

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 61746/2013

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 10 February 2023

In the matter between:

FIRST RAND BANK LIMITED

APPLICANT

And

KHANYE: ANDRIAS MAVUKAKASENI

FIRST RESPONDENT

KHANYE: MABOSEHELE PRISCILLA

SECOND RESPONDENT

KHANYE FAMILY TRUST

THIRD RESPONDENT

KHANYE: ANDRIAS MAVUKAKASENI N.O.

FOURTH RESPONDENT

KHANYE: MABOSEHELE PRISCILLA N.O.

FIFTH RESPONDENT

JUDGMENT

ALLY AJ

[1] This is an application for the reconsideration of a reserve price in terms of Rule 46 (9) (c) and (d) relating to a property described as Erf 6[...] E[...] Township held by deed of transfer T[...] hereinafter referred to as 'the property'.

[2] A reconsideration application, in normal circumstances, should not be a complicated matter. What complicates such matters is where a Respondent, such as in this case, files papers in 'opposition'.

[3] In this matter, it is common cause that the Applicant obtained an Order¹ on 17 November 2017 wherein default judgement was granted against all the Respondents and the said Respondents were ordered to pay the amount of R1 863 444-32 [one million eight hundred and sixty-three thousand four hundred and fourty-four rand and thirty-two cents] jointly and severally, the one paying the other to be absolved.

[4] The Court also ordered 'the property' to be specially executable. In accordance with the said Court Order, 'the property' was sold in execution for a price of R418 000-00 [four hundred and eighteen thousand rand].

[5] Subsequent to the said sale, the purchaser did not comply with the sale conditions and the sale was set aside in accordance with a Court Order. The Court further ordered that 'the property' be sold at a reserve price of R663 000-00.

[6] It is further common cause that the First and Second Respondents were residing in 'the property', it being their primary residence.

[7] It is also common cause that a second sale of 'the property' was arranged for 23 March 2020 but was cancelled for the reason that an offer to purchase was received for 'the property'. The offer to purchase came to naught, alleged by the Applicant, for the reason that the Respondents failed to sign the necessary documentation to complete the sale.

¹ Caselines: 001-14

[8] As a result, the Applicant proceeded with the sale as ordered by the Court which was scheduled for 11 October 2021. Unfortunately, the sale in execution was cancelled for the reason that there was no bid in the amount of R663 000-00 [six hundred and sixty-three thousand rand].

[9] The Applicant submits that the only reason that can be ascribed to the cancellation of the sale in execution, is that the reserve price and the amount owing to the Ekurhuleni Municipality was too high. As a result, the Applicant has launched this application.

[10] Now Rule 46A (9) (c) – (e) provides the following:

“(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 five 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.

[11] It is clear from the papers that the Applicant has followed the process as set out above and has claimed the relief set out in the Notice of Motion claiming that 'the property' be sold without a reserve price or alternatively, for an amount of R294 019-89 [two hundred and ninety-four thousand nineteen rand and eighty-nine cents].

[12] The Respondents entered appearance to oppose and the First Respondent filed opposing papers. The First Respondent disputes the allegations made by the Applicant and basically states that his attorney was in negotiations with the Applicant and the Applicant refused to accept an offer of R500 000-00 for 'the property' which amount would be paid over a period of three months and insisted on an amount of R1 300 000-00 [one million three hundred thousand rand]².

[13] The gist of the opposition by the First Respondent is that the amount of R294 019-89 [two hundred and ninety-four thousand nineteen rand and eighty-nine cents] is too low and this is his primary residence.

[14] The Applicant in a replying affidavit puts the above allegations of the First Respondent in context and it would appear that throughout the negotiations regarding the sale of the house, the First and Second Respondent reneged on agreements to sign documents which would have allowed 'the property' to be sold for R1 000 000-00 [one million rand].

[15] It should be noted that the procedures of Rule 49 (9) (c) – (e) outlined above, do not make provision for opposition to an application for the reconsideration of a reserve price. Binns-Ward J³ stated as much and with which I agree. However, this does not resolve having a Respondent before Court who then places certain information before the Court. Do you as a Court then say to such Respondent you cannot be heard? In our Constitutional dispensation, I submit not. All information may be taken into account in coming to a decision as to whether a reserve price

² Caselines: 006-12; Annexure "C"

³ Standard Bank of South Africa Ltd v Tchibamba & Ano 2022 WCHC @ para 29.

should be set, as enjoined by the Rule, and, in my view, the same pertains when dealing with a reconsideration of a reserve price.

[16] Returning to the present case, I requested Counsel for the Applicant to provide me with supplementary Heads of Argument to deal with the Constitutional Court's judgements relating to the issue of a purchaser not having to be liable for the seller's municipal bill before transfer of the property can take place and therefore the amount of the reserve price would have to be reduced by such amount owing. The Court is appreciative of the effort by Counsel for the Applicant to file such supplementary heads.

[17] The crux of the submission, is that the amounts owed to the Municipality do form part of the calculations involved in determining the reserve price. In fact a Court is enjoined by Rule 46A (9) (b) to take into account the rates owed to the Municipality.

[18] The Court is tempted to consider the submissions made by the First Respondent to the effect that a higher reserve price should be set. However, when one takes into account all the facts relating to this case, such as the availability of the offer that was made to purchase 'the property' for R1 000 000-00 [one million rand] and Respondents' conduct relating thereto, such a course of action, firstly goes against the principles of determining a reserve price and secondly, the Respondents still owe the Applicant the amounts determined by the Court to be owed, in the default judgement. The Respondents, in any event, still have the opportunity, if so advised, to make a bid at the sale in execution.

[19] Accordingly, whilst this Court is of the view that the Applicant has not made out a case to have the sale in execution without a reserve price, the Applicant has made out a case for a sale in execution at a reserve price in the amount as proposed in the Draft Order, namely, R294 019-89 [two hundred and ninety-four thousand nineteen rand and eighty-nine cents].

[20] In respect of the costs of this application, I do not see why an order as proposed in the Draft Order should not be granted.

[21] As a result, the following Order shall issue:

a). An Order in terms of the Draft marked "X" is made an Order of Court.

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 February 2023.

Delivery of virtual hearing: 24 October 2022

Date of judgment: 10 February 2023

Appearances:

Attorneys for the Applicant:	A D HERTZBERG ATTORNEYS natashar@adhertzberg.co.za
Counsel for the Applicant:	Adv. L. Louw
Attorney for the Respondents:	First Respondent In person