

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2023/066082

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED: YES

In the matter between:

SB GUARANTEE COMPANY (RF) PROPRIETARY LIMITED

Applicant

and

CARMEN JOLENE SMIDT

Respondent

(ID No. 7[...])

JUDGMENT

WENTZEL AJ

Introduction

- [1] This is an application in terms of Rule 46A(9)(d) and (e) to cancel the sale in execution of residential immovable property owned by the respondent on 10 December 2024 to Mr Deheshan Naidoo (“*Naidoo*”) on behalf of Langlaagte Truck & Car CC (“*Laaglaagter Truck*”). The property was sold to Naidoo, in his aforementioned capacity, as the highest bidder, for an amount of R500 000 which was substantially less than the reserve price of R1 500 000 set by the court on 8 February 2024. For convenience I will refer to the purchaser as “*Naidoo*”.

- [2] The matter came before me on 30 July 2025 in the unopposed motion court. Of concern to me was how a binding sale requiring cancellation could have been concluded at a price less than the reserve price without the confirmation of the court. I requested counsel appearing for the applicant to provide additional heads of argument to me to address my concerns, which he did.

The relevant legislative provisions

- [3] Rule 46A deals with execution against residential immovable property and provides in relevant part:

46A Execution against residential immovable property

...

- (8) A court considering an application under this rule may —

- (a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;
- (b) order the furnishing by —
 - (i) a municipality of rates due to it by the judgment debtor; or
 - (ii) a body corporate of levies due to it by the judgment debtor;
- (c) on good cause shown, condone —
 - (i) failure to provide any document referred to in subrule (5); or
 - (ii) delivery of an affidavit outside the period prescribed in subrule (6)(d);
- (d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;
- (e) set a reserve price;
- (f) postpone the application on such terms as it may consider appropriate;
- (g) refuse the application if it has no merit;
- (h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or
- (i) make any other appropriate order.

- (9)

(a) In an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set.

(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.

(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 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 [*sic*] 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.

[4] It is apparent that in terms of Rule 46(9)(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. Sub-paragraph (c) thus permits the court to reconsider the reserve price and re-

set the reserve price if needs be, having regard to the factors set out in Rule 46(9)(b). In doing so, it is also incumbent upon the court to have regard to the reasons why the reserve price was not achieved, as well as other factors set out in the sheriff's report contemplated in terms of Rule 46A(9)(d). In addition to having the power to reset the reserve price, the court is given the additional power in terms of sub-rule (e) to order that the property be sold to the highest bidder.

- [5] In terms of the notice of motion the applicant seeks cancellation of the sale to Naidoo. However, in the applicant's counsel's heads of argument he states that the present application brought and issued on 4 July 2025 provides notice of the applicant's intention to seek an order "*declaring the sale in execution null and void.*" This is different from the relief sought in the notice of motion which seeks cancellation of the sale and presupposes that a binding contract of sale was concluded. However, the applicant's counsel submits in his heads of argument that the sale to Naidoo did not constitute a final and binding sale and was merely provisional, subject to the approval of the Court. In this respect, reference was made to the conditions of the sale signed by the Naidoo.
- [6] Whether or not a binding sale is concluded would depend upon whether the terms of the condition of the sale are considered as suspensive or resolutive conditions. Parties to a contract provide for the uncertainty in the fulfilment of an uncertain future event that would affect the party's obligations by qualifying the obligation by means of a condition. The condition qualifies the obligation by making its operation and consequences dependent upon whether or not this uncertain event will happen. (See: Van Huystein et al, Contract General Principles, 6th ed para. 10.39-40).
- [7] Conditions may then be classified as suspensive or resolutive. A suspensive condition suspends (or postpones) the operation of the obligation which it qualifies until the condition is fulfilled or not fulfilled. A resolutive condition, on the other hand, does not postpone the operation of the obligation which operates in full, but comes to an end when the condition is fulfilled or fails. (See Van Huystein (*supra*) at paras. 10.49-51). When a suspensive condition is fulfilled, the obligation which it qualifies becomes unconditional; its fulfilment

does not create a new obligation, but simply resolves the uncertainty which had hitherto existed. (*Van Huystein* (*supra*) at para. 10.62). Accordingly, a valid contract is concluded but is not enforceable until and unless the suspensive condition is fulfilled.

- [8] However, there is a long line of cases which have held that in contracts of sale, different rules apply. These cases have held that where a contract of sale incorporates a suspensive condition, no contract of sale arises pending fulfilment of the condition. This means that the contract only comes into existence when the condition is fulfilled (See: *Van Huystein* (*supra*) para. 10.63; ***Tuckers Land and Development Corporation (Pty)Ltd v Strydom*** 1984 (1) SA 1(A)). On the basis of this approach, unless and until the Court confirms the sale to Naidoo, no sale is in fact concluded and there would be no need for the applicant to bring the current application to cancel the sale to Naidoo.
- [9] A different approach preferred by *Van Huystein* (*supra*) was taken in ***Southern Era Resources Ltd v Farndell NO*** 2010 (4) SA 200 SCA (at para. 11). In this matter the Supreme Court of Appeal adopted the same approach to that taken in all other contracts and found that the fulfilment of a suspensive condition results in the conclusion of a contract of sale but renders the sale enforceable unless and until the suspensive condition is fulfilled. This means that the contract and the obligations arising from it arise *ab initio* which can, on the fulfilment of the condition, now be enforced.
- [10] If this is the correct approach, then it suggests that where there is a sale in execution subject to a reserve price which is not achieved, the sale to the highest bidder constitutes a valid sale but is not enforceable unless the sale is confirmed by the court. In this sense, the enforceability of the sale remains in limbo until the court decides whether or not to confirm it.
- [11] This appears to be the approach taken by Bins-Ward J in the Western Cape High Court in the matter of In ***Standard Bank of South Africa Ltd v Tchibamba*** 2022 (6) SA 571 (WCC) where Bins-Ward J held that the sheriff has as real an interest in obtaining further directions from the court as the judgment creditor does. This is because the sheriff invariably becomes a party

to an executory contract of sale with the successful bidder at the auction sale in execution, subject only to the court's confirmation. It was Bins-Ward J's view that the court can "*hardly order that the property be sold to the person who made the highest offer or bid*" if that offer or bid did not have binding effect.

[12] This was explained by Bins-Ward J in paragraph [36]:

"[36] The sheriff has as real an interest in obtaining further directions from the court as the judgment creditor does. As described above, the sheriff has become party to an executory contract of sale with the successful bidder at the auction sale in execution. The contract is subject to the court's confirmation. In the current case that situation is entrenched by clause 2.2 of the conditions of sale, but it is a situation that would appear to apply in all cases in which a fixed reserve price is not attained. That is necessarily implied by subrule 46A(9)(e). The court can hardly 'order that the property be sold to the person who made the highest offer or bid' if that offer or bid did not have binding effect, for the court would otherwise be ordering a party to conclude a contract, a power excluded by the substantive law. Thus, when the court makes such an order it is in effect confirming a sale that was subject to its imprimatur, thereby causing the fulfilment of a condition to which the contract was subject."

[13] However, if a suspensive condition fails, the obligation which qualified the condition comes to an end and all obligations undertaken in exchange of it fall away as well. (See: *Van Huystein* (supra), para. 10.64.). This is because in the normal course (ie in contracts other than contracts of sale), if the condition cannot be fulfilled, the contract is unenforceable and whatever has been transferred must be returned or may be recovered under the *condictio indebiti*. This means that pending the fulfilment or non-fulfilment of the suspensive condition, both the enforceability and the performance of the contract are suspended.

[14] Nevertheless, because the obligation exists, neither party may resile from the contract pending the possible fulfilment of the condition (***Melamed and Another v BP Southern Africa (Pty) Ltd*** 2000 (2) SA 614 (W); ***Reed Bros v Bosch*** 1914 TPD 578; ***Fichardts Motors (Prop) Ltd v Nienaber*** 1936 OPD 221; *Van Huystein* (supra) para. 10.58). Thus, should the court not confirm the bid to Naidoo, the deposit and the amount of the sheriff's commission paid by Naidoo and held in trust by the sheriff would by operation of law need to be repaid.

[15] It is thus important to determine the nature of the so-called “*provisional contract*” concluded between the sheriff and Naidoo and the obligations of the respective parties qualified by the condition pending the decision by the court whether or not to ratify the sale. The question that arises is whether a contract of sale is concluded between the parties at the fall of the hammer at the auction (as would be the case in all other contracts subject to a suspensive condition) or should contracts of sale be treated differently- such that a binding contract of sale is only concluded on confirmation of the “*sale*” to the highest bidder by the court.

[16] Christie, Contract General Principles, accepts that there is some controversy in the case law as to whether a contract exists which is not enforceable until fulfilment of the suspensive condition or whether no contract of sale arises at all pending the fulfilment of the suspensive condition. (See Christie, Chapter 10 paragraph 10.63 and the cases cited therein).

[17] There are early cases cited by Christie (*supra*) namely, **Reed Bros v Bosch** 1914 TPD 578 and **Fichardts Motors (Prop) Ltd v Nienaber** 1936 OPD 221 which have held that because a binding contract of sale is concluded pending the fulfilment of the suspensive condition, neither contracting party may resile from the contract, pending the possible fulfilment of the condition.

[18] In **Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd** 2013 1 All SA 266 (SCA); 2013 2 SA 133 (SCA) par 10, Brand JA endorsed Botha J’s explanation of a suspensive condition in **Design and Planning Service v Kruger** 1974 1 SA 689 (T) 695C–E that:

“a suspensive condition of a contract, properly so called, suspends the operation of all or some of the obligations flowing from that contract pending the occurrence or non-occurrence of a specific uncertain future event.”

[19] This approach was recently endorsed by the Supreme Court of Appeal in **Codevilla v Kennedy-Smith NO and others** [2024] 4 All SA 637 (SCA); 2025 (2) SA 42 (SCA) where the court accepted that a suspensive condition in a

contract suspends in whole or in part, the operation of the obligations flowing from contract, pending the occurrence of a specific uncertain future event. It was accepted by the court, with reference to a number of authorities, that if the condition is fulfilled, the obligations under the contract become enforceable; if the condition is not fulfilled, the contract becomes unenforceable. As the condition was not fulfilled, it was found that the contract for the sale of the property lapsed due to the non-fulfilment of a suspensive condition. However, it was accepted that where there was a time period stipulated for the fulfilment of the suspensive condition, the lapsing of the sale occurred on the expiry of this period by operation of law. But, on the facts it was found that the sale was revived by means of an addendum concluded which extended the period for the fulfilment of the suspensive condition.

[20] Where, however, there is no time period set for the fulfilment of the suspensive condition, it is trite that the law implies that the condition must be fulfilled within a reasonable time. What is reasonable would depend on the facts of each case. This means that unless a party approaches the court to confirm the provisional sale to Naidoo or to cancel it, the enforceability of the obligations flowing from the contract of sale are suspended and the contract remains in abeyance unless and until the court decides whether or not to confirm the sale to the highest bidder. Should the court not confirm the sale, the contract would lapse for want of fulfilment of the suspensive condition and would be regarded as *void ab initio*. This means that there would be no need to cancel the contract of sale should it be established that a reasonable time had elapsed for the fulfilment of the suspensive condition. What a reasonable time would be in the present context is more complex and is dealt with below.

[21] A different approach was taken in ***Diggers Development (Pty) Ltd v City of Matlosana & another*** [2012] JOL 28177 (SCA) where it was stated that:

"It is not in dispute that the agreement of sale contained suspensive conditions as set out in clause 4.1. The authors RH Christie and GB Bradfield state that a condition precedent or suspensive condition suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event. The author AJ Kerr describes a suspensive condition as one which suspends the operation or effect of one or some or all of the obligations until the condition is fulfilled. In Corondimas v

Badat Watermeyer CJ enunciated the principle relating to a contract of sale subject to a suspensive condition, as follows: "[W]hen a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled. . . . Until that moment, in the case of a sale subject to a true suspensive condition, such as this is, it is entirely uncertain whether or not a contract of sale will come into existence at some future time" ("the Corondimas principle")."

[22] In ***Red Dunes of Africa CC v Masingita Property Investment Holdings (Pty) Limited and others*** [2015] JOL 33328 (SCA); [2015] ZASCA 99 it was also held that when a contract of sale is subject to a true suspensive condition, no contract comes into existence unless and until the condition is fulfilled.

[23] Accordingly, it is necessary to determine whether the normal rules should apply to contracts of sale in execution subject to confirmation by the court or whether the particular rules carved out for contracts of sale in particular ought properly to apply in such instances, which would mean that no contract is in fact concluded unless and until the court confirms the sale to the highest bidder. However, either way, there would be no need to apply to court to cancel the sale. Should the normal rules apply, then the sale would lapse on the effluxion of a reasonable time; should the special rule outlined by Watermeyer CJ apply, no contract would arise at all and thus there would also be no sale to cancel.

[24] At this juncture it is pointed out that where a reserve price is set by the court, and a price at or above the reserve price be achieved, a valid sale in execution will be automatically concluded and the courts continued involvement would not be required.

[25] The relevant terms of the conditions of the sale in execution signed by Naidoo are as follows:

a. Clause 1.1 provides:

"The sale shall be conducted in accordance with the provisions of Rule 46 and Rule 46A, of the Uniform Rules of the Superior Courts Act, No. 10 of 2018, as well as the provisions of the consumer Protection Act, No. 68 of 2008 the regulations promulgated thereunder and the "Rules of Auction", and all other applicable law."

b. Clauses 2.1 reads:

“The property shall be sold by the Sheriff of SANDTON SOUTH at the SHERIFF'S OFFICE, UNIT 1B6 LANZERAC OFFICE PARK, 22 OLD PRETORIA MAIN ROAD, HALFWAY HOUSE, MIDRAND, GAUTENG, to the highest bidder, subject to a reserve price at R1 500 000.00 SET BY THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION. JOHANNESBURG by Court Order dated 8 FEBRUARY 2024.” (emphasis added)

c. Clause 2.2, in turn, stipulates:

“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 5.1; and confirmation by the court. Should the sale not be confirmed by the court all amounts paid by the highest bidder will be refunded.” (emphasis added)

[26] This makes it plain that the sale in execution was first and foremost subject to the attainment of the reserve price. However, should this not be attained, the highest bid would be provisionally accepted, subject further to:

- a. Compliance with clause 3.1;
- b. Compliance with clause 4.1;
- c. Compliance with clause 5.1; and
- d. Confirmation by the court.

[27] Clause 3.1 provides:

“The purchaser shall, as soon as possible after the sale, and immediately on being requested by the sheriff, sign these conditions of sale.” (emphasis added)

[28] Clause 4.1. provides:

“The purchaser shall pay to the sheriff a deposit of 10 % of the purchase price in cash, by bank guaranteed cheque or by way of an electronic funds transfer immediately on the fall of the hammer or in any customary manner and provide proof thereof to the satisfaction of the sheriff.” (emphasis added)

[29] Clause 5.1 in turn reads:

"The purchaser shall, immediately on demand pay the sheriff's commission calculated as follows:

5.1.1. 6% on the first R100 000.00 and 5.1.2. 3.5% on R100 001.00 to R400 000.00, and 5.1.3. 1.5% on the balance of the proceeds of the sale, subject to a maximum commission of R40 000.00, plus VAT, in total and a minimum of R3 000.00, plus VAT (inclusive in all instances of the sheriff's bank charges and other expenses incurred in paying the proceeds into his or her trust account)."(emphasis added)

[30] This means that the sale in execution was subject to Naidoo signing the conditions of sale, paying a deposit of 10 percent of the purchase price and the sheriff's commission calculated as stipulated in sub-clause 5.1.1. All of these conditions were fulfilled. The only remaining condition to be fulfilled was confirmation of the sale by the court. Without fulfilment of this condition, either no binding sale in execution would be concluded or a binding sale would be concluded but not be enforceable unless confirmed by the court. Either way, should the sale in execution not be confirmed, all amounts paid by the highest bidder must be refunded.

[31] In my view, a literal interpretation of clause 2.2 tends to support the view that a binding sale is indeed concluded when the bid of the highest bidder is accepted, but is only enforceable on confirmation of the sale by the court. This occurs on the provisional acceptance by the bid by the sheriff and precludes the bidder from resiling from the sale pending the decision by the court whether to confirm the sale or not.

[32] The applicant's counsel, however, takes the opposite approach advocated by Watermeyer CJ and contends that no binding sale in execution was concluded between Naidoo and the sheriff; in his view, a binding contract of sale would only come into existence if confirmed by the court. The applicant's counsel furthermore points out that it is noted in the sheriff's report that the sale was "*subject to the Bondholder's, Standard Bank confirming the sale in execution as the preferred creditor*". The applicant's counsel argues that a bid below the reserve price without confirmation by the preferred creditor and the court

constitutes merely an offer and without such confirmation, no binding contract of sale was concluded. He thus appears to support the Watermeyer CJ approach that applies different rules to contracts of sale subject to suspensive conditions and other contracts which are said to be suspended pending the fulfilment of an uncertain future event.

[33] This, however, is contrary to the relief sought by the applicant in the notice of motion. In the notice of motion the applicant seeks an order cancelling the sale in execution as this would not be necessary were I to accept that contentions advanced by the applicant's counsel in his heads of argument; as neither the preferred creditor nor the court has as yet confirmed the sale to Naidoo, the effect of the argument advanced by counsel is that no binding sale was concluded and there is thus no sale for the court to cancel.

[34] Rule 46A(e) does not expressly provide for the cancellation of a sale in execution below the reserve price. Cancellation of the sale is only contemplated in terms of Rule 46(11) in the event of breach by the highest bidder. The Rule provides in relevant part:

“(11)

(a)

(i) If the purchaser fails to carry out any obligations due by the purchaser under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser, and the attached and immovable property may be put up for sale again.

(ii) The report shall be accompanied by a notice corresponding substantially with Form 21A of the First Schedule.

(iii) If the sale is cancelled, the sheriff shall inform the judgment debtor of the cancellation

(b) Any loss sustained by reason of the purchaser's default may, on the application of any aggrieved creditor referred to in subparagraphs (i) and (ii) of subrule (14)(c), be recovered from the purchaser under judgment of a judge given on a written report by the sheriff, after notice in writing has been given to the purchaser that the report will be laid before a judge for the aforesaid purpose.”

[35] This is in line with Clause 17.1 of the conditions of the contract which provides for cancellation of the sale in the event of breach by the purchaser. It states:

"If the purchaser fails to carry out any obligation due by the purchaser under these conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff after due notice to the purchaser, and the property may again be put up for sale."

[36] It is provided in clause 17.4 that:

"In the event of the sale being cancelled as aforesaid the deposit shall be retained by the sheriff in trust for such period that is stipulated in the judgment in terms of Rule 46(11) of the Uniform Rules or if no such period is stipulated therein then until such time that the property has been sold to a third party and the execution creditor's damages have been quantified and Judgment has been granted in respect thereof."

[37] Cancellation of the sale by the court is thus only provided for in the terms and conditions on application by the sheriff and in the event of breach by the purchaser. However, the provision for cancellation of the sale is in line with the approach taken in **Reed Bros** and **Fichardt Motors**, which both contemplate that a valid and binding contract of sale is concluded precluding the parties from resiling from the contract pending the decision by the court whether or not to endorse the sale. What Rule 46

[38] The applicant's counsel appreciates this and thus submits in paragraph 35 of his heads of argument:

"Therefore, the Applicant is not seeking to "cancel" a perfected sale due to a breach, but rather confirmation of a provisional bid, which, proffers that there was no concluded sale to begin with".

[39] He states a paragraph 36 that "[t]his fundamental distinction is crucial to the proper understanding of the Applicant's position and the relief sought."

[40] This, I am afraid, is a *non-sequitur*, either there is a binding sale concluded on the provisional acceptance of the highest bid which requires cancellation, or no sale comes into effect unless and until the provisional sale is confirmed by the court, in which case there is no sale to cancel. Moreover, on the approach taken by him, all the applicant need do to avoid the sale becoming effective

would be for the applicant, as the preferred creditor, not to endorse the sale. What Rule 46(A)11 allows is for the sheriff to resile from the sale in the event of breach by the purchaser before any application is made to the court to approve the sale. Where there is no breach by the seller and the court does not endorse the sale, the sale automatically lapses and becomes *void ab initio*, which does not require any further intervention by the court.

[41] Accordingly, the applicant's counsel's own submissions negate the need to approach the court to cancel the sale to Naidoo as, should neither the applicant nor the sheriff approached the court to confirm the sale within a reasonable time (as no time period is stipulated in the terms of the sale), the sale would automatically lapse and be regarded as null and void by operation of law.

[42] I pause to mention that I have been unable to find the quoted paragraph in the sheriff's report specifying that the sale was subject to the Standard Bank confirming the sale in execution as the preferred creditor. But if this is indeed correct, it would mean that if the applicant does not confirm the sale, the sale would also lapse for want of compliance with this condition and there would also be no need for the applicant to approach the court to cancel the sale. The current application itself thus indicates that the applicant accepts that a binding sale of the debtors property to Naidoo was concluded on the fall of the hammer at the auction which, if confirmed by the court, would be enforceable. The sheriff and/or the execution creditor may only resile from the in the event of breach by Naidoo.

[43] But therein lies the rub. Since the sequestration of the respondent, the applicant, despite being the preferred creditor, has lost the right to determine whether the sale to Naidoo should be accepted or not. As the applicant itself states in its supplementary affidavit, the trustee of the respondent's insolvent estate would need to accept the offer made by Naidoo. Reading between the lines, what the applicant in truth and in fact wishes to avoid is the trustee approaching the court to seek confirmation of the sale to Naidoo at a price well below the market value of the property.

The effect of the sequestration of the respondent's estate.

[44] On 10 December 2024, the first sale in execution to Naidoo took place. On 13 December 2024 the respondent's estate was placed under sequestration.

[45] Where immovable property is sold by the sheriff prior to the insolvency of the registered owner, the question that arises is whether the sale is valid, void or voidable and whether the sheriff may pass transfer of the property to the purchaser.

[46] Section 20(2)(a) of the Insolvency Act, 1936 provides that all property of the insolvent estate at the date of sequestration including property or the proceeds thereof which are in the hands of the sheriff shall vest in the Master and subsequently the trustee of such insolvent estate.

[47] Section 20 provides:

“20. Effect of sequestration on insolvent's property

(1) The effect of the sequestration of the estate of an insolvent shall be—

- (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;
- (b) to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section 23, be instituted by the insolvent for his own benefit or be instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section 44 or 78, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate;
- (c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the Court otherwise directs;
- (d) to empower the insolvent, if in prison for debt, to apply to the Court for his release, after notice to the creditor at whose suit he is so imprisoned, and to empower the Court to order his release, on such conditions as it may think fit to impose.

(2) For the purposes of subsection (1) the estate of an insolvent shall include—

- (a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment;
- (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section 23."

[48] ***Simpson v Klein NO and Others*** 1987 (1) SA 405 (W) held that immovable property sold in execution but not yet transferred at the date of sequestration vests in the Master and then in the trustee on his appointment.

[49] Under the common law, the contract is not automatically terminated by the sequestration, and the trustee can elect whether or not to enforce the contract. If he elects to enforce the contract, he, not the sheriff, must pass transfer of the immovable property to the buyer. Accordingly, following the sequestration of the respondent, the applicant ceased to have *locus standi* to approach the court to cancel the sale to Naidoo and it would be incumbent upon the trustee to decide whether or not the sale to Naidoo as the highest bidder should be accepted or not. Should the trustee elect to accept the bid to the highest bidder, it would still be incumbent upon the trustee, and not the applicant, to approach the court to sanction the sale and to provide all the necessary information required in order to enable the court to properly exercise its powers in terms of Rule 46A(9)(e).

[50] It is trite that where a party ceases to have standing, whether by death, incapacity, sequestration or liquidation, they should be substituted by the executor, trustee or liquidator of the estate, as the case would be. Rule 15(3) provides:

"(3) Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted."

[51] Erasmus et al., in their commentary on the Rule 15 state that "...the court will not allow any further steps to be taken in the proceedings until an executor,

curator, trustee or similar legal representative has, in terms of the subrule, been substituted.” See Estate Huisman v Visse 1967 (1) SA 470 (T); Dlwati v King Sabata Dalindyebo FET College (2021) 42 ILJ 2427 (LC) at paragraphs [18]–[21] and

[52] The applicant thus ceased to have the power to seek the cancellation of the sale to Naidoo following the sequestration of the respondent and has usurped the trustee’s powers in seeking to do so.

[53] It is assumed that the trustee has not yet made his election whether to seek confirmation of the “*sale*” to Naidoo. Thus far, the trustee has not sought to seek confirmation of the sale to Naidoo from the court. It would now be incumbent upon the trustee to either seek to confirm the sale or cancel it, in the best interests of all creditors and other secured creditors, if any, and not the applicant as the preferred creditor. It does not appear that the current application was even served on the trustee of the respondent’s insolvent estate.

[54] The applicant’s counsel stressed that Rule 46A(9)(c) is peremptory and the court must order how execution is to proceed once it receives the sheriff’s report. This provides that:

“(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.”

[55] The powers the applicant’s counsel contends are conferred upon the court are:

- a. To confirm the sale to the highest bidder under sub-paragraph (e);
- b. Cancel the provisional sale and set a new reserve price or conditions;
- c. Order a re-auction of the property without reserve; and
- d. Make any appropriate order in terms of Rule 46A(8)(i).

[56] The applicant’s counsel also makes reference to ***Campbell v Botha and Others*** 2009 (1) SA 238 (SCA) at 242F-244H in support of the proposition that the sheriff, who signed the contract of sale, lacks the power to cancel it for

reasons other than specified in the Rule. I do not see how the passage relied upon provides support for the stated proposition. In any event, should the sale be confirmed, it would be concluded between the trustee of the respondent's insolvent estate and not the sheriff.

The powers of the court

- [57] What then are the court's powers and duties in the current situation, particularly when it has found that the applicant lacks *locus standi* to bring the current application and it has no other application before it? Can the court *mero motu* reduce the reserve price and direct that an attempt be made to sell the property at that lower reserve price or are the further steps to be taken with regard to the sale of the immovable property now within the purview of the trustee of the respondent's insolvent estate?
- [58] Windell J found in ***Sheriff of the High Court, Pretoria East Dos Reis and others*** (2017/12536)[2020] ZAGPJHC 416 (4 December 2020) that although the sheriff was obliged to deliver a report to the court should the reserve price not be achieved, no formal application was required to initiate the reconsideration of the reserve price. It was also found that there was no need for such a reconsideration to take place in open court.
- [59] In *Changing Tides 17 (Pty) Ltd NO v Tyler and Another* (2757/2020) [2024] ZAECPHC 3 (30 January 2024) Fisher J held that the reconsideration process should be initiated by a substantive interlocutory application; the filing of the sheriff's report would trigger the reconsideration application. However, Fisher J did not consider who should bring such an application- the execution creditor, the sheriff or the judgment debtor.
- [60] In ***Standard Bank of South Africa Ltd v Tchibamba and Another*** (5642/2018) [2022] ZAWCHC 169; 2022 (6) SA 571 (WCC) (2 September 2022), the Western Cape High Court per Binns-Ward J found that the application procedure was not supported by the wording of subrule (9)(c), which, in the given circumstances, directs the sheriff to submit a report to the court and requires the court receiving such report *ipso facto* to undertake the

necessary reconsideration, irrespective whether anyone applies for it or not. It was stated at paragraphs [32] and [33] that:

“[32] In Changing Tides supra, the court determined that an application by the judgment creditor was necessary to obtain the reconsideration by the court required by Rule 36A(9)(c). Respectfully, whilst acknowledging the considerations of pragmatism that informed it, I cannot subscribe to that view. It is not supported by the wording of the subrule, which, in the given circumstances, directs the sheriff to submit a report to the court and requires the court receiving such report ipso facto to undertake the necessary reconsideration, irrespective whether anyone applies for it or not.

[33] Parties have been making applications for the reconsideration of reserve prices simply because rule 46A(9) does not provide the procedural framework for getting the sheriff’s report before a judge and enabling the judge to obtain the necessary information to undertake a reconsideration with reference to the several factors enumerated in rule 46A(9)(b). The rule does not put anyone on terms to institute interlocutory proceedings for the prescribed reconsideration.”

- [61] In Binns-ward J’s view, the reconsideration process was simply an extension of the application provided for in Rule 46(A)(9)(3).
- [62] Binns-ward J’s finding that Rule 46A(9) “*does not put anyone on terms to institute interlocutory proceedings for the prescribed reconsideration,*” has obvious ramifications for the enforceability of a sale to the highest bidder at a price below the reserve price as should the court not review the matter within a reasonable time, the sale would lapse by operation of law for want of compliance with a suspensive condition. This is an aspect to which I will return.
- [63] In view of these conflicting judgments and the inconsistent application of rule 46A(9), the erstwhile Judge President of the Gauteng Division of the High Court convened a full court in **SB Guarantee Company (RF) (Pty) Ltd v Hlongwane** 2025 (3) SA 640 (GP) to give guidance on the manner in which rule 46A(9) was to be applied. After reviewing the case law, the full court (per Swanepoel J) concluded that it was indeed necessary that a supplementary affidavit be filed by the judgment creditor stating whether or not the court should confirm the sale to the highest bidder or to direct that the property be resold but perhaps at a lower reserve price. To this end, the fullest possible information should be provided to the court.

[64] Swanepoel J approved of the approach taken by Binns-Ward J that the Rule does not envisage that a formal application be brought for the court to reconsider the reserve price. Thus the sheriff did not require *locus standi* to bring such an application and does not become a party to the proceedings but simply provides information upon which the court can reconsider the reserve price. In this regard it was stated:

“[20] The Court was of the view that the reconsideration process was simply an extension of the application provided for in rule 46A(9)(3). I respectfully agree with the learned Judge [Binns-ward J], that the rule does not envisage the bringing of a formal application. Had the rule-maker required a new application to be brought, it would have said so. The Sheriff did not, therefore, require locus standi as it would have done had it been an applicant in a new application: it does not become a party to the proceedings and only provides information upon which the Court may reconsider the reserve price. I respectfully agree with Binns-Ward J that the result of this interpretation is that whereas an application is essentially adversarial in nature, the reconsideration procedure is inquisitorial: 8 the Court is tasked with considering the information placed before it, and if necessary, calling for more information. The reconsideration of the reserve price is thus based on all relevant factors and there is no onus on any party to prove or disprove anything.”

[65] This was an approach also followed in Tchibamba at paragraph [38]:

“The scheme of the subrule is that the original application continues on the basis of supplemented papers, commencing with the Sheriff’s report. There is no new application to be instituted. If there were one, one would expect the rule to provide for it. It does not. That does not surprise me. The exercise that it involved is, after all, nothing more than a consideration by the court whether to amend the order that it has already given in the application in terms of rule 46 A (3) so that it can be effectively executed. The reconsideration does not occur in a new matter. Rule 46 A (9) plainly implies that a court that fixes a reserve price in its order is not functus until the contemplated sale has been concluded at or above the determined reserve price.”

[66] In **Hlungwane**, Swanepoel J pointed out that “[t]he failure of rule 46A(9) to provide for the process to be followed leaves a further lacuna as to the exact manner in which the reconsideration is to be brought before Court.” The learned judge raised the obvious rhetorical question: “Once the Sheriff has reported, then, what is the role of the execution creditor and judgment debtor?” The court then set out the process it felt ought to be followed in paragraph [25]:

“[25] In my view the process should be as follows:

[25.1] the process is initiated by the Sheriff filing his report to the Registrar within 5 days of the auction. The Sheriff must also deliver a copy of his report to the execution creditor and judgment debtor within that period. The report must fully deal with the aspects listed in rule 46A(9)(d). More specifically, the Sheriff must convey any information that may be available relating to the failure to achieve the reserve price. For instance, if the immovable property is not in a saleable state, or is in such a condition that a lower reserve price would be appropriate, the Sheriff must say so. If the Sheriff is aware of private offers the report must include that information;

[25.2] the execution creditor must then file an affidavit within 10 days thereafter. The supplementary affidavit of the execution creditor must, at a minimum, deal with the following:

[25.2.1] explain the manner in which the sale in execution was advertised;

[25.2.2] explain, if known, any reason why the reserve price could not be achieved, and if the reserve price was too high, the affidavit should say so, propose a lower reserve, and explain how the figure is calculated;

[25.2.3] provide comparative prices for comparable properties for sale in the particular area;

[25.2.4] if there has been an appreciable increase in the municipal charges or monies owing to a body corporate, the new figures should be provided, and if the forced sale value of the property has appreciably changed (for instance due to damage to the property), then that aspect must be dealt with;

[25.2.5] if there have been private offers made before or after the sale in execution that are still open to acceptance, the full details of such offers must be disclosed, as well as an affidavit from the prospective purchaser that he/she is still willing and able to fulfil the obligations arising from the private offer;

[25.2.6] updated figures on the mortgage account balance, and in respect of the arrear instalments;

[25.2.7] any other information that may assist the court in coming to a just decision.”

[67] In **Standard Bank of South Africa Ltd v Bogatsu** 2025 (1) SA 514 (GP) Snyman AJ held that an application for reconsideration of the reserve price should be made on affidavit and also set out the facts that are required to be placed before the court to enable it to exercise its discretion, broadening those set out by Swanepoel J.

[68] In the supplementary affidavit in the present matter it is stated at paragraph 13.6.3:

“Considering that the Respondent has been placed under sequestration, the Respondent's estate is to be wound up in terms of insolvency law. Accordingly, the trustee of the Respondent's insolvent estate is required to ratify the provisional sale of the property. However, the provisional sale at a value well below reserve price will not benefit the insolvent estate or come close to settling the Applicant's secured claim.”

[69] In support of their application for cancellation of the sale in execution the deponent to the founding affidavit states that:

“13.1 It is submitted that both the Applicant and the Respondent would be prejudiced by any further delay in this matter in that interest, charges and service fees will continue to accrue to the outstanding balance, with the result that the equity in the property will be diminished.

13.2 It is further submitted that both the Applicant and the Respondent would benefit if the property is sold as expeditiously as possible in order to guard against deterioration of the property and in doing so secure a reasonable selling price.”

[70] The deponent goes on to state:

“13.5 To the best of my knowledge and belief, the only rational explanation for the failure to achieve the reserve price at the first sale in execution held on 10 December 2024 is that the reserve price is too high, coupled with the high rates and taxes and levies, which would be for the purchaser's eventual account.

13.6 It is further respectfully submitted that the following factor, that may have an impact upon the price which could potentially be achieved at the sale in execution, ought to be taken into consideration:

13.6.1 The market value and forced sale value of the property: It is generally accepted that an immovable property is sold in execution at more or less the forced sale value thereof.

Prospective buyers are aware of this and will refrain from bidding at a market related value. It is, therefore, submitted that the forced sale value provides a better indication of what a reserve price might relate to.

13.6.2 Both the market value and forced sale value of the property have decreased since the Rule 46A application was considered and an order granted on 6 February 2024.

13.6.3 ...(already quoted above)

13.7 Considering the aforementioned factors and the fact that the Sheriff of this Honourable Court has been unable to sell the immovable property in execution at the court set reserve price set, and the fact that the Respondent has been

placed under sequestration, the Honourable Court is requested to cancel the provisional sale.”

[71] Although the submissions made in the supplementary affidavit suggest that the property should be resold at a reduced reserve price, there is no application for this before this court and all that is sought is cancellation of the sale to Naidoo. Indeed, the applicant’s representative report confirming the outcome of the provisional sale attached as “**SB3.1-SB3.3**” further states that “*the reserve price + the arrear amounts and all the other costs payable will be more than the market value and no profit can be made in re-selling the property.*”

[72] It can thus be assumed that the applicant has no intention of seeking permission from this court to re-sell the property at a lower reserve price and wishes the property to be sold following the insolvency of the respondent in the ordinary course. What it seeks to avoid is confirmation of the sale to Naidoo as it, as the preferred creditor, it has an interest in achieving the highest possible price for the property. The applicant points out that the reserve price of R1 500 000,00 was not achieved at the auction and states that the Applicant expressly elected not to accept the highest bid of R500,000.00.

[73] Clearly the applicant retains an interest in the continued conduct of the matter, as the preferred creditor and wants to realize as much as possible from the sale of the immovable property. However, since the sequestration of the respondent, it has lost *locus standi* to do so and the proceeds from the sale to Naidoo, if confirmed by the court will fall into the insolvent estate of the respondent, subject of course to the applicant’s preference.

[74] In addition, the fundamental basis for setting a reserve price, namely the protection of the debtor whose primary residence is sought to be sold in execution, no longer applies. In **Standard Bank of South Africa v Bogatsu** (*supra*), it was stressed at paragraph [31] that “*the purpose of the rule 46A is to stop the exploitation of debtors, protect their rights to housing and further to obtain a realistic price at auction.*” It was further stated by the learned judge at paragraph [33] that “[t]he object of setting a reserve price in respect of a sale of

a person's home residential property, is to obtain the market related price or at least relieve the defendant from the burden of the bigger portion of the debt."

[75] Similar statements were made by Fisher J in ***Changing Tides*** and by Binns-Ward J in ***Tchibamba***.

[76] The full court in ***Hlungwane*** (per Swanepoel J) approved the decisions in ***Nedbank v Mabaso*** 2023 (2) SA 298 (GJ) and ***Standard Bank of South Africa Ltd v Tchibamba and Another*** 2022 (6) SA 571 (WCC) and stressed that:

"[31] It must be borne in mind that the court is not functus officio until the execution sale has been successfully concluded. As a result, where circumstances warrant it, the court is entitled to revisit the entire order, including the declaration of executability. In my view, the reconsidering judge has the widest possible powers to do justice between the parties, and to facilitate an equitable outcome. Obviously, it cannot do so unless full and relevant information is placed before it."

[77] Indeed it was found that the wording of Rule 46(9)A is such that the court may also consider a private offer. As was explained by Swanepoel J:

"[30] The final aspect for consideration is: what powers does the reconsidering Court have? Rule 46A(9)(c) provides that the reconsidering court must order how execution is to proceed. Rule 46A(9)(e) authorizes a court, after considering the factors in sub paragraph (d), to order that the property be sold to the person who made the highest bid or offer (my emphasis). The latter implies that the reconsidering Court may consider an offer made other than at auction, and sanction it." (footnotes omitted).

[78] Without a supplementary affidavit from the trustee, the effect of the full court's decision in ***Hlungwane*** is that this court may not *mero motu* reconsider the reserve price or give directions on receipt of the sheriff's report. As the applicant no longer has *locus standi*, it is incumbent upon the trustee to prepare a supplementary affidavit with all the requisite information as to what has transpired since the sequestration of the respondent's estate, both with regard to the property market and relevant factors concerning the sequestration of the estate.

[79] I am not at all certain that following the sequestration of the judgment debtor the court retains the power to reconsider the reserve price or otherwise direct

that the execution process proceed in a particular manner without an application from the trustee of the respondent's insolvent estate to do so. The court's further regulation of the sale in execution would in any event be inappropriate without the input of the trustee of the respondent's insolvent estate.

[80] The applicant failed to serve its supplementary notice of motion and supplementary affidavit on the trustee, who has a direct interest in the outcome of this matter. I am mindful that the trustee may wish to accept the sale to Naidoo, which he would be entitled to do as following the sequestration of the respondent. I am thus inclined to direct that the current application brought by the applicant application and this judgment be served on the trustee of the respondent's insolvent estate within 5 days of delivery of this judgment. I also propose putting the trustee on terms to elect whether to abide by the sale to Naidoo and seek confirmation by the court. Either way, it is necessary that the trustee report to the court and provide all the relevant information to it so that it can properly exercise its discretion conferred upon it in terms of Rule 46(9)A.

[81] It is stressed that there is no time limit set in Rule 46(9)A for a review by the court by the court after receipt of the sheriff's report. As I have explained, in such circumstances, it is implied by law that this occurs within a reasonable time, failing which the sale in execution to the highest bidder at a price less than the reserve price will lapse by operation of law. As this occurs by operation of law, it is a matter that could legitimately be raised by the trustee or perhaps even the applicant in the present matter (were it be able to establish *locus standi* to do so); it is also a finding that Naidoo would presumably like to avoid in view of the bargain he appears have got for the property.

[82] This brings me to the issue raised by me earlier in this judgment and that is what period is to be considered a reasonable time.

[83] In **Hlungwane**, Swanepoel J stressed the need for the reconsideration by the court to take place as expeditiously as possible. The learned judge stated:

"[30] The very purpose of rule 46A is to achieve a just outcome between the execution creditor and debtor to protect both parties' interests. The judgment

debt continues to attract interest, and it is in everyone's interests to achieve the highest possible price for the property as expeditiously as possible. To interpret the rule otherwise would not result in a purposive interpretation."

[84] Swanepoel J also set time limits for the filing of the sheriff's report and the requisite supplementary affidavit by the applicant. These time limits constitute a good indication of what time period would be regarded as reasonable for the court to be approached to consider whether or not to confirm the sale. One needs to be mindful that the purchaser will remain bound throughout this period which may preclude him/her concluding an alternative sale.

[85] In ***Tchibamba*** Binns-Ward J pointed out at paragraph [33] that:

"The rule does not put anyone on terms to institute interlocutory proceedings for the prescribed reconsideration."

[86] In my view, it would be unfair to leave Naidoo in limbo while the trustee exercises his/her election whether to abide by the sale and approach the court for confirmation or not. The sale in execution took place on 10 December 2024. It would seem that the sheriff's report was prepared on the same date but was only made available to the court on 4 July 2025 when the present application was issued by the applicant seeking a cancellation of the sale (and the sheriff's report was attached to the applicant's affidavit). No explanation has been provided as to why the sheriff did not file his/her report timeously and why the applicant delayed six months before bringing its application to court.

[87] In my view, the present application was not brought within a reasonable time but I decline to make a finding or in any way bind another court as to whether or not the sale to Naidoo should be regarded as lapsed by operation of law. I also believe that it would be improper for me to make such a finding without the input of the trustee and full knowledge of the facts.

[88] I tend to agree with the applicant that to proceed with the sale to Naidoo at less than half of the forced sale price would not be in the interests of the applicant as the preferred creditor, the general body of creditors or the respondent. However, again I decline to make any ruling regarding the further conduct of this matter and do not intend to bind any court faced with a reconsideration of the reserve price or an application to sanction the sale of the property to Naidoo

pursuant to an application by the trustee, or even by Naidoo should he establish *locus standi*, to do so.

[89] Because I am of the view that the applicant lacked the requisite locus standi to bring the current application following the sequestration of the respondent, I have no choice but to dismiss the current application and direct that the costs thereof not be borne by the insolvent estate of the respondent. However, I intend placing the trustee and Naidoo on terms to provide further information to the court so that it might properly exercise its discretion whether or not to confirm the sale to Naidoo or otherwise give directions as to the further conduct of this matter. Moreover, I have intentionally left open the question whether or not the court retains jurisdiction under Rule 46A(9) following the sequestration of the debtor to regulate the further conduct of a sale in execution. I thus make an order in the following terms:

Order

- (1) The application brought by the applicant in terms of Rule 46A(9)(d) and (e) is dismissed.
 - (2) The costs of the application are to be borne by the applicant.
 - (3) The applicant is directed to serve the aforementioned application and this judgment on the trustee of the respondent's estate and on Naidoo within 10 days of delivery of this judgment.
 - (4) The trustee and Naidoo are directed to file an affidavit for consideration by the court allocated to hear the matter within 15 days of receipt of the current application brought by the applicant and this judgment.
 - (5) The trustee is directed to apply to set down the matter within 5 days of filing his/her affidavit.
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**WENTZEL AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant: Advocate Muhammad Amojee

Instructed by: Tim Du Toit and Co. Inc.

Tim Du Toit & Co Inc.

