REPUBLIC OF SOUTH AFRICA

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

Case Number: 13719/2016

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

DATE: 15 FEBRUARY 2022
SIGNATURE: denise fisher

In the matter between:

CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O. Execution Creditor

And,

KUBHEKA, DUMISANI NELSON First Judgment Debtor

KUBHEKA, PRECIOUS MAKHOSAZANA Second Judgment Debtor

Case Number:14932/2016

In the matter between:

CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O. Execution Creditor

And,

MOWASA, MALETSATSI AUGUSTINA First Judgment Debtor

MOWASA, MOHLATLEGO JOSEPH Second Judgment Debtor

Case Number: 14488/2017

In the matter between:

CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O. Execution Creditor

And,

BUCKTWAR, RISHAL Judgment Debtor

Case Number: 11647/2019

In the matter between:

CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O. Execution Creditor

And,

HORSLEY, ROBERT HARRY Judgment Debtor

JUDGMENT

Summary- civil procedure – rules 46A(c),(d) and (e):

Held- reconsideration of a reserve price in terms of rule 46A(9)(c) should be sought by way of application in open court and not by approach to a judge in chambers.

Held- such an application should at least:

- **seek specific relief in the notice of motion;**
- **satisfy the court that the auction was properly advertised, at least, in accordance with the rules;**
- **assert that there are, to the best of the deponents belief, no reasons other than the reserve price being too high which could rationally be said to be a reason for the failure to achieve a bid at the reserve;**
- **be brought as interlocutory to the main application so that the court is afforded access to all documents in the main application and all other interlocutory maters;**
- **be brought as soon as possible after the sheriff's report is issued;**
- **explain any failure to hold the sale within six months of the handing down of the foreclosure order;**

- **place before the court any additional reliable evidence of the true value which could assist in the reconsideration process - for example information relating to other recent property sales in the area.**

Held - the report of the sheriff submitted in terms of rule 46A(9)(d) comprises both a return of service and an aid to the court and is always be the best evidence; the absence of such a report would have to be fully explained.

Held - That the reserve price was not achieved is a jurisdictional fact which is evidenced by the sheriff's report and without such evidence, the provisions of sub section (c) are not triggered.

Held - If the applicant specifically seeks that the court allow the property be sold at the highest bid that was received at the sale, the absence of the report is fatal to the application

Held- An application for reconsideration of the reserve price must be served on the judgment debtor and cannot be brought *ex parte.*

Held - the constitutional imperatives inherent in such an application and the fact that the foreclosure application itself requires personal service is sufficient to justify the requirement by a court that these applications also be personally served.

<u>Re- service of foreclosure applications generally</u>:
- Troubling trend of practitioners who draw foreclosure processes not indicating a date in the notice of application and contenting themselves with either leaving the date blank or stating that the date is to be allocated in due course by the registrar is not competent; the date must be in the notice of application; not enough to put date in set down only; where there is no date in the notice of application the registrar is not permitted to enrol the application.

- Fact that the sheriff's return of service evidences service on 'a tenant' is not, in itself, a reason to assume that the property is not the residence of the respondent; the South African rental market is such that it is not unusual for homeowners to rent out rooms or outhouses on their property whilst still occupying that property. It thus should not be assumed, without more, that the occupancy of a tenant puts paid to the operation of the rule.

- Fact that a spouse was served upon should not be regarded as sufficient service on the other spouse; this fails to take account of the prevalence of divorce or spouses living apart.

<u>FISHER J:</u>

Introduction

[1] These four cases were placed before me in chambers. The purpose of the applications is to seek, in terms of rule 46A(9)(c)-(d) the amendment of the reserve price set in terms of the original application for foreclosure. This relief is sought in the absence of the bringing of an application, without resort to a hearing in open court, and without service of the documents on the judgment debtor.

Procedural background

[2] Rule 46A (9)(a) and (b) deal with the setting of a reserve price in foreclosure applications and read as follows:

'Rule 46A

…

(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.'

[3] The foreclosure process is thus relatively clear and designed to protect the rights of the home-owner whilst allowing for the commercial necessity of execution. The application has a special format (Form 2A) which is designed to spell out the rights of the debtor in relation to the application as simply as possible. Essentially, the form prescribes that the debtor be told that he or she is allowed to oppose the foreclosure application on the date mentioned in the application or if he or she does not oppose to make his or her own submissions as to the appropriate reserve price.

[4] It has been held by a specially convened full court of this division that a court making a foreclosure order against a home-owner must as part of the process determine a reserve price in all but exceptional circumstances if the property is the home of the debtor.[1]

[5] The foreclosure application is one of the processes specifically singled out for personal service by the rules. This is to avoid the process being undertaken without the court being satisfied that the debtor has been afforded an opportunity to be heard on what must entail his or her most fundamental rights.

[6] The determination of the reserve, it is a delicate judicial task which has as its central endeavour the balancing of the respective rights of the parties. This task is impossible without the court being reliably told what the market value of the property is under circumstances of a forced sale and the debts which will have to be paid in order for the transfer of the property to be effected- i.e. municipal rates or levies and amounts for which the property is mortgaged.

[7] The determination also entails a consideration of the likelihood of the proposed reserve price being achieved and the respective prejudice to the interested parties if it

---

[1] *Absa Bank Ltd v Mokebe and Related Cases* (in particular, paragraphs [53], [57], [59], [61], [62], [63], [65] and [66] of the judgment). See also *Standard Bank of South Africa v Hendricks and Related Cases*.

is not achieved. Thus the prospect of the execution process not yielding the price set is a feature in the evaluation from the beginning of the process.

[8] This judgment deals with what should be done if the reserve price is not achieved. This is dealt with in subrules 46(9)(c), (d) and (e). These provisions read as follows.

'(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.'

[9] It is immediately apparent that this portion of the rule has not been framed with the same precision as to the process to be adopted. This is regrettable as this part of the process is as important if not more so to the balancing of rights. The constitutional imperatives which are protected by the enactment of Rule 46A generally and in connection with the determination of the reserve price are fundamental.

[10] If a property is sold at a price which is significantly below the true market value, the homeowner is liable to lose the investment made in the property and still be left indebted to the bank for more than is fair. For most homeowners the investment in the mortgaged property is the largest and most important of their lives. The very purpose of rule 46A is to avoid a homeowner's investment in his or her property from being unjustifiably impinged upon. It seeks to ameliorate the devastating effects of a debtor's inability to meet the payments of a mortgage loan and the inevitability of execution

against his or her home. One of its aims is to protect debtors by ensuring that homes are not sold in execution for prices which are not market related, as was a prevalent iniquity in the recent past. This protection to the homeowner touches directly on the constitutional imperatives to be found, inter alia, in section 26 of the Constitution (the right to housing) and s 1 of the Constitution which places an obligation on all to promote the value of human dignity, the achievement of equality and the advancement of human rights and freedoms.

[11] I have observed different approaches being adopted by practitioners in the pursuit of guidance as to the process to follow once the reserve price is not achieved. Practitioners variously apply in open court for relief or seek to approach judges in chambers. The form of these applications variously allows for service on the judgment debtor or is sought *ex parte*. The relief sought is framed with differing degrees of clarity and the evidence put forward to allow for the reconsideration process is often not of a high quality.

[12] In many instances practitioners, who may be justifiably fatigued in their endeavours to obtain execution for their mortgagor clients are tempted to do as little as possible in these applications. A common approach appears to be that the view is taken that after the first sale in execution fails the process no longer requires input from the homeowner. Such an approach is a figment born of the past is not consistent with the spirit and import of rule 46A.

[13] The four cases which I am dealing with in this judgment are examples an attempt to interpret the rule in a way that allows for a revisiting of the reserve price with as little trouble and expense to the creditor as possible and with limited regard to the rights of the homeowner.

[14] The contention made in each instance on behalf of the judgment creditor is that an application to court is not required. In each instance the documents filed on Caselines are supported by a document headed '*submission in terms of rule 46A(9)(c)(d) and (e)*'. These 'submissions' are made on affidavit by Mr Selwyn Keith Dewberry of attorneys Moodie and Robertson on behalf of the judgment creditor, Changing Tides in each case. The documents in each instance are not filed of record in the proceedings but consist merely of the disembodied submission and supporting

documents obtained from the sheriff. I am thus not apprised of the pleadings and other important documents which comprise the court file. Such documents would include the sworn valuation and the other documents which supported the determination of the reserve price in the first place.

[15] The affidavit of Mr Dewberry in each instance sets out the fact that no bids were received above the reserve price at the auction and the amount owing to the local authority. The point is made that, given the ever-increasing liability to the local authority, a further delay in the sale will cause prejudice to the judgment debtor and the judgment creditor. I am asked variously in the affidavits of Mr Dewberry either to (a) authorise the sale of the property without reserve; approve the highest bid received or substantially lower the reserve price; or (b) in the event that I am not prepared to so authorise, that I make an order as to how execution against the immovable property is to proceed.

[16] A more detailed examination of each of the cases is useful in that it conveys a real sense of the shortcomings in the approach adopted. I thus move to deal with each of the cases.

CASE NO. 2016/13719

[17] An undated sheriff's report is filed together with the submission document. The report confirms that the auction was held on 20 January 2021. The 'submission' is filed approximately five months later on 24 June 2021. The document is unstamped. There is no copy of the foreclosure order provided and no indication of the date on which it was handed down. The reserve price is said to be R640 000 I am asked to approve the highest bid at R400 000 or to give further directions as to execution.

CASE NO. 2016/14932

[18] This auction took place in on 3 February 2021. The submission was filed on Caselines on 21 June 2021. Again it is not stamped. There is no sheriff's report filed.

It is sought that I reduce the reserve from R350 000 to R 200 000 or give further directions. No explanation is given as to the absence of the sheriff's report.

CASE NO. 2017/14488

[19] The foreclosure order was granted on 21 Feb 2019 with a reserve price set at R470 000. The auction took place more than a year later on 20 March 2020. The Sheriff's filed her report, within the five days required, on 25 March 2020. The report records that highest bid was R300 000. In Feb 2021 i.e. nearly a year after the auction an application was issued by the judgement creditors attorneys asking for an order that a sale in the amount of R300 000 be authorised. There is no access to this application on Caselines. It is not clear if there was any service of this application and if so the form that it took. The application was placed on the unopposed roll for 18 February 2021. The court refused grant the order as it held that to do so would be unfair to the judgment creditor and the application was removed from the roll. Notwithstanding this, the applicant's attorneys have now filed the request again as a' submission' dated 27 may 2021 i.e. about 3 months after the court refused to lower the reserve. Why a judge should countermand the decision made by a court three months earlier is not explained.

CASE NO. 2019/11647

[20] The foreclosure order was handed down on 23 September 2019 with a reserve price set at R1 690 000. The sale in execution took place on 22 January 2021- i.e more than a year later. The report of the sheriff was duly issued on 26 January 2021. There was no bid at the reserve or above. It is asked in the submission made on 08 July 2021 that the reserve price be reduced to R910 000.

[21] As I have said, in each instance, none of the documents were served on the homeowner. On inquiry as to service, I was informed that notice to the homeowner was not a requirement of the sub-rule. It was submitted, by way of correspondence

with my office, that such cases are not applications and thus that no service or notice to any person was required.

[22] Rule 46A(9)(e) contemplates that the revisiting of the process be aided by the sheriff's report in relation to what transpired at the auction. This report must be made in terms of rule 46A(9)(d). The period prescribed for the submission of this report is a mere 5 days from the date of the auction. This suggests that the Legislature intends the reconsideration of the reserve price must be done within a short period of time and without undue delay. This stands to reason. Property values are not static and the vagaries of the market might render the original determination of the sale value of the property relatively unhelpful to the judge who is called on to determine the way forward when a sale is not obtained at auction if an inordinate time is allowed to pass between the auction and the approach to court.

[23] The sheriff's report must contain information as to the highest bid obtained; the details of people who attended the auction; the highest bid or offer made on the property; and any other relevant factor which may assist the court in performing its function. In one of the cases there is no sheriff's report. This notwithstanding the matter is still placed before me.

[24] It appears that it is sought in these cases to posit some sort of sui generis process which is, at once, a request for relief but not a formal application. It is submitted that all that needs to be done under the subrules is for the sheriff's report to be placed before a judge in chambers so that the judge can reconsider the position. It is submitted that its attorneys have seen to it that this occurs and that they have, in fact, gone further than the rule requires and have filed an affidavit in which they have set out further information as to the proposed reserve price of the property. These submissions reduce to the following questions for consideration:

- What form does the process under rule 46A(c),(d) and (e) take?
- Can the application be considered in the absence of a proper sheriff's report?
- Should there be service on the judgment debtor and, if so, what form should such service take?

I move to deal with these questions.

How should a request for reconsideration of the reserve price in terms of subsection 46A(9)(c) be brought?

[25] The submission made to the effect that the relief under rule 46A (c) – (e) is not claimed by way of application is perplexing. It is trite that the usual way in which a court's jurisdiction is engaged is by the issue of process in accordance with the rules of court and the Superior Courts Act. This is either in the form of an application or a summons. The fact that the rule does not specify the form that the approach to the court should take should not, to my mind, be construed as an invitation to depart from the norm – which is an application for specified relief supported by evidence on affidavit.

.

[26] It seems that these attempts to approach me in chambers is a misunderstanding of the process which is to unfold after the auction has failed. Rule 46(11) deals with the position which applies if the purchaser fails to comply with the terms of sale. In such a case the rule[2] provides that the sale 'may be cancelled by a judge summarily on the report of the sheriff conducting the sale.' In terms of the definition of 'judge' in rule 1 this means a judge sitting otherwise than in open court – i.e. in chambers. This process may have created the erroneous assumption that a judge may be approach in chambers once the auction has taken place and failed to achieve a sale at the reserve. This is decidedly not the case. The subrule does not use the term 'judge'; It provides that 'the court' must undertake the reconsideration process.

[27] The application is of the nature of a reconsideration of the original application and thus it is properly brought as interlocutory to the application. The rule creates a statutory basis for the variation of the original order. The trigger for the reassessment is that the reserve price has not been reached.

---

[2] Subrule 46 (11) (a)(i).

[28] Whilst a court is given a wide discretion under rule 46A(c) –(e) such discretion can only be exercised in accordance with the facts put forward by the parties or one of them and the sheriff.

[29] The task of the applicant for this relief is to satisfy the court that it is entitled to the relief it seeks. It must do this in the usual way – by way of affidavit made by a person having personal knowledge of the facts or having ascertained them.

[30] The starting point of the main rule 46A application for the determination of the reserve price is obviously the appropriate market price. This is considered again in an reconsideration application.

[31] The reconsideration application works from the perspective that there has been a change in the facts before the court. This change is found in the fact that the property has been subject to the sale in accordance with the conditions of the order and there have been no bids at the reserve.

[32] The implication of the rule seems to be that this failure to sell triggers a right to a reconsideration of the matter so as to allow for the determination of a proposed way forward. Clearly the execution should not be stymied by the failure to obtain a bid. This would be unfair to the applicant for execution. But can the fact that there have been no bidders at the sale or none who have bid at the reserve be enough, on its own, to determine that the reserve is too high?

[33] Michael Lombard in an article in the de Rebus entitled '*Amendments of rules in line with constitutional rights to adequate housing*' [3] states the following in in relation to the definition of market value: 'The property industry accepts the following definition of "market value", as provided by the International Valuation Standards Council: "Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing where the parties had each acted knowledgeably, prudently and without compulsion.'

[3] 2018 (May) *De Rebus* 30 at 31-32:

[34] I do not understand rules 46A(9) (c),(d) and (e) to allow for the sale of the property below its true forced sale market value. Indeed, the purpose of the inclusion of rule 46A was to prevent the selling of the property for amounts which were significantly below the actual value.

[35] A rote approach which says that the mere fact that the property was not sold is enough to suggest that the property should have no reserve, that a significant drop in the market price should be allowed or that the property should simply be knocked down to the lowest punter without further ado does not, to my mind, strike an appropriate balance between the interests of consumers and credit providers as mandated by the National Credit.[4]

[36] Instead, to my mind, a court faced with an application under these subrules is called upon to adjust the reserve price now taking into account, as one factor to consider, that the property has not sold for the reserve price. The implication is that the reserve price was not, in fact, the true forced sale market value i.e. a 'proof of the pudding' approach. But this may be a false assumption. What if for example the sale was not adequately advertised? What if the auction were held over a traditional holiday period which meant that appropriate buyers were less likely to attend the sale? There could be many reasons for the failure of the auction and the only possible inference to be drawn from the failure to reach the reserve is not necessarily that the reserve price is too high.

[37] To my mind the application for reconsideration should at least:

- seek specific relief in the notice of motion;
- satisfy the court that the auction was properly advertised, at least, in accordance with the rules;
- assert that there are, to the best of the deponents belief, no reasons other than the reserve price being too high which could rationally be said to be a reason for the failure to achieve a bid at the reserve;

[4] Act 34 of 2005

- be brought as interlocutory to the main application so that the court is afforded access to all documents in the main application and all other interlocutory maters;
- be brought as soon as possible after the sheriff's report is issued;
- explain any failure to hold the sale within six months of the handing down of the foreclosure order;
- Place before the court any additional reliable evidence of the true value which could assist in the reconsideration process - for example information relating to other recent property sales in the area.

[38] If the auction was held more than six months after the foreclosure order was handed down a court may wish to be furnished with a fresh sworn valuation.

The absence of the sheriff's report

[39] As set out above, in case 2016/14932 there was no report of the sheriff as contemplated in rule 46A(9)(d). What is the consequence of this omission? It seems that the report of the sheriff in this instance comprises both a return of service and an aid to the court. Unless the deponent to the affidavit has personal knowledge of what occurred at the sale, the sheriff's report would have to be submitted. This would always be the best evidence and the absence of such a report would have to be fully explained. That the reserve price was not achieved is an important jurisdictional fact which is evidenced by the sheriff's report. Without such evidence, the provisions of sub section (c) are not triggered.

[40] If the applicant specifically seeks that the court allow the property be sold at the highest bid received at the sale, however, the rule prescribes that the court, before making such an order, must have reference to the sheriff's report. Thus, if such an order is sought, the absence of the report would be fatal to the application. If the sheriff's report is non-compliant with the rules and thus deficient as to the assistance it provides, a court would be justified in refusing the relief.

Service

[41] Before dealing with service in respect of these applications I must say something in regard to the manner in which service of foreclosure is treated by some practitioners.

[42] Sitting in the unopposed motion court I have noticed a troubling trend of practitioners who draw the foreclosure processes not indicating a date in the notice of application and contenting themselves with either leaving the date blank or stating that the date is to be allocated in due course by the registrar. They then follow up this inchoate notice with a notice of set down which purports to appoint the date. Such a process is not permissible; Rule (4)*(a)*(i) is peremptory and prescribes that 'The applicant shall in the notice of application;

(i) state the date on which the application is to be heard;' (Emphasis added).'

[43] Furthermore, in terms of rule 46A(7) the registrar is peremptorily enjoined ('shall') to 'place the matter on the roll for hearing by the court on the date stated in the Notice of Application'. (Emphasis added).

[44] Thus the registrar is precluded from placing the matter on the roll for a date which is not that stated in the notice of application. Accordingly, the setting down of the matter by way of notice of set down where there is no date in the notice of application is not permissible.

[45] A further regular occurrence is for legal practitioners to rely on the fact that the sheriff's return of service evidences service on 'a tenant' for the proposition that the property is not the residence of the judgment debtor. This does not necessarily follow. The South African rental market is such that it is not unusual for homeowners to rent out rooms or outhouses on their property whilst still occupying that property. It thus should not be assumed, without more, that the occupancy of a tenant puts paid to the operation of the rule.

[46] A further approach is to submit that the fact that a spouse was served upon should serve as proper service. This fails to take account of the prevalence of divorce or spouses living apart.

[47] Getting back to the matters before me, the submission on behalf of the applicant is that, even if an application in open court is required, it can be made *ex parte*. There is no basis whatsoever for this assertion. The question then is whether it is sufficient that such service should be effected in terms of rule 4 or whether it should be personal.

[48] To my mind, the constitutional imperatives inherent in the application and the fact that the foreclosure application itself requires personal service is sufficient to justify the requirement that these applications also be personally served.

Conclusion

[49] The cases placed before me do not constitute applications and are irregular steps. I decline to entertain them in chambers or at all and make no order in respect of any of them.

denise fisher

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Judgment Delivered: 15 February 2022.

APPEARANCES:

The matters were dealt with in Chambers.