HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 34524/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 16 MARCH 2022

SIGNATURE [redacted]

In the matter between:

CHANGING TIDES 17 (PTY) LTD Applicant

and

ADRIANUS WILHELMUS CORNELIS SCHUURMAN First Respondent
MARYKA SCHUURMAN Second Respondent
GOVAN MBEKI MUNICIPALITY Third Respondent

J U D G M E N T

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

This is an application by the judgment creditor for the ratification of a sale in execution of an immovable property where the reserve price fixed by this court had not been attained. The judgment debtors are represented by Mr Venter, an attorney appointed by the Legal Practice Council, acting pro bono. He is thanked for his assistance. The judgment debtors are referred to as "the respondents", which reference then excludes the cited Municipality.

[2] Relevant chronology

2.1 On 11 October 2018 default judgment was granted by the then Deputy Judge President of this court for payment of the outstanding amount on a home loan in the amount of R1 160 417, 43, together with interest and costs.

2.2 As part of the aforesaid order, a certain immovable property belonging to the respondents situated in Secunda (the property) was declared specially executable. A reserve price of R900 00, 00 was set in terms of the provisions of Rule 46A(8)(e). Execution of the order was suspended for four months.

2.3 Almost a year later, on 18 September 2019, the sale in execution took place. It was reasonably well attended by nine bidders as well as the judgment creditor's attorneys.

2.4 The highest bit at the auction was for R 800 000.00, made by one Jacob Mphogato Ledwaba.

2.5 The sheriff gave a report in respect of the sale in terms of Rule 46A(9)(d), confirming the above and stated his opinion that the reserved price might not be met, even at another sale in execution.

2.6 On 9 March 2020, the judgment creditor launched the application under consideration, applying for an order ratifying the sale in execution at R800 000,00 to Mr Ledwaba, alternatively that the property be re-sold without a served price.

2.7 The abovementioned application was initially to be heard on 30 September 2020. Service of the application took place on 4 September 2020 by affixing a copy at the principal door of the property.

2.8 The matter did not proceed on 30 September 20202 and was set down again for hearing on 13 June 2021. On 7 June 2021 the respondents gave notice of opposition to the application and delivered their opposing affidavits on 10 June 2021. This caused the application to be postponed and the respondents were ordered to pay the wasted costs occasioned by the postponement.

2.9 On 10 August 2021 the judgment creditor delivered its replying affidavit, whereafter heads of argument were exchanged and the matter found its way to the opposed motion court roll.

[3] <u>The respondents' opposition</u>

The respondents' only opposition persisted with was that there is no evidence available that the preceding steps to a sale in execution, namely a formal attachment as provided for in Rule 46(2) or service of the conditions of sale on the respondents 15 days prior to the date of sale as provided for in Rule 46(8)(c) had taken place. The respondents say this never took place and that, should the sale to the highest bidder be ratified, the sale might be

attacked on this ground and transfer to Mr Ledwaba could not validly be effected.

[4] Not only could the judgment creditor not refute the above denials of service but the return of service which was produced in respect of the conditions of sale, was in respect of service on 17 May 2021, that is after the sale. It may be that documents may have gone missing or lost and it is surprising that the respondents only raise this issue so long after the sale. It was also not raised in correspondence prior to the preceding urgent application. Some doubt exists therefore, about the bona fides of their opposition. Be that as it may, there might be a risk to an innocent bidder which in my view should be avoided.

[5] Appropriate relief

5.1 In terms of Rule 46A(9)(c) where the reserve price is not achieved at an auction, the court may, after consideration of all relevant factors, "*order how execution is to proceed*".

5.2 Despite the respondents collateral allegations regarding the sale in execution, they have not applied for the actual sale in execution to be found to be invalid and no such declaration has been made. The allegations made by them are therefore merely considered as possible risk factors, militating against the granting of an order in terms of Rule 46(9)(e), namely a sale to the person who made the highest bid. I was also concerned about whether that person, Mr Ledwaba, was still able or willing to purchase the property after such a long time has elapsed. The parties could not assist the court in this regard, which is another factor militating against a ratification of a sale to him as highest bidder.

5.3 Taking all these factors into consideration, I am of the view that a fresh sale in execution should take place. Mr Venter conceded that this would be the appropriate consequence of the respondents' opposition to the application. This is also the alternative relief claimed by the judgment creditor.

5.4 The question then is whether the same or a different reserve price, or none at all, should be set. The returns of service made by the sheriff since the granting of the order, all indicate that the property is no longer the primary residence of the respondents. On 28 May 2019 the warrant of execution in respect of the property which has been declared executable, was served at the property on a Mrs Brunner who was a tenant thereof. She was also served with a copy of the warrant as being the occupier of the property when the sheriff obtained a detailed description of the property.

5.5 In their answering affidavits, the respondents declined to furnish their current addresses. They also failed to answer to the express allegation made in the judgment creditor's founding affidavit supporting the current application that the property is no longer the primary residence of the respondents and that therefore, there is no need for a reserve price to be set, contrary to what may have been the initial position when executability was considered in terms of Rule 46(A)(1). The protection of primary residences as contemplated by this Rule is therefore no longer necessary.

5.6 Taking all these factors into consideration, I am of the view that the alternative relief claimed by the judgment creditor, should be granted. Taking into account the absence of proof of preceding steps but also the technical nature of the defence and the lateness thereof, in the exercise of my discretion, I determine that each party should pay its own costs.

[6] Order

1. The immovable property which has been declared executable by the order of this court dated 11 October 2018 is to be sold by the sheriff at a new sale in execution, without any reserve price.

2. Each party shall pay its own costs of this application.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 7 March 2022

Judgment delivered: 16 March 2022

APPEARANCES:

For Applicant:	Adv C J Welgemoed
Attorney for Applicant:	Strauss Daly Incorporated, Umhlanga c/o Strauss Daly Incorporated, Pretoria
For 1st & 2nd Respondents:	Mr D W Venter
Attorneys for 1st & 2nd Respondents:	Venter & de Villiers Attorneys, Pretoria