

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No. 1540/2020

In the matter between:-

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

(Registration Number: 1[...])

and

VERGIL BENEDICT LE JOHN

First Respondent

GAYROONEESA LE JOHN

Second Respondent

JUDGMENT

BANDS AJ:

[1] The right to have adequate access to housing, enshrined in section 26 of the Constitution of South Africa, is amongst the justiciable socio-economic rights included in the Bill of Rights. The purpose of Uniform Rule 46A, which was inserted into the Uniform Rules of Court, and which came into operation on 22 December 2017,¹ is to provide for a uniform procedural approach by our courts regarding the nature of the enquiry and the factors to be considered when exercising judicial oversight over orders of execution against residential immovable property.²

¹ GNR 1272, dated 17 November 2017. Published in GG No. 41257 of 17 November 2017.

² *Petrus Johannes Bestbier and Others v Nedbank Limited* (150/2021) [2022] ZASCA 88 (13 June 2022).

[2] This application concerns the reconsideration of a reserve price, fixed in an order of this court, granted by default, on 27 October 2020, pursuant to an application seeking, *inter alia*, leave to execute against the respondents' property. In terms of the order, judgment was granted against the first and second respondents, as defendants, jointly and severally, in the sum of R604,814.16, together with interest thereon at 10.75% per annum from 5 March 2020. The mortgaged property, which forms the subject matter of these proceedings, was declared specially executable to satisfy the judgment debt. The court, exercising its discretion in accordance with Uniform Rule 46A(9)(b) set a reserve price in the amount of R671,521.03.

[3] A writ of attachment in respect of the mortgaged property was issued on 10 December 2020, whereafter the sale in execution took place on 8 April 2022. The reasons for the delay are not apparent from the papers before court save that the Applicant had made various attempts to enter into an EasySell agreement with the respondents. Whilst the first respondent was amenable thereto, the second respondent, who now resides in the United Kingdom, was not.

[4] In view of the second respondent's unwillingness to co-sign the EasySell agreement, the sale in execution proceeded. According to the sheriff's report, filed in accordance with Rule 46A(9)(d), four bidders attended the sale in execution at the sheriff's office in Gqeberha. Bids were called for at the reserve price of R671,521.03, however no bids were received. The mortgaged property was thereafter put up for auction without a reserve price, subject to an Order of this court that the property may be sold to the highest bidder. The highest bid received was in the amount of R522,000.00.

[5] In terms of clause 2.1 of the conditions of sale:

"If the sale is subject to a reserve price then should the highest bid be less than the reserve price, the highest bid will be provisionally accepted subject to the purchaser complying with clauses 3.1, 4.1 and 4.8; and confirmation by the court. Should the

sale not be confirmed by the court all amounts paid by the highest bidder will be refunded.”

[6] Clause 3.1 provides that:

“The Purchaser shall, as soon as possible after the sale and immediately on being requested by the Sheriff, sign these conditions.”

[7] In terms of clause 4.1:

“The Purchaser shall on completion of the sale, pay a deposit of 10% (TEN PERCENT) of the purchase price immediately on demand by the Sheriff and on the same day of the sale.

[8] Clause 4.8 provides for the payment of the Sheriff’s commission in due course.

[9] The conditions of sale were duly signed by the purchaser on 8 April 2022 in accordance with clause 3.1. It is unclear whether there has been compliance with clause 4.1 and whether the Sheriff has called for the payment of commission as provided for in clause 4.8.

[10] The provisions of the Rules relevant to proceedings of this nature are as follows. In terms of Rule 46A(9)(b):

“In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court shall take into account-

- (i) the market value of the immovable property;*
- (ii) the amounts owing as rates or levies;*
- (iii) the amounts owing on registered mortgage bonds;*

(iv) *any equity which may be realised between the reserve price and the market value of the property;*

(v) *reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);*

(vi) *whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;*

(vii) *the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;*

(viii) *any prejudice which any party may suffer if the reserve price is not achieved; and*

(ix) *any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor."*

[11] In circumstances where a reserve price is not achieved at a sale in execution, Rule 46A(9)(c) provides that:

"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."

[12] Rule 46A(9)(d), which makes provision for the submission of a report to the court, prescribes as follows:

"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).”

[13] In terms of Rule 46A(9)(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] The apparent shortcomings in the above quoted Rules and their failure to provide for a procedural framework in terms of which the mandatory reconsideration in accordance with Rule 46A(9)(c) is to happen, was dealt with by Binns-Ward J in *Standard Bank of South Africa Ltd v Tchibamba and Another*³ with reference to the comments of van Loggerenburg, *Erasmus, Superior Court Practice Vol 2* (Juta)⁴ and *Changing Tides 17 (Proprietary) Limited N.O. v Kubheka; Changing Tides (Proprietary) Limited N.O. v Mowasa; Changing Tides (Proprietary) Limited N.O. v Horsley*.⁵ I am in agreement therewith. For present purposes, it is perhaps apposite to give a recount of the proper approach to applications of this nature as articulated by Binns-Ward J at paragraph [43] of *Tchibamba (supra)*.

“... In my opinion, the prescribed reconsideration must take place in open court, rather than only ‘ideally’ so. For the reasons I have sought to articulate, it is an extension of the proceedings commenced in terms of rule 46A(3). Such proceedings are ordinary motion proceedings, and thus subject to the general requirements of s 32 of the Superior Courts Act 10 of 2013. I cannot in any event imagine how a court could properly undertake a consideration of

³ 2022 (6) SA 571 (WCC).

⁴ RS 18,2022, D1-632W.

⁵ 2022 (5) SA 168 (GJ).

the factors set out in rule 46A(9)(b) other than in open court with regard to the submissions thereanent by the interested parties.”

[15] In terms of section 32 of the Superior Court’s Act:

“Save as is otherwise provided for in this Act or any other law, or proceedings in any Superior Court must, except insofar as any such court may in special cases otherwise direct, be carried on in open court.”

[16] I return to the facts of the present matter.

[17] The report prescribed by Rule 46A(9)(d) was duly compiled and lodged with the registrar. Respective copies were provided to the respondents and the purchaser. The Sherriff, in accordance with Rule 46A(9)(d)(iv) stated as follows:

“It is very rare to sell the immovable property on our auction for more than the amount that we received. I believe that the price was pushed up by the Reserve price that was on the conditions of sale.

The sheriff of the above Honourable Court accordingly requests, in terms of Rule 46A(9)(c) read with Rule 46A(9)(e) that a Judge in Chambers reconsider the factors presented to the Court in the Buyer’s Application in terms of Rule 46a (sic) and the above Honourable Court’s Order and that the above Honourable Court may confirm whether the sale of the immovable property in the above matter sold on the 08th April 2022 for a purchase price of R522 000.00 may be confirmed in terms of Rule 46a(9)(e) (sic).”

[18] I have dealt with the appropriate mode of hearing of applications of this nature. The present proceedings were properly dealt with in open court.

[19] Of significance is that whilst the mortgaged property constitutes residential immovable property of the respondents, it is not their primary residence. From a perusal of the papers, which served before the court on 27 October 2020, this fact appears to have been unknown to the applicant at the relevant time, same having only come to the fore in the present proceedings.

[20] As previously stated, the second respondent resides in the United Kingdom. The second respondent does not oppose these proceedings. According to the first respondent, he vacated the mortgaged property in 2019 when his father suffered a severe stroke, rendering him wheelchair bound. The first respondent and his son, who is currently a grade 7 learner, moved in with the first respondent's parents to assist in caring for his father. The first respondent is gainfully employed. The mortgaged property was retained by the respondents purely for investment purposes and is currently tenanted.⁶ Prior to April 2022, the mortgaged property yielded a monthly rental of approximately R9,000.00 per month. That the tenants have not honoured their rental agreement since the sale in execution, during April 2022, is of no consequence.

[21] It was argued on behalf of the first respondent that I ought to read into the first respondent's papers that the mortgaged property is for all intents and purposes his primary residence, and that the only reason why he vacated the property was due to his inability to cover the monthly instalments due to the applicant. Not only is this contention not born out from the facts before court, but it is contrary to the position expressly adopted by the first respondent in his answering affidavit.

[22] The mortgaged property, according to a sworn valuation obtained by the applicant, dated 31 August 2022, has a market value of approximately R850,000.00 and a forced sale value of approximately R700,000.00. The sworn valuer was denied access into the mortgaged property by the tenants for the purposes of inspection. Accordingly, only an external inspection was conducted. It was noted that the timber structure to the rear of the main building has disintegrated, lowering the estimated market value from R870,000.00 to R850,000.00. Without dealing with the evidential value of the market valuation placed before the court by the first respondent, such valuation is in the amount of R823,400.00 and is accordingly, in any event, not too dissimilar to that obtained by the applicant. The mortgaged property, as of 14 February 2022, is valued at R780,000.00 on the municipal

⁶ Albeit that there were periods during which the mortgaged property was not tenanted.

valuation roll. The first respondent is silent on what he contends to be a fair forced sale value in respect of the mortgaged property.

[23] The purpose of a sale in execution is to satisfy the judgment debt. It does not safeguard a judgment debtor's interest in obtaining a market-related price, which interest is guarded to a greater extent when following alternative avenues, such as entering into the EasySell program, which the respondents failed to do. The comments of Binns-Ward J at paragraph [48] of *Tchibamba (supra)*, in respect of forced sale values, bears repetition:

*"The forced sale value of a property is very much a matter of opinion. What a property will fetch in a forced sale is determined by what happens when the property is auctioned. In the current matter, it is clear that there was bidding interest and that, even in a competitive context, the highest bid obtained nine months ago was well below what the pundits' estimates suggested would likely be forthcoming. The purpose of the sale in execution is to achieve the satisfaction of the judgment. The procedure does not safeguard the judgment debtor's interest in obtaining a market-related price; on the contrary, involving a forced sale, it inherently does quite the opposite. The purpose of rule 46A, on the other hand, is to ensure that execution against a judgment debtor's primary residence does not occur in a manner inconsistent with s 26 of the Constitution, which is an entirely different matter. To the extent that para 10 of the judgment in *Changing Tides* might be read to conflate the two considerations, I must respectfully differ. Clearly, however, the disposal of anyone's home on an exploitative or starkly unfair basis would unjustifiably impinge on that person's right to access to housing, and it is that connection that the fixing of a reserve price in terms of rule 46A comes into play."*

[24] Pursuant to a competitive bidding process, the highest bid received was in the amount of R522,000.00. The Sheriff, having acknowledged this fact, is of the view that the amount received was pushed up by the reserve price on the property; and further commented that it would be rare to sell the property on auction for more than the amount reached. In the event that the current reserve price of R671,521.03 were not too dissimilar to the forced sale value, one could reasonably have expected the property to sell for that price. The fact that the highest bid is some R150,000.00

lower than the reserve price, is indicative of the fact that the forced sale value of R700,000.00, as contended for by the applicant's valuer, is incorrect.

[25] The amounts owing to the local authority for rates and other duties in respect of the mortgaged property is in the amount of R44,344.07 as of 22 September 2022. This amount has increased in excess of R35,000.00 from R8,478.91 since 14 August 2020.

[26] On consideration of the aforesaid factors, I am satisfied that it would be proper that the mortgaged property be sold to the person who made the highest bid. The effect of the Order which I intend making is to confirm the agreement of sale, which was subject to this court's approval by virtue of clause 2.1 of the conditions of sale. I am satisfied that the costs should follow the result insofar as the first respondent is concerned.

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

1. The property described as:

ERF 1[...] M[...] ROAD IN THE NELSON MANDELA BAY METROPOLITAN MUNICIPALITY, DIVISION OF PORT ELIZABETH, PROVINCE OF THE EASTERN CAPE, IN EXTENT 4[...] (F[...] H[...] AND N[...] E[...]) SQUARE METERS, HELD BY DEED OF TRANSFER NUMBER T6[...] SUBJECT TO THE CONDITIONS CONTAINED THEREIN, be sold to the person who made the highest bid at the auction held at the offices of the Sheriff for Gqeberha West, situated at 6[...] P[...] Street, North End, Gqeberha on 8 April 2022 at 10h00.

2. The first respondent is ordered to pay the applicant's costs.

I BANDS
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Ms Desi

Instructed by:

Joubert Galpin Searle

173 Cape Road, Mill Park, Gqeberha

For the first and second respondents: Mr Moorhouse

Instructed by:

Melissa Marais Hoffman Attorneys

c/o Market & Graham Streets, Africa House, North End, Gqeberha

Coram:

Bands AJ

Date heard:

1 December 2022

Delivered:

28 February 2023