

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2488/2019

In the matter between:

NEDBANK LIMITED

Applicant

and

TLADI JACOB BOHLOKO

1st Respondent

**THE SHERIFF OF THE HIGH COURT,
BLOEMFONTEIN**

2nd Respondent

JUDGMENT BY:

MHLAMBI J,

HEARD ON:

08 AUGUST 2019

DELIVERED ON:

12 SEPTEMBER 2019

MHLAMBI, J

[1] The applicant seeks an order in the following terms:

1. That the sale in execution of the immovable property described as Erf [...] Heidedal (extension 20), district Bloemfontein, Free State Province in extant 341 square metres, held by deed of transfer No. 13466/2015, also known as 9613 Grassland, Heidedal, Bloemfontein be set aside;
2. That the second respondent be permitted to hold a new auction for the property described in paragraph 1 in accordance with normal rules, procedures, conditions and legislations pertaining to auctions after 10 day from the date of the service of this order;
3. That the respondents pay the costs of this application, jointly and severally only if opposed.

[2] On or about 29 September 2015, the applicant and a certain Mr Gift Teboho Tsatsane concluded a written loan agreement in terms of which the said Mr Tsatsane acknowledged himself to be truly and lawfully indebted to the applicant in the sum of R 617 000.00 being the capital, together with interest thereon, and a further sum of R 154 425.00.

[3] As security for the payment of the amount owing, the applicant hypothecated as a first mortgage: "(Erf [...] Heidedal, (extension 20),

district Bloemfontein, Province Free State, in extant 341 square meters, held by deed of transfer number T9513466/2015". Default judgment was granted against the debtor, the said Mr Tsatsane, in favour of the applicant on 13 April 2018. Subsequent to the default judgment having been granted, the applicant launched an application to declare the immovable property specially executable. In the founding affidavit in support of such application, the court was requested to set a reserve price of R 340 000.00; in the alternative to setting a reserve price, the court was requested to order the sale of the immovable property without a reserve price. The court elected not to set a reserve price having considered the merits of the application.

- [4] On 17 April 2019, the morning of the sale in execution, the applicant's attorneys of record sent an email to the second respondent, requesting that a reserve price in an amount of R 430 000.00 on the property be set. Despite the email, the property was sold to the first respondent for the amount of R 234 000.00.
- [5] The applicant is of the view that its attorneys of record were under the *bona fide* impression that the email, stipulating the reserve price to the second respondent, was accepted by it and that the auctioneer, in line with their aforesaid letter, would ensure a sale of the property at the requested reserve price. The following submissions and contentions were made on behalf of the applicant:

1. No reply was furnished by the second respondent that the reserve price was accepted. The second respondent had neither opposed the application nor placed the facts in issue;
2. A power of attorney was never required in past auctions;
3. Previous informal requests for the setting of a reserve price had been met and complied with in the past;
4. The attorney was under a *bona fide* impression that a reserve price would be set in line with the letter to the second respondent;
5. The second respondent's summary of sales and conditions, clause 2.2, provided for the cancellation of the sale if a *bona fide* error was committed by either the attorney or sheriff;
7. The applicant and Mr Tsatsane would be severely prejudiced should the auction not be set aside.

[6] The application was opposed by the first respondent on various grounds of which the following deserve mention for purposes of this judgment:

1. The applicant failed to comply with Uniform Rule of court 31 and 42 and that once the High Court had pronounced its final judgment in regard to the application for declaring immovable property executable, it became *functus officio*;
2. The applicant should have filed for leave to appeal against the order if so dissatisfied;
3. As the court had exercised its discretion not to set a reserve price, the applicant should have either applied in terms of Rule 49 read with Rule 31(4) for the rescission of the order, alternatively, a variation of the court order so as to include in such an order, a reserve price;

4. The applicant should have applied to court for the modification of the conditions of sale;
5. Consequently, an email sent the morning before the auction was held, was insufficient to set a reserve price as the court had not done so.

[8] In argument, the applicant's counsel conceded that the respondent had an arguable case. The relief sought was based on an alleged bona *fide* error that occurred prior to the auction sale, in order to avoid an "injustice"¹ for the property to be sold at a fraction of its market price. The thrust of the applicants' case is set out in paragraphs 17 to 23 of the founding affidavit, which read as follows:

- "17. I further refer to page 10, paragraph 16.5 of the aforesaid application which reads: "The applicant has determined a reserve price of R 340 000.00 based on the percentage of the estimated market value of immovable property, balance outstanding and arrear rate per annexure "F"; annexed to the said application."*
- 18. A copy of the application pertaining to the aforementioned paragraphs thereof (sic) are attached here too and marked as annexures "**D1 to D11**". The court however, in its discretion elected not to reserve a reserve price after considering the facts and merits of the aforementioned application.*
- 19. As alluded to above the sale in execution of the property, previously declared specially executable, was conducted and concluded on 17 April 2019. The nub of the applicant's contentions for the relief*

¹ Para 4.1: Applicant's Heads of Argument

sought herein, are centralised around the events that transpired on that day.

20. *The Applicant's attorneys of record, Matsepe's Attorneys, On 17 April 2019, on the same morning of the aforementioned sale in execution, sent an email to the 2nd respondent to set a reserve price in the amount of R 430 000.00 on the property on request of the Applicant. A copy of the email is attached hereto and marked as annexure "E".*
21. *The sale in execution was initiated and conducted by the 2nd Respondent but held and facilitated at the premises of Sheriff West. I personally attended the sale of execution on 17 April 2019 on behalf of the Applicant to note and observe the proceedings, in order to report back to the applicant and obtain a copy of the conditions of sale. Upon arrival at the auction, I was informed by the 2nd Respondent, that in order for me to bid on the property, a power of attorney should be provided to me by the Applicant.*
22. *I was under the bona fide impression that owing to the email sent to the 2nd Respondent "setting" a reserve price that no instructions to bid were necessary and that the aforesaid letter sent via e-mail would be sufficient in the circumstances to ensure a sale of the property at the requested reserve price.*
23. *At this juncture, I pause to mention that our offices in the past have attended previous sales in execution held by the 2nd Respondent in terms of the same terms and conditions for these auctions, without having to provide a power of attorney as requested. Similarly in the past our office have in same way requested the setting of a reserve price which has always been met and complied with."*

[9] Uniform Rule of **court 46A (8) (e)** empowers the court to set a reserve price when considering an application seeking to

execute against the residential immovable property of a judgment debtor. In such an application or upon submissions made by the respondent, the court must consider whether a reserve price is to be set. In deciding whether to set a reserve price and the amount at which the reserve price is to be set, the court has to take certain factors into account². The execution creditor shall, not less than 35 days prior to the date of the sale, prepare the conditions of sale, corresponding substantially with form 21 of the first schedule, upon which the attached property is to be sold, and shall submit such conditions to the sheriff conducting the sale for the purposes of settling them.³ In addition to any other terms, the conditions of sale shall include any conditions ordered by the court.⁴

- [10] Counsel for the applicant referred me to **Absa Bank Ltd vs. Dennison Dixy Steven and 3 others**⁵, an unreported decision in the Gauteng Division, Pretoria, where a sale in execution was set aside on the basis that an administrative clerk in the employment on the banks' attorneys, failed to furnish Absa Bank with a statement of arrears and levies, thereby causing the bank not to make an informed decision in calculating its bidding price. This case is, in my view, distinguishable from the one at hand, in that it referred to a *bona fide* error in the calculation of a bidding price. *in casu*, the circumstances which obtained on the day of the auction, are irrelevant as the auction proceeded in accordance with a court order.

² Rule 46A(9)(a) and (b) of the Uniform Rules of Court

³ Rule 46(8)(a)(i) of the Uniform Rules of Court

⁴ Rule 46(a) of the Uniform Rules of Court

⁵ 2152/2001

[11] I was also referred to paragraph 59 of **Absa Bank Ltd vs. Mokebe**⁶ and three related matters. However, reference to this decision and the particular paragraph do not assist the applicant's case in that the said case referred to the imposition of more rigorous investigative functions on a court faced with an application for the declaration of executability.

[12] In **Absa bank v Mokebe**⁷, it was stated⁸ that *"it is therefore necessary for a court to determine whether a reserve price should be set based on all the factor placed before it by both the creditor and the debtor when granting an order declaring the property to be 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 the debtors input. We cannot stress enough that this matter concerns and applies only to those property which are primary home of debtors who are individual consumers and natural persons. Rule 46A(8)(e), in operations since December 2017, now empowers the court to set a reserve price for the property at sale in execution. It would, in our view, be expedient and appropriate to general order a reserve price in all matters, depending on the facts of each case..."* It was further stated⁹ *"We are of the view that setting a reserve price would depend on the facts of each case. Some facts may indicate that the debt is so hopelessly in excess of the value of the property that the reserve price would be irrelevant compared to the value of the property but yet, if the debt is not satisfied by the proceeds of the sale of the property, a debtor still remains liable for any balance after realisation of the property. In all the circumstances a reserve price should be set in all matter where the facts indicate it. It will not be possible to set out a*

⁶ 2018 4 All SA 206 (GJ)

⁷ *supra*

⁸ Paragraph 59

⁹ Paragraph 62 of the said judgment

numerus clausus of factors to be considered in each case as the reserve price will depend on the facts of each individual matter...”

[13] The application is based on the events of the day the auction was held and no reference whatsoever is made to the court order which gave rise to the auction. This order is not challenged and therefore remains effective. It cannot be said that the sheriff acted incorrectly. His conduct was in compliance with the court order to sell the property without a reserve price, in line with the conditions of sale. The sheriff was therefore justified in ignoring the email as it was not a condition of the sale. In the circumstances, the application must fail for lack of substance.

[14] The costs should follow the event.

[15] In the circumstances the following order is issued;
The application is dismissed with costs.

MHLAMBI, J

Counsel for the Applicant: Adv. Ploos Van Amstel
Instructed by: Matsepes Incorporated
26/28 Aliwal Street
Bloemfontein

Counsel for Respondents: Mr. P Peyper
Instructed by: Peyper Austen Inc
39 C First Avenue
Westdene
Bloemfontein