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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. 18367/2020

In the matter between:

MAWUTOR KWEKU LETSU

Applicant

and

FIRSTRAND BANK LIMITED

First Respondent

**THE SHERIFF OF THE HIGH COURT,
WYNBERG NORTH**

Second

Respondent

GARY NIGEL HARDISTY

Third Respondent

Coram: NUKU J

Date of hearing: 8 May 2025

Delivered on: 14 July 2025

JUDGMENT ON COSTS

NUKU, J

[1] The applicant owns an immovable property situated at [...] M[...] Court, M[...] Street, Claremont (“property”). He registered a mortgage bond over the property in favour of the first respondent to secure the loan he had obtained to acquire the property.

[2] The applicant fell into arrears with his monthly bond repayments. This resulted in the first respondent instituting an action against the applicant and obtaining judgment for payment of the sum of R619 022-48 together with interest at the rate of 10.30% from 3 January 2023, as well as an order declaring the property especially executable with a reserve price of R1 100 000.

[3] The second respondent sold the property to the third respondent by public auction on 2 September 2024 for R715 000. As the reserve price was not achieved by this sale, the first respondent brought an application in terms of Rule 46A(9)(c) seeking an order the effect of which would be to reduce the reserve price to R715 000 and sanction the sale of the property to the third respondent after the fact (reconsideration application).

[4] The reconsideration application was initially set down for hearing on 20 January 2025. The applicant opposed it and it was postponed by agreement between the parties to 4 August 2025. The basis upon which the applicant opposed the reconsideration application was that he had received a private offer for the property for an amount that was higher than the reserve price.

[5] The postponement of the reconsideration application was followed by correspondence from the applicant’s attorneys to the first respondent’s attorneys

requesting them to obtain what is commonly known, in conveyancing parlance, as bond cancellation figures. The bond cancellation figures, in simple terms, refer to the amount that the bondholder requires before the mortgage bond over the property may be cancelled.

[6] On 24 March 2025, the applicant's attorneys addressed an email to the first respondent's attorneys recording in the following terms:

'We refer to the above matter and urgently require the FNB bond cancellation figures as requested by our conveyancing department since 4 March 2025.

Allow me to elucidate the gravity of the current circumstances:

1. The transaction in question constitutes a cash sale, wherein the purchaser has fulfilled all financial obligations and rightfully anticipates the prompt registration of transfer.
2. The inexplicable delay in providing the requisite bond cancellation figures has precipitated a chain of deleterious consequences, not least of which is the accrual of interest charges to the detriment of our mutual client.
3. The purchaser, having demonstrated considerable patience heretofore, is now exerting significant pressure upon our offices to expedite the registration of transfer at the Cape Deeds Registry, a process which remains in abeyance pending your provision of the aforementioned figures....'

[7] The first respondent's attorneys responded on 14 April 2025 advising, inter alia, that the first respondent was '*obliged to seek directives from the High Court in terms of Uniform Rule 46A(9) regarding the further conduct in respect of the sale in execution*' and that the '*sale in execution precedes the transaction concluded between your client and the third-party purchaser*', and further that '*in any event, a private sale does not*

invalidate the sale in execution, nor does it oblige my client to provide your office with a consent to cancel the mortgage bond.' The response went further to blame the applicant for electing to sell the property with full knowledge of the events that transpired at the sale in execution and it was suggested that the applicant did this at his peril. The suggestion was that any relief that the applicant may be entitled to *'is sub judice and due to be considered on the opposed motion roll on 4 August 2025.'*

[8] The letter from the first respondent's attorneys concluded with an invitation to the applicant to make a proposal which would:

- '4.1 allow for the cancellation of the sale in execution (in order for your client's transaction to proceed);
- 4.2 allow our client to issue bond cancellation figures against an acceptable guarantee in favour of our client for the outstanding mortgage bond account and ancillary legal costs of the proceedings; and
- 4.3 Indemnify our client from the costs due to the cancellation of the sale in execution (as well as any claims by the purchaser in the sale in execution).'

[9] The applicant's attorneys responded on 15 April 2025 stating, in the relevant parts, that:

- '1. We herewith request (again) that your client provide our client with the cancellation figures against the receipt of a guarantee acceptable therein.
- 2. Our client is in a position to tender costs as necessary for the cancellation of the sale, naturally considering the SIE purchaser's knowledge that the reserve price was not met and considered despite the SIE being voidable at the instance of the mortgagor. Bearing this in mind we are sure that any

claim the purchaser would have against your client would be mitigated in this regard. In this regard we indemnify your client and consequently request to be joined in any action the SIE purchaser may take against your client.

We have placed on record that we are:

1. In a position to issue guarantees for your client's full outstanding amount; and
2. The transfer date is set for 8 May 2025 or as soon as possible thereafter.'

[10] The first respondent's attorneys reverted, on 23 April 2025, with a counter proposal to the effect that the applicant may enrol the reconsideration application for hearing on an earlier date than 4 August 2025. They also advised of the first respondent's consent to an order in the following terms:

- '2.3.1 The judicial sale in execution is not confirmed and a declarator to that effect is issued that there is no enforceable sale in execution.
- 2.3.2 Your client agrees to carry the wasted costs of the sale in execution and indemnify the third-party purchaser against loss of commission or sheriff's fees.
- 2.3.3 Your client will pay the costs of the Rule 49(9) application (inclusive of the costs for the hearing of the matter on an expedited basis) on an attorney and own client scale.
- 2.3.4 FirstRand will issue bond cancellation figures and consent to the cancellation of the mortgage bond on receipt of an acceptable guarantee for the outstanding mortgage bond amount (which will include the costs referred to above).'

[11] The applicant's attorneys were required to advise if the proposal was acceptable to the applicant and to provide possible dates by which the reconsideration application may be enrolled.

[12] The applicant's attorneys did not respond to the first respondent's counterproposal. Instead on 2 May 2025, they issued the application on seeking orders relating to (a) urgency, (b) the provision of bond cancellation figures by the first respondent, (c) leave to remove the reconsideration application from 4 August 2025 and to re-enrol it for hearing on 8 May 2025, (d) non-confirmation of the sale in execution, and (e) costs on an attorney and client scale, including those relating to the reconsideration application.

[13] The application was only opposed by the first respondent whose attorneys, on 5 May 2025, made a with prejudice offer of settlement that was contained in a draft order worded as follows:

'IT IS ORDERED BY AGREEMENT BETWEEN THE PARTIES THAT:

1. The application brought by the first respondent in respect of Uniform Rule 46A(9)(c) for the reconsideration of the judicial sale in execution of section 7 in the M[...] Sectional Title Scheme ("**the property**") concluded between the second respondent and the third respondent on 2 September 2025 and authorised by the order of this Court on 27 January 2023 in terms of Rule 46A ("**the sale in execution**") is removed from the semi-urgent roll on 4 August 2025 and enrolled on the urgent roll of 8 May 2025.
2. The sale in execution is set aside in terms of Uniform Rule 46A(9)(c) and the highest bid for the property received by the second respondent for R715 000.00 from the third respondent is not confirmed.
3. The first respondent shall:

- 3.1 Provide the applicant with its bond cancellation figures and its requirements for an acceptable guarantee in order for the first respondent to give its consent to the cancellation of the mortgage bond over the property.
 - 3.2 Take the steps in 3.1 within 5 days after this order is granted.
 - 3.3 Include the legal costs debited to the applicant's mortgage bond account as of the date of this order as well as costs referred to in paragraph 4 below.
4. The applicant shall pay the first respondent's legal costs (of this application and the application in terms of Uniform Rule 46A(9)(c) in an agreed sum of R [INSERT].'

[14] The above offer of settlement dealt with the substance of the relief sought by the applicant and the difference between the parties related to the issue of costs of the application as well as those relating to the reconsideration application. The matter, however, was not settled and both parties filed further sets of papers subsequent thereto.

[15] On the date of the hearing I made an order that roughly follows paragraphs 1,2.3.1 and 3.2 of the offer of settlement referred to in paragraph [14] above and reserved judgment in respect of the issue of costs. The order I made also accorded with paragraphs 1 to 3 of a draft order that had been presented on behalf of the first respondent on the date of the hearing.

[16] Addressing the issue of costs, Mr Zimmermann, who appeared for the applicant submitted that the draft order presented by the first respondent's legal representatives is a complete capitulation by the first respondent and as such, the applicant should be entitled to costs to be paid on a punitive scale.

[17] Mr Viljoen, who appeared for the first respondent submitted that the application was not necessary and could have been avoided. This was because it was disposed of on the basis that had been proposed to the applicant, which proposal was unreasonably rejected by the applicant.

[18] The manner in which both parties' legal representatives have conducted this matter leaves much to be desired, to say the least. This is a simple matter that should have been resolved the moment the applicant's attorneys wrote to the first respondent's attorneys requesting bond cancellation figures during March 2025. The further exchange that ensued between the parties was totally unnecessary and appears to have been caused by the belief, on the part of the first respondent's attorneys, that the sale in execution precluded the applicant from dealing with his property. This is clear from the passage referred to above where they wrote the '*sale in execution precedes the transaction concluded between your client and the third-party purchaser*'.

[19] The sale in execution, however, was not in compliance with the order sanctioning it in that the reserve price was not achieved. Self-evidently, the sale in execution did not result in a binding agreement of sale, hence the first respondent had to bring the reconsideration application. Until the property was lawfully sold in a public auction that complied with a court order sanctioning it, the applicant was always free to deal with his property and the first respondent was obliged to furnish the applicant with the bond cancellation figures upon request. This is more so in instances where the applicant intended to pay the full amount owing to the first respondent.

[20] Things, however, had moved a bit by the time the application was issued. The counterproposal that was made by the first respondent on 23 April 2025 dealt with the substance of the matter and, other than the issue of costs, there was no longer a substantive dispute between the parties. The failure to deal with the counterproposal has not been explained in the papers and, in my view, it was unreasonable for the

applicant to have simply proceeded to issue the application whilst the counterproposal was still on the table.

[21] The conduct on the part of the applicant is exacerbated by him proceeding with the application in the face of the prejudice settlement proposal referred to in paragraph [13] above. The fact that the matter was disposed of in a manner that substantially accords with the terms of the proposed settlement would ordinarily entitle the first respondent to be entitled to costs occasioned subsequent to the date when the settlement proposal was made. But, when one has regard to the first respondent's prior conduct which precipitated the application in the first place, it does not seem fair to reward it with a cost order. In my view, a fair order under the circumstances is for each party to bear its own costs of this application.

[22] The costs in relation to the reconsideration application stand on a different footing. With the second respondent having failed to achieve the reserve price, the first respondent had no option but to bring the reconsideration application and the applicant cannot escape those costs. The order declaring the property especially executable awarded costs on an attorney and client scale, and I see no reasons why costs in the reconsideration application should not be awarded on a similar scale.

Order

[23] In the result I make the following order:

- 23.1 The applicant is ordered to pay the costs occasioned by the application in terms of Rule 46A(9)(c); and
- 23.2 Each party is to pay the costs of this application.

L.G. NUKU

JUDGE OF THE HIGH COURT

APPEARANCES

For Applicant:	Mr Q Zimmermann
Instructed by:	Liddle & Associates Inc, Bellville
C/O:	Yusria Cornelius Inc, Goodwood

For First Respondent:	Adv B Viljoen
Instructed by:	Heyns and Partners Inc, Cape Town

For Second and Third Respondents:	No appearance
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