IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable

Case no: **4460/2022**

In the matter between

THE STANDARD BANK OF SOUTH AFRICA LTD	**Applicant**
and	
ITUMELENG WILL CHOENE	**First Respondent**
TSHOLOFELO CHOENE	**Second Respondent**

Coram:	**Ramdeyal AJ**
Heard:	**15 August 2024**
Delivered:	**22 August 2024**

JUDGMENT

Ramdeyal AJ

[1] The Applicant seeks an order in the following terms:
That the reserve price as set in the amount of R790, 000.00 as per the Court Order, dated 20 April 2023 be set aside.
(a) That the sale of the immovable property known and described as:
A unit consisting of-
Section Number 194 on Sectional Plan Number SS 182/2011 in the scheme known as Park Avenue, Bloemfontein, Extension 181 Mangaung Metropolitan Municipality, held by deed of transfer ST 5800/2012 proceed without reserve.
(b) That the Defendant/s pay the costs of this application

[2] The applicant obtained default judgment against the respondents on 9 February 2023 for the amount of R1 165 167.37 whereafter the property in question was declared specially executable on 20 April 2023 and a reserve price for its sale set at R790 000.00

[3] The applicant proceeded with a sale in execution of the property and apparently no persons showed interest at the sale in execution. As such, the sale in execution did not realize. Annexure C is the return of service from the sheriff for the sale in execution scheduled for the 2nd of August 2023.
It reads as follows:
'This is to certify that a SALE IN EXECUTION was scheduled to take place on 2 August 2023.
A representative of the PLAINTIFF was present at the sale, but the auction did not take place because there were not interested buyers not any bid on the property.'
It is signed by the Deputy Sheriff and incorporated in it is the Sheriff's Cost Account.
The Applicant now approaches this court seeking a reconsideration of the reserve price, that it be removed for the property to be sold and to realise its security.

[4] The application is opposed by the respondents. They contend that the applicants did not follow the provisions of Rule 46(9)*(c)*, *(d)*, and *(e)* of the Uniform Rules of Court and, hence, a court does not have sufficient information at its disposal for a reconsideration of setting aside the reserve price.

[5] Rule 46A(9)*(c)*, *(d)*, and *(e)* reads as follows:

'*(c)* If the reserve price is not achieved by 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 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)*.

(e) The court may, after reconsidering 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.'

[6] Rule 46(A) has been created to allow Judges to impose a reserve price on houses, in order to prevent the sale of such property at ridiculously low amounts. Rule 46A is designed to protect home owners from their homes being sold for far less than it is worth. The purpose of rule 46A is to avoid a homeowners investment in his property from being encroached upon, and to protect impoverished debtors who are in danger of losing their homes. This is one of the mechanisms in play that gives effect to s 26(1) of the Constitution of South Africa which guarantees that everyone has the right of access to adequate housing. It was also meant to protect indigent debtors who were in danger of losing their homes. The sole purpose of judicial oversight in all cases of execution against immovable property is to ensure that the orders being granted did not violate section 26(1) of the Constitution where the judgment debtor is likely to be left homeless as a result of the execution. In *Petrus Johannes Bestbier and Others v Nedbank Ltd*[1] the Supreme

[1] *Petrus Johannes Bestbier and Others v Nedbank Ltd* [2022] ZASCA 88; 2023 (4) SA 25 (SCA).

Court of Appeal held that: 'Rule 46A must be interpreted in view of the historical and legislative context, and taking into account the purpose and objectives of the Rule.'[2]
The Court continued at para 20, by holding that:

'the aim of Rule 46A is to assist the Court in considering whether the s 26 rights of the judgment debtor would be violated if his/her house is sold in execution. Rule 46 A contains procedural prescripts, not substantive law. The requirement of judicial oversight in s 26 of the Constitution must be viewed in light of South Africa's history of forced removals and racist evictions during apartheid and the need to protect security of tenure of all South Africans.'[3]

[7] In *Nxazonke and Another v Absa Bank Ltd and Others*,[4] an unreported case from the Western Cape Division of the High Court, a sale in execution resulted in a home being sold at a disproportionately low price, being R10. The property was valued at R81 000. This was prior to the enactment of Rule 46A. That being said, in this matter before me the property has already been declared specially executable on the 20th of April 2023 with a reserve price for a sale in Execution of R790 000. The application now brought is to set aside the reserve price which could not realise on 2 August 2023 and a considerable period has lapsed since then. The application is heard a year later.

[8] Therefore when an application is brought for reconsideration of the sale of a property by way of a sale in execution without a reserve price, a court, in considering such application, must tread carefully and by way of applicable procedure as set out in Rule 46A, more especially 46A(9)*(c)*, *(d)* and *(e)*. Rule 46A(9)*(c)* states 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.'
Rule 46A(9)*(b)* reads as follows:

'(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 maybe realized between the reserve price and the market value of the property;

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[2] Ibid para 10.
[3] See also *Petrus Johannes Bestbier and others v Nedbank Ltd* [2024] ZACC 2; 2024 (6) BCLR 741 (CC) in this regard.
[4] *Nxazonke and Another v ABSA Bank Ltd and Others* [2012] ZAWCHC 184.

(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 realized 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.'

According to the Applicant, the founding affidavit of Camilia Nair refers, judgment was granted against the respondents for payment of the amount of R1 165 167.37. The respondent's account in terms of the mortgage loan was in arrears in the amount of R173 811.74 which escalated from the amount of R73,890.11, from the time the property was declared special executable and the full outstanding balance currently amounts to R1 311 163.86. The market value of the property is R1 100 000.00 and the forced sale value is R920 000.00 whilst the municipal valuation amount to R1 160 00.00 The outstanding balance to the municipality is R127,023.43. Hence, she submits that the Applicant's security in the immovable property has been compromised and that the property be sold at the highest possible price.

[9] The first respondent, Ithumeleng Choene on the other hand in his answering affidavit, confirmed by the second respondent, submits that the sheriff has failed to submit its report as per the requirements in rule 46A(9)*(d)*. The respondent declares that the immovable property in question is their primary residence, and he has now made payments in the amount of R23 000. He and his wife could not meet their financial obligations previously in respect of the immovable property due to the aftermath of covid which affected their business. They, however, appear to be in a better financial situation currently, having also secured certain work contracts and the respondent feels assured that he can settle the outstanding arrears. His greatest concern is that if the property is sold in execution without a reserve price at the highest possible price, they will be left homeless and yet be responsible for any shortfall on the mortgage bond.

[10] Reverting to rule 46A(9)*(b)*, it is incumbent upon a court to examine these factors carefully before making a determination in respect of the reserve price or setting aside of same. The founding affidavit of the Applicant explains the amounts owing and the procedure requested. However, the likelihood of the immovable property not being realized, and the likelihood of the immovable property not being sold will find merit in the sheriff's report which is essential for a determination of same, for reconsideration of an amount, or setting aside the reserve price. That is not forthcoming.

[11] In this case the report or rather return of service from the sheriff is not comprehensive and does not set out the full details as required by the Rules. To say it is not necessary for finer details as submitted by the Applicant's counsel and for a court to grant the application brought could revert to a position of Nxazonke and Another, supra which the court must guard against and reiterate the reasoning behind Rule 46A. Setting aside the reserve price could only result in a situation where the Respondent will be left homeless and still be liable for the shortfall on the mortgage debt if sold at a very low price. Therefore this could result in an abuse of process.

[12] In *Changing Tides 17 (Proprietary) limited N.O Kubheka and Another*[5] it was said: 'If a property is sold at a price which is significantly below the true market value, the homeowner is liable to lose the investment made in the property and still be left indebted to the bank for more than is fair. For most homeowners the investment in the mortgaged property is the largest and most important of their lives. The very purpose of Rule 46A is to avoid a homeowner's investment in his or her property from being unjustifiably impinged upon. It seeks to ameliorate the devastating effects of a debtor's inability to meet the payments of a mortgage loan and the inevitability of execution against his or her home. One of its aims is to protect debtors by ensuring that homes are not sold in execution for prices which are not market related, as was a prevalent iniquity in the recent past. This protection to the homeowner touches directly on the constitutional imperatives to be found, inter alia, in section 26 of the Constitution (the right to housing) and s 1 of the Constitution which places an obligation on all to promote the value of human dignity,

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[5] *Changing Tides 17 (Proprietary) Limited N.O. v Kubheka and Another; Changing Tides 17 (Proprietary) Limited N.O. v Mowasa and Another; Changing Tides 17 (Proprietary) Limited N.O. v Bucktwar; Changing Tides 17 (Proprietary) Limited N.O. v Horsley* (13719/2016; 14932/2016; 14488/2017; 11647/2019) [2022] ZAGPJHC 59; 2022 (5) SA 168 (GJ).

the achievement of equality and the advancement of human rights and freedoms.'[6]

[13] In the circumstances, the following order is made:

The application is dismissed with costs.

[redacted]

RAMDEYAL, AJ

[6] Ibid para 10.

Appearances

For the Appellant:	Advocate Z Nyezi
Instructed by:	McIntyre Van Der Post Attorneys
For the Respondents:	Advocate N M Phakama
Instructed by:	Motaung Attorneys