

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

CASE NO: 2017/12536

REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED

In the matter between:

THE SHERIFF OF THE HIGH COURT, PRETORIA EAST	First Applicant
ABSA BANK LTD	Second Applicant
STEPHANUS ANTONIE JACOBUS NAUDE	Third Applicant

and

DOS REIS, ORLANDO DE FARIA DA SILVA	First Applicant
DOS REIS, VANESSA REQUEL PINTO FAIA	Second Applicant
MOLKFI PIET NTLERU	First Intervening
Party	
LORRAINE NTLERU	Second Intervening Party
(Plaintiff a quo)	

JUDGMENT

WINDELL, J

INTRODUCTION

[1] This matter came before me in the unopposed motion court on 2 November 2020. The third applicant, the first and second respondents, as well as the intervening parties filed heads of argument, and the application proceeded on an opposed basis. I reserved judgment and requested counsel for the second applicant ("Absa Bank"), on 24 November 2020 to submit written heads of argument. Despite counsel's undertaking to do so on 25 November 2020, I have to date not received Absa Bank's heads of argument. On 4 December 2020, I granted an order in the following terms:

- 1. The intervention application is granted and leave is granted to the first and second intervening parties to be joined as the third and fourth respondents in the main application;*
- 2. Upon a reconsideration of the relevant factors in accordance with Rule 46(A)(9)(c), the sale whereby the third applicant, as the highest bidder, provisionally purchased from the First Applicant at a sale in execution held on 28 January 2020, Portion [...], being a portion of Portion [...] of the Farm Rietfontein [...], Registration Division J.R., Province of Gauteng situated at [...] Royal Chalice Crescent, Mooikloof Equestrian Estate, Mooikloof is not confirmed.*
- 3. The second and third applicants are ordered to pay the costs of the respondents, jointly and severally, the one paying the other to be absolved, including the costs of counsel, on an opposed scale.*

[2] These are the reasons for the order.

[3] On 11 April 2019, Sutherland J granted an order in the following terms:

- 1. The Sheriff of the above Honourable Court is authorized to execute the Warrant of Attachment in terms of which the immovable property known as Portion 465, Portion of Portion [...], of the Farm Rietfontein [...], Registration Division J.R., Province Gauteng measuring 1,0000 hectares, held by Deed of Transfer No. T128005/2002 ("the property") may be sold in execution, subject to a reserve price of R9 800 000.00 ("the reserve price");*
- 2. In the event that the reserve price is not achieved at the sale in execution, then and in that event, the Sheriff is authorized to submit a report to this Honourable Court within 5 days from the date of the sale in execution for an*

Order that the property be sold to the person who made the highest offer or bid as provided;

3. *The first and second defendants shall pay the costs of the application, jointly and severally, the one paying the other to be absolved, on the attorney and client scale.*

[4] During April 2019, and at the time the order was made by Sutherland J, the market value of the property was estimated at approximately R16 000 000.00 and the municipal value of the property was estimated at approximately R13 000 000.00. The outstanding rates and taxes on the property as at 17 January 2019 was R348 444.09, and the balance due to Absa Bank, as at February 2017, was an amount of R10 166 439.94.

[5] It is common cause that the sale in execution occurred on 28 January 2020. The reserve price of R9 800 000.00 was not achieved. The highest bid that was obtained was R7 200 000.00, which was made by the third applicant ("Mr Naude"). The bid was provisionally accepted by the Sheriff subject to the court's confirmation.

[6] Rule 46A(9)(d) of the Uniform Rules of Court provides that "*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.*"

[7] On 28 January 2020, the Sheriff compiled its report in terms of Rule 49A(9)(c). The Rule provides that the report must be submitted to court within 5 days of the auction. The consideration of the report by the Sheriff is done in chambers and no formal application is necessary to be heard in open court. However, on 4 February 2020 the Sheriff, Absa Bank and Mr Naude (the applicants) launched a formal application for an order in terms of Rule 46A(9)(c), namely that Mr Naude be declared the purchaser of the immovable property, being the person who made the highest bid at the sale in execution that took place on 28 January 2020.

[8] The application in terms of Rule 46A(9)(c) was originally set down for hearing on 23 April 2020. The respondents state that they only became aware of the application on 20 May 2020 when a copy of the set down was emailed to them. A copy of the application was, however, only received on 19 June 2020. The respondents immediately filed an intention to oppose the application and briefed counsel to appear in the matter on 22 June 2020. The matter was, however, not properly set

down and was not on the roll, and the presiding judge was not willing to entertain the matter.

[9] On the same day, namely, 22 June 2020, the respondents' attorney of record sent a letter to Absa Bank's attorney of record (Jay Mothobi Incorporated Attorneys). It was specifically recorded that the respondents would be seeking a postponement of the main application on 22 June 2020 because the property had been sold to a certain Mr Molefi Piet Ntleru for the amount of R10 300 000.00. The respondents aver that Mr Olivier from the firm Jay Mothobi Incorporated replied by requesting information relating to the commission and the respondents' attorney, at approximately 09h56, confirmed that a copy of the commission addendum will be sent as soon as it becomes available. The respondents further aver that Mr Olivier stated that Absa Bank had to understand what amount would be available to be paid to it and further advised that the aspect of levies, rates and taxes had to be dealt with. At 15h33 on the same day, the respondents' attorney provided Mr Olivier with a professional fee agreement. It was specifically emphasized that the matter was not adjudicated by the court and had to be set down again. The respondents' attorney specifically requested the copies of all proceedings relating to the matter as well as substantiating documents for amounts outstanding. Mr Olivier tendered copies against the reproduction costs.

[10] On 25 June 2020, the respondents' attorney again directed an email to Mr Olivier. Mr Olivier was requested to provide an estimate to obtain copies of all the relevant pleadings. Mr Olivier was further requested to provide calculations on all the outstanding amounts relating to the property and to confirm whether the application would proceed, taking into account the offer for R10 300 000.00. On the same date, Mr Olivier replied, indicating that Absa Bank Limited had no election whether the application would proceed or not. Mr Olivier further indicated that:

1. The amount outstanding relating to rates and taxes and levies were substantial;
2. The purchaser at a sale in execution is responsible to pay the above expenses;
3. In a private sale, the seller will be responsible to pay the above expenses;

4. The respondents did not pay such expenses for a prolonged period of time;
5. The only manner to proceed with transfer is if the seller takes liability and/or deducts such amount from the sale proceeds.

[11] The matter was subsequently set down for hearing for 1 September 2020.

[12] The respondents filed their answering affidavit on 27 August 2020. The answering affidavit was accompanied by an affidavit deposed to by Ms Susanna Strydom, an attorney and conveyancer, practising as such under the name and style of Susan Strydom Inc, wherein she confirmed that:

1. She received instructions on 22 June 2020 from Far Properties Estate Agency to attend to the transfer of the property from the respondents to Molefi Piet Ntleru, married in community of property to Lorraine Ntleru.
2. The purchase price of the property is an amount of R10 300 000.00 (Ten Million Three Hundred Thousand Rand).
3. Mr Ntleru, initially indicated that the property will be purchased by cash. However, due to the COVID-19 pandemic and lockdown restrictions payments from his clients was not forthcoming as usual. Mr Ntleru, therefore, made alternative plans.
4. In terms of the offer to purchase, Mr Ntleru was obliged to provide guarantees for the purchase price on or before 4 August 2020, which was in actual fact the period in which the purchase price would have been paid into the trust account of the attorney. Because of the delayed payment, Mr Ntleru secured a loan from the bank to expedite matters.
5. On 29 July 2020, the parties agreed to extend the period for the provision of the guarantees to 20 August 2020, as Mr Ntleru was having problems with the banks in respect of valuations of the property.
6. On 29 July 2020, Mr Ntleru obtained approval of a bond with Investec Bank in the amount of R5 600 000.00.
7. The purchasers also paid an amount of R3 500 000.00 into the trust account of Tintingers Inc, which amount has been invested with Investec Bank in an interest-bearing account for the purchasers in terms of Sections 86(4) and 86(5) of the Legal Practice Act, No 28 of 2014.

8. An amount of R1 200 000.00 is still outstanding in respect of the purchase price.
9. On 26 August 2020, the purchasers obtained further finance in the amount of R1 600 000.00 through Absa Bank by registering a bond over another immovable property of the purchasers, being Unit [...], SS Hereford, Township Irene Extension 193.
10. It is clear that the full purchase price has been paid. There are sufficient funds to pay all the expenses of the property as well as transfer fees.
11. The purchasers confirmed that the amount of R1 200 000.00 following the bond registration referred to is available for this sale transaction.
12. Consequently, the full purchase price of R10 300 000.00 has been paid and/or secured through bank loans. Furthermore, the purchaser has confirmed to pay the outstanding amounts relating to levies, rates and taxes.

[13] On 11 September 2020, Absa filed a replying affidavit. On 23 October 2020, Mr Ntleru and Ms Ntleru filed an application to intervene. The application to intervene was not opposed. The intervening parties clearly have a legal and financial interest in the application. Leave was granted to them to intervene.

[14] On 30 October 2020, Mr Naude filed a supplementary affidavit. Mr Naude stated that he currently still had a sufficient amount of cash available to purchase the property at the reserve price and to cover the cost associated with the purchase and tendered an amount of R9 800 000.00 (eight million nine hundred thousand Rand) in respect of the purchase price for the property. He further stated that he had considered the purchase offer by the intervening parties and noted that once the commission of R515 000.00 (five hundred and fifteen thousand Rand), that is payable to the estate agent, is deducted from the purchase price of R10 300 000.00 (ten million three hundred thousand Rand) the amount available to the judgement creditor is R9 785 000.00 (nine million seven hundred and eighty five thousand Rand). He therefore submit that, as the highest bidder on auction, his current offer of the reserve price can be accepted as part of the execution process and that it is in fact more favourable to the judgement creditor as well as the judgement debtor than the offer by the intervening parties. He accordingly formally offered to increase his

bid to purchase the property at the full reserve price of R9 800 000.00 (eight million nine hundred thousand Rand).

RULE 46A(9)

[15] Rule 46 A (9) of the Uniform Rules of court provides as follows:

"(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 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.

[16] It is clear from a reading of Rule 46A(9)(e) that the court has a discretion to order that the property be sold to the person who made the highest offer or bid. In the exercise of its discretion the court must consider the factors set out in subparagraph (b), as well as any other relevant factor prior to making its decision.

[17] The following relevant factors were taken into account:

1. The intervening parties made an offer to purchase the property on 21 June 2020 for R10 300 000.00, which was accepted by the respondents.
2. The offer was much higher than the value attained at the auction in execution, being R7 200 000.00.
3. The intervening parties have already paid an amount of R6 300 000 in respect thereof, and have obtained bank guarantees for the balance.
4. The intervening parties also tendered to pay additional costs including clearance amounts from the homeowner's association and the municipality.
5. Mr Naude, had subsequently, on 23 October 2020, tendered to purchase the property for R15 000 more than the intervening parties have offered.

[18] There can be no doubt that the offer of R 7 200 000.00 made by Mr Naude at the sale in execution cannot be confirmed. In *Hancock and Another v Nedbank Limited and Others*¹, the immovable property was sold at the sale in execution for an amount of R2 200 000.00, which was R800 000 below the reserve price. The execution debtors subsequently sold the property after the sale in execution for a

¹ (905/2018) [2019]ZAFSHC 219 (14 November 2019)

higher amount, namely R5 380 000.00. The court held that common sense and the interest of justice demands that the court should bring finality to the issues in question, and found that the subsequent offer of R5 380 000.00 should prevail. The facts in *Hancock* are distinguishable from the facts in the present matter. In the present matter the court is faced with two competing offers, where the difference in price is a mere R15 000. Under the circumstances, I decline to make any order in terms of Rule 46A(9)(e). The sale whereby Mr Naude, as the highest bidder, provisionally purchased the property is not confirmed.

[19] Rule 46A(9)(c), states that if the reserve price is not achieved at a sale in execution, the court must order how execution is to proceed. This entails a reconsideration of the factors in subparagraph (b) as well as the courts powers under the Rule 46A. In the reconsideration of the factors, there is no reason to increase the reserve price. In fact, it is clear from the figures provided to the court that the outstanding property rates, water charges, home owners association levies and current outstanding balance have all increased significantly. There is no suggestion from Absa Bank, the respondents nor the intervening parties that this is a situation where the court should make an order that another sale in execution should be held. It is only Mr Naude that requests that such an order be made in the event that the court refuses to make an order in terms of Rule 46A(9)(e) and does not declare him the successful bidder.

[20] It is common cause that the reserve price of R9 800 000.00 was not achieved at the sale in execution. It is in the best interest of both judgment debtor and judgment creditor that the property be sold as soon as possible. Absa Bank, as the registered bond holder and judgment creditor, is now in possession of two offers for amounts that are more than the reserve price. Absa Bank is in the best position to consider both offers and to make a decision whether to accept any of the offers. If it decides not to accept any of the offers, it would be within its rights to instruct the Sheriff to sell the property on a sale in execution.

COSTS

[21] The respondents and the intervening parties seek a costs order against Absa Bank and Mr Naude. It is trite that costs are in the discretion of the court. The discretion must be exercised judicially, having regard to all the relevant facts and

circumstances of each case. The factors relevant to the exercise of the court's discretion are, *inter alia*, the nature of the litigation, the conduct of the legal representatives, and the conduct of the parties.²

[22] Rule 46A (9)(c) and (d) are peremptory. The court must, on a reconsideration of the relevant facts, order how execution is to proceed if the reserve price is not achieved at the sale in execution and the Sheriff must submit a report to the court whereafter the court may order that the property be sold to the person who made the highest bid. It would be incumbent on the attorney acting on behalf of the execution creditor (Absa Bank), to ensure that the Rules are complied with.

[23] Instead of submitting the Sheriff's report for consideration before a judge in chambers and leave it in the discretion of such judge to refer to open court, Absa Bank decided to launch application proceedings in court. When the respondents got heed of the application they filed a notice to oppose and incurred costs in instructing counsel to argue the matter in open court. Absa Bankin fact filed an affidavit, akin to an opposing affidavit. It is in this affidavit that Absa Bank casted aspersions on Ms Strydom and made mention of the fact that Mr Ntleru and Mrs Ntleru's "confirmation" was not before court and that it is doubtful that they are even aware of these proceedings. This left the intervening parties with no alternative but to intervene, and to incur costs by instructing counsel to bring their views and set out their material interests, as factors for the court to consider. This could all have been avoided if Absa Bank did not rush to court to launch application proceedings, but approached court in chambers to consider the Sheriff's report. It would then have been in the discretion of that judge to refer the matter to open court and to determine what additional evidence would be required.

[24] The application necessitated counsel for the respondents as well as the intervening parties to file heads of argument and the matter proceeded on an opposed basis. Throughout, until literally at the latest hour, both Absa and Mr Naude maintained that the offer at the sale in execution should be accepted, despite the fact that both had been aware that a much better offer was made by the intervening parties. Belatedly, Absa Bank changed tack and indicated that it will not be opposing the application for intervention and will adopt a neutral attitude.

² *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at paras [7] – [9].

[26] I am satisfied that this is an appropriate case where the second and third applicants should be ordered to pay the costs of the respondents and intervening applicants on an opposed motion scale.

Electronically transmitted therefore unsigned

COUNSEL FOR THE RESPONDENTS: ADV. S.J. VAN RENSBURG
SC

RESPONDENT'S ATTORNEYS:
ATTORNEYS

JC

SCHEEPERS

ATTORNEYS FOR THE INTERVENING PARTIES: **TINTINGERS INC**

DATE OF HEARING:

2 NOVEMBER 2020

DATE OF JUDGMENT:

4 DECEMBER 2020

**DATE OF PROVISION OF WRITTEN REASONS
FOR JUDGMENT:**

24 DECEMBER 2020