporting documents, service of the notice of application and supporting affidavit on the debtor and other affected persons, and the manner in which the debtor should respond to the application. Most pertinently, the Rule provides for the Court’s exercise of, what has described as, a “novel power”ⁱⁱⁱ to set a reserve price.

[36] A reserve price is something peculiar to a sale by public auction. The “reserve”

or the “reserve price” is the minimum price that a seller is willing to accept for goods/assets to be sold at auction. Typically, the seller is the owner of the auctioned item or at least is acting at the owners’ behest. At an auction sale, the seller would ordinarily have the power to choose whether the auction of the relevant item is to be subject to a reserve price. In contrast the judgment debtor, having already largely lost control over the fate of his/her attached property, has no power to require the application of a reserve price. The absence of the owner’s input on whether a reserve price should to be stipulated for clearly led to inequity and abuse.

[37] In *Nxazonke and Another v Absa Bank Ltd and Others* [2012] ZAWCHC 184 (WCC), Davis J deal with a notorious instance where in an action sale in execution, the debtor’s home was sold for a pittance of its apparent value. In that case the debtor’s home had a municipally assessed value of R81,000.00, yet it was sold for the derisory sum of R10.00. There was thus a manifest need to provide a framework for the judicial oversight necessary to avoid potential abuses that could occur (and had occurred) where the price of a home sold by dint of an order of special executability is ultimately set by an unfettered auction sale process.

[38] Rule 46A therefore contains specific provisions that both enable and mandate the Court to consider whether a reserve price is to be set.

[39] Rule 46A(8) provides that:

“A court considering an application under this Rule may –

(a) of its own accord or on the application of any effected party order the inclusion in the conditions of sale of any condition of which may consider appropriate;

(e) set a reserve price”.

[40] Rule 46A(9)(a) provides that:

“In an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set.” (My emphasis.)

[41] Whilst the above sub-rules enable and oblige the Court to enquire into the appropriateness of a reserve price, they do not of themselves prescribe that upon enquiry and consideration a reserve price ought to be set. The question of when a reserve price ought to be set was thus one of the issues considered by a Full Bench of this Division in *Absa Bank Limited v Mokebe and Related Cases* 2018 (6) SA 492 (GJ).

[42] In *Mokebe*, under section 14(1)(a) of the Superior Courts Act 10 of 2013, the Full Bench was directed to make a ruling on the procedures that financial institutions must adhere to when foreclosing on a mortgaged property that is the debtor’s primary residence. The issuing of the directive has been described as a salutary attempt to bring sanity to a procedural muddle.^{iv}

[43] One of the questions put to the Full Bench was, under what circumstances should a Court set a reserve price and how is this to be determined in terms of Uniform Rule 46A? The Full Bench’s definitive answer to this question was the following (para 66):

“We are aware that Rule 46A(8) provides that a court ‘may’ set a reserve price. In order to comply with the constitutional requirement of just and equitability, it would be an exception rather than a rule where a reserve price is not set by a court. In our view question 7 [of the Judge President’s directive in terms of section 14(1)(a) of the Superior Courts Act] should be answered as follows:

‘Save in exceptional circumstances a reserve price should be set by a court, in all matters where execution is granted against immovable property which is the primary residence of the debtor, where the facts disclosed justify such an order.’”

[44] In the course of answering the directive the Full Bench further stated that:

“[57] The courts’ power and duty to impose a reserve price is founded, inter alia, in s 26(3) of the Constitution ...

[59] ... It is therefore necessary for a court to determine whether a reserve price should be set based on all the factors placed before it by both the creditor and the debtor when granting an order declaring the property especially executable. If a debtor fails to place facts before the court despite the opportunity to do so, the court is bound to determine the matter without the benefit of debtor’s input.”

- [45] I note that in another Division there has been some reservations expressed about some aspects of the Full Bench’s judgment in *Mokebe*.^v Those reservations do not have any application to the issue of when a reserve price must be set. I am thus bound by the consideration that where the facts disclosed to the Court justify that a reserve price be set, the Full Bench has given its definitive imprimatur to the setting of a reserve price in all but exceptional cases.^{vi}
- [46] I am accordingly required to consider whether the facts disclosed in the main application justified the inclusion of a reserve price and, if so, whether there are any exceptional circumstances justifying a departure from the default position of including a reserve price.
- [47] The record in the main application and in particular the facts disclosed in Nedbank’s founding affidavit, plainly justified the setting of a reserve price in respect of the [...] property. In respect of this property Nedbank in the main application had quite properly disclosed that to its knowledge it is the Kgasoanes’ primary residence. Nedbank advised that it was not averse to a reserve price being set for this property. Nedbank also alleged several facts to support its submission that if a reserve were to be set, the appropriate minimum sale price to be achieved should be set at R2,8 million being half of its estimated market value and taking into account matters such as unpaid rates, transfer fees and sheriffs’ fees.

[48] Ultimately the main application was not opposed and the default order did not provide for a reserve price. As the order herein was granted by default, there is no judgment setting out the court's reasons. It is therefore not possible to discern from the record why the Court, in granting the default order, chose not to provide for a reserve price. Nevertheless, there clearly were **no** exceptional circumstances which required the Court to depart from the default position of providing for a reserve price for the [...] property.

[49] I am mindful that Rule 42 would not ordinarily permit a variation of a default order in circumstances where an applicant for rescission has failed to demonstrate an omission of the nature described in *Jurgens* and where the alleged error does not appear from the record of the proceedings. However, in the context of considering the variation of a default order of special executability granted against the debtors' home and the meaning of the word "omission" as used in Rule 42, I must interpret the wording and apply the Rule in a manner that advances the constitutional imperative to develop the common law so as to promote the rights vouchsafed by the Bill of Rights.

[50] In this context it seems to me that in a variation application, once it becomes manifest that the relevant order ought to have provided for the inclusion of a reserve price but did not do so, that there exists a judicial omission that can be remedied by variation.

[51] Apart from the imperative to develop the common law under the aegis of section

39(2) of the Constitution, a narrower construction of Rule 42 and the term "omission" in the present matter would, in any event be, dissonant with the Full Bench's *Mokebe* decision as to when a reserve price must be set.

[52] Rule 46A provides that when considering an application under the Rule the Court "*may of its own accord order the inclusion in the conditions sale, of any condition which it deems appropriate*". The present application has not strictly speaking been brought under Rule 46A. Yet, it is so closely intertwined with the requirements of Rule 46A that it would amount to a hidebound approach

for me to have declined to consider whether the default order ought to have included a reserve price.

- [53] I am accordingly of the view, notwithstanding that the present application is brought under Rule 42, that I am required to address the issue of whether the default order ought to have included a reserve price and, if so, whether and in what manner the default order falls to be varied.

The [...] property

- [54] The record in the main application does not indicate the existence of any exceptional circumstances allowing for the omission of the reserve price. To the contrary, in its founding affidavit Nedbank, having identified the [...] property as the Kgasoanes' primary residence, stated that it was not averse to the inclusion of a reserve price being set for this property. As such, in terms of Rule 46A and in accordance with the judgment in *Mokebe*, in granting the default order the Court herein ought to have provided for the inclusion of a reserve price.
- [55] As to the amount of the reserve price in respect of the [...] property, I consider it appropriate that Nedbank's submissions as set out in the founding affidavit should prevail. These after all were the only submissions that the Court granting the default order could have taken into account when hearing the main application.
- [56] Whilst the Kgasoanes urged for a higher price to be set for the [...] property and their affidavit contains some averments in support of this submission, these submissions were not before the Court when the main application was heard.
- [57] It is necessary therefore to have regard to the record that was before the Court when the main application was heard. I emphasise that Nedbank's submissions on the quantum of the reserve price at that time went unchallenged. Nedbank's submissions also dealt properly with the factors

stipulated in Rule 46A(9)(b). Nedbank repeated these submissions in its answering affidavit in the present application. The Kgasoanes did not then reply to Nedbank's answering affidavit. Nedbank's allegations in support of their submissions on the amount of the reserve price thus once again effectively stand uncontested.

- [58] To the extent necessary, I nevertheless further enumerate the reasons why Nedbank's submissions are preferred over those of the Kgasoanes. Firstly, at the time when the main application was heard the record did not include the Kgasoanes' submission on the reserve price. Secondly, in the present application they failed to reply to Nedbank's answering affidavit and thus failed properly to challenge Nedbank's averments on what a reasonable reserve should be. Thirdly, the Kgasoanes, in support of their submission of what would constitute a reasonable reserve price, annexed a valuation they obtained from professional valuator trading under the name and style of Infoprops. Infoprops valued the [...] property at a market value of R6,000,000.00 and at a forced sale value of R4,400,000.00. This valuation is dated 1 October 2019 and is therefore, particularly in view of the hobbling impact of the Covid-19 pandemic on all aspects of the economy, including the housing market, clearly outdated. Fourthly, the Kgasoanes did not challenge Nedbank's allegations to the effect that at the time when the main application was heard the municipal arrears on the [...] property were more than R192,000.00. Nor did they contest Nedbank's assertion that these arrears have likely increased every month and that the unpaid arrears would significantly reduce the price a buyer (who would on assuming ownership bear responsibility for these charges) might be willing to pay for the [...] property.

The [...] property

- [59] Mr Kgasoane alleged that this property is now primarily used for residential purposes by "the Applicant". The use of the word "now" appears to be aimed at Nedbank's allegations (in the main application) that the Kgasoanes had purchased this property for investment purposes and as such it is not their

home. The potential elasticity of the time period encompassed by the Kgasoanes' use of the word "now" does not assist them. Their application, despite it involving Rule 46A considerations, is nonetheless still an application for variation. There is thus no proper basis for the Kgasoanes to have sought to vary the default order on the basis that the [...] property is now occupied by "the Applicant".

[60] In respect of the [...] property the Court hearing the main application could not conceivably have considered the applicable provisions of Rule 46A. At that time the record clearly indicated that the [...] property, not the [...] property, was the Kgasoanes' residential property.

[61] In summary, I consider that a reserve price of R2,8 million is appropriate for the [...] property and no case has been made out for the variation of the default order so as to set a reserve price for the [...] property.

COSTS

[62] That leaves the question of costs. Whilst the Kgasoanes have succeed, albeit to a limited extent, in obtaining a variation of the default order, their conduct in these proceedings leaves much to be desired. As noted above, they were clearly in default of their obligation to place facts before the Court in support of their reserve price submissions. They failed to provide a proper or adequate explanation for their default, this despite their initially having applied for a rescission of default order in its entirety. Their founding affidavit, was long in argumentative matter but largely bereft of relevant fact. It was only after receipt of Nedbank's heads of argument and immediately prior to the hearing of their rescission application that the Kgasoanes then unsuccessfully sought to take steps remedy the manifestly inadequate nature of their founding affidavit by applying for a postponement to introduce a further affidavit. Thereafter they filed supplementary heads of argument in which they confined their application to one of variation for the inclusion of a reserve price. These supplementary heads of argument whilst being of assistance to the Court

contained intemperate and speculative submissions that Nedbank intentionally failed to disclose relevant facts in the main application and procured the default order through improper means.

[63] Nedbank's opposition to the rescission application, particularly given that the main relief sought was the rescission of the default order in its entirety, can hardly be considered unreasonable. Moreover, had the Kgasoanes accepted Nedbank's submissions regarding the appropriate reserve price for the [...] property, it is likely that the matter would not have been opposed and the parties would have instead submitted an agreed variation order for this Court's consideration.

[64] In the circumstances I consider it fair that the Kgasoanes pay the costs occasioned by this application.

ORDER

[65] I accordingly make the following order:

1. Paragraph 2 of the default order of this Court under case number 13040/2019 dated 8 August 2019 is varied to include the following paragraphs 2A:

"2A(a) The sale in execution of the property described as Erf 2505 [...] Extension 5 Township, Registration Division I.R., the Province of Gauteng is subject to a reserve price of R2.8 million (Two Million Eight Hundred Thousand Rand).

2A(b) If the reserve price of R2.8 million (Two Million Eight Hundred Thousand Rand) million is not achieved at the sale in execution:

2A(b)(i) The sheriff must submit a report to this Court, within 5 days of the date of the auction, which report shall contain the matters mentioned in Rule 46(A); and

2A(b)(ii) This Court must, on a reconsideration of the factors in Rule 46A(9)(b) and in the exercise of its powers under this Rule, order how execution is to proceed.”

2. Mr John Karabo Kgasoane and Mrs Lerato Gift Kgasoane (the First and Second Respondents in the main application under case number 13040/2019 and the First and Second Applicants in the application for rescission, alternatively variation of the above default order) are ordered to pay, jointly and severally the one paying the other to be absolved, Nedbank’s costs of the application for rescission, alternatively variation.

G B ROME
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Date of hearing: 26 January 2021

Date of judgment: 23 March 2021

APPEARANCES

Counsel for the Applicants for rescission: EC Chabalala

Instructed by: CSM ATTORNEYS

Counsel for the First Respondent: S Kabelo

Instructed by: KWA Attorneys

ⁱ Strictly speaking until the default order herein had been granted Nedbank was a creditor not a judgment creditor. It is now at least in this Division clear law that where an order of special executability over a home is sought the creditor must apply for both monetary judgment and the order of executability at the same time. In this context it may be appropriate to refer to the debtor in such an application as “*the judgment debtor*”.

ⁱⁱ In the Kgasoanes’ supplementary heads of argument the amount of the suggested reserve price as contained in their notice of motion (R6 million) was then reduced in submissions to an amount of some R5,2 million. In view of the findings contained in this judgment, it is not necessary to deal with the difference between the amount of the reserve price initially contended by for the Kgasoanes and their lesser amount of some R5,2 million

ⁱⁱⁱ Rule 46A(8)(e); Brits “Executing a debt against Residential Property: The Potential Application Of Rule 46A of the Uniform Rules of Court Beyond A Literal Reading Of ‘Property Of A Judgment Debtor’” (2020) *Journal for Juridical Science* 45(2) 74 at 76. Both this article and the article at endnote 4 provide summaries of the provisions of Rule 46A and of the context in which the Rule was introduced and which summaries I found of great assistance in preparing this judgment.

^{iv} Kawadza “Taming the mechanics of mortgage foreclosures: The case of *ABSA Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ)” 2019 *De Jure Law Journal* 102-109.

^v See in this regard the judgment of Rogers J in *Changing Tides 17 (Pty) Ltd No V Frasenburg* [2020] 4 All SA 87 (WCC), where the learned Judge declined to follow that part of the *Mokebe* decision which requires that an application for a monetary judgment and an order of execution against immovable property must always be brought simultaneously.

^{vi} I am of course bound by the *Mokebe* decision as it is judgment of the Full Bench of this Division. See in this regard the discussion on the application of the doctrine of *stare decisis* cross different provincial Divisions sitting in varying numbers in Hahlo and Kahn *The South African Legal System and its Background* (1968) at 250-256.