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

Case No. 5642/2018

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 1 and 23 August 2022
Date of judgment: 2 September 2022

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD Plaintiff

and

VIANA NTUMBA TCHIBAMBA First Defendant

VIRGINE NTUMBA MBUYI Second Defendant

JUDGMENT

BINNS-WARD J

[1] This matter concerns the reconsideration of a reserve price fixed in the order made in an application brought in terms of Rule 46A for leave to execute against the defendants' property that is their primary residence. It has raised the problematic question of the practical working of Rule 46A(9). Rule 46A was inserted into the Uniform Rules by GNR 1272 dated 17 November 2017.[1] It came into operation on 22 December 2017.

[2] On 1 June 2018, this court (per Slingers AJ) granted judgment by default against the defendants (hereinafter referred to as 'the judgment debtors'), jointly and severally, in the sum of

[1] Published in GG No. 41257 of 17 November 2017.

R955 411,72, together with interest thereon at 8,86% per annum from 21 December 2017. The plaintiff's claim was in respect of the outstanding amount due in respect of a mortgage loan contract upon which the plaintiff bank foreclosed when the judgment debtors had fallen significantly into arrears with their monthly payments. Notwithstanding the terms of the mortgage contract, the learned acting judge refused to order the mortgaged property directly executable and required the plaintiff first to try to execute the judgment against the defendants' movable assets. (This was before the delivery of the full court's judgment in *Standard Bank of South Africa Limited v Hendricks and Another and various other matters* [2018] ZAWCHC 175 (14 December 2018); [2019] 1 All SA 839 (WCC); 2019 (2) SA 620 (WCC), which counselled against that approach.[2]) The Sheriff was subsequently able to attach moveable assets with an estimated value of only R51 600, which was a sum insufficient even to cover half of the amount in which the judgment debtors were then in arrears on the mortgage loan account.

[3] The matter therefore had to be reenlisted in the unopposed motion court for the hearing of a standalone application in terms of rule 46A. That application came before Sievers AJ on 20 August 2019. He granted an order declaring the mortgaged property executable to satisfy the judgment debt.

[4] Rule 46A(8)(e) empowers a court granting such an order to determine a reserve price for the sale in execution. In *Hendricks* supra,[3] the full court expressed the view that only in

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[2] At para 35-40, adopting the reasoning in *Absa Bank Ltd v Mokebe and Related Cases* [2018] ZAGPJHC 485 (12 September 2018), 2018 (6) SA 492 (GJ) in para 9-30. The pertinent principles had, in fact, already been rehearsed - with reference, *inter alia*, to Constitutional Court and appeal court authority - in earlier decisions of this court before the advent of rule 46A; see *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) at para 33-35 and *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) at para 16-26.

[3] In para 63.

'exceptional circumstances' should a court seized of an application under the rule not exercise its discretion to set a reserve price. Rule 46A(9)(b) provides in that connection:

> 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—
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> (i) the market value of the immovable property;
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> (ii) the amounts owing as rates or levies;
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> (iii) the amounts owing on registered mortgage bonds;
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> (iv) any equity which may be realised between the reserve price and the market value of the property;
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> (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);
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> (vi) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;
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> (vii) the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;
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> (viii) any prejudice which any party may suffer if the reserve price is not achieved; and
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> (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.

[5] In this case, notwithstanding that I have yet to come across a sale of immovable property in real life that turned on a matter of cents, a reserve price of R973 032,05 was fixed by the court. The judgment debtors were ordered to pay the plaintiff's costs in the rule 46A application on the scale as between attorney and client.

[6] A writ of attachment in respect of the mortgaged property was issued by the registrar on 9 October 2019, but the sale in execution took place only on 7 December 2021. The reasons for the delay were reportedly the dislocating effects of the Covid-19 related lockdown and the

engagement of the plaintiff (to which I shall hereafter refer as 'the judgment creditor') in 'numerous attempts' to make alternative payment arrangements with the defendants. The defendants reportedly failed to comply with their obligations under the arrangements that were made.

[7] There were three bidders at the sale in execution conducted at the office of the Sheriff for the Goodwood 1 district. The property was knocked down to the highest bidder for R700 000. The successful bidder was aware of the reserve price,[4] but reportedly refused to increase the bid to match it because he considered the property to be in poor condition and was concerned that in order to for his principal to obtain vacant occupation of the property a costly eviction process would be required to evict the foreign nationals living there. It is common ground that the judgment debtors are foreign nationals holding refugee status in South Africa. The judgment debtors have testified in the current proceedings that part of the property is let to tenants who are themselves in arrears with their rentals. The nationality of the tenants has not been disclosed.

[8] The conditions of sale contained the following provision (in clause 2.2):

> '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.'

The clauses mentioned committed the highest bidder to (i) signing the conditions of sale as soon as possible after the sale and immediately upon request by the Sheriff, (ii) the immediate payment to the Sheriff of a deposit equating to 10% of the selling price and (iii) payment on demand of the Sheriff's commission. It appears from the Sheriff's return, a copy of which was sent by email to

[4] It was reflected in the conditions of sale.

the judgment creditor on 14 December 2021, that the successful bidder had before that date paid the sum of R94 150,00 in compliance with the conditions of the sale in execution. The money is being held by the sheriff pending the determination of the current proceedings.

[9] Rule 46A(9)(d) provides:

> 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—
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> (i) the date, time and place at which the auction sale was conducted;
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> (ii) the names, identity numbers and contact details of the persons who participated in the auction;
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> (iii) the highest bid or offer made; and
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> (iv) Any (*sic*) other relevant factor which may assist the court in performing its function in paragraph (c).

The stipulation of a 5-day time limit for the submission of the report suggests an appreciation by the rule maker that an element of urgency is involved so that the required reconsideration by the court can be done expeditiously.[5]

[10] Paragraph (c) referred to in Rule 46A(9)(d) provides:

> 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. (Underlining for emphasis.)

Rule 46A(9)(e) then provides (in evident amplification of Rule 46A(9)(c) quoted above)):

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[5] As Fisher J noted in *Changing Tides 17 (Proprietary) Limited N.O. v Kubheka; Changing Tides 17 (Proprietary) Limited N.O. v Mowasa; Changing Tides 17 (Proprietary) Limited N.O. v Bucktwar; Changing Tides 17 (Proprietary) Limited N.O. v Horsley* [2022] ZAGPJHC 59 (15 February 2022) at para 22 '*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*'. It is not only the vagaries of the market that can be affected by the passage of time, but also the condition of the property and the position regarding its occupation. Time is of the essence if fixing reserve prices is to be of fair and meaningful effect.

> 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.

[11] Van Loggerenburg, *Erasmus, Superior Court Practice* Vol 2 (Juta) observes '[p]*aragraphs (c), (d) and (e) of subrule (9) are not clearly worded*'.[6] I regret to say that I have to agree. It is not so much that the individual paragraphs do not read clearly enough when each is considered on its own; it is that, read together, they fail, conspicuously, to provide any procedural framework in terms of which the mandatory reconsideration prescribed in paragraph (c) is to happen. As the current matter and others to which I shall refer illustrate, such a framework is plainly required.

[12] The shortcoming in the subrule was recognised in *Changing Tides 17 (Proprietary) Limited N.O. v Kubheka; Changing Tides 17 (Proprietary) Limited N.O. v Mowasa; Changing Tides 17 (Proprietary) Limited N.O. v Bucktwar; Changing Tides 17 (Proprietary) Limited N.O. v Horsley* [2022] ZAGPJHC 59 (15 February 2022), in which Fisher J, sitting in the Gauteng Division (Johannesburg), in four 'applications' by a judgment creditor that were placed before her in chambers, sought to remedy the situation by providing some procedural guidelines to be followed in such cases in that jurisdiction. The learned judge recorded that in her own experience practitioners dealt with the means of obtaining the prescribed reconsideration of a reserve price under rule 46A(9)(c) in a variety of ways that showed up an undesirable lack of uniformity.[7]

[13] Prior to the introduction of the Uniform Rules, almost 60 years ago, the divisions of the then Supreme Court operated in accordance with their own discrete rules of court. The object of the Uniform Rules, as their title suggests, is to promote a desirable degree of uniformity in the practices and procedures of the various divisions and local divisions of the High Court nationally.

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[6] RS 18, 2022, D1-632W, citing *Changing Tides* supra, at paragraph 9.

[7] In para 11-12.

The gaps in rule 46A mean, however, that the courts are unavoidably thrown back on their own devices to fill them. The inevitable result is the current lack of predictability and, going forward, a likely lack of uniformity. That is far from ideal. Clearly, the situation should enjoy the early attention of the Rules Board.

[14] In the current matter, the Sheriff duly compiled a report in compliance with paragraph (d) of rule 46A(9). It appears to have been produced on the same day as the sale in execution took place. I assume that he lodged it with the registrar and provided a copy to the judgment creditor. The precise position in that regard is not clear on the papers. The report was placed before me about nine months later as an annexure to each of the supporting affidavits in the two court applications that followed. I shall describe those applications and their unhappy histories presently.

[15] The Sheriff's report contained the following additional information, no doubt included by virtue of sub-para (iv) of rule 46A(9)(d): '*The property is further in a poor condition on the inside and will require substantial renovation/work*'. It seems to me that the content of the report falls within the ambit of s 43(2) of the Superior Courts Act 10 of 2013, which provides" '*The return of the sheriff or a deputy sheriff of what has been done upon any process of a court,* (sic*) shall be prima facie evidence of the matters therein stated*'.[8] Accordingly, in the absence of cogent evidence to contradict what the Sheriff has reported, I must accept for present purposes that the state of the property is as he has described.

[16] It is evident that once the Sheriff had made his report, confusion reigned as to how to bring about the reconsideration required by paragraph (c). It is necessary to chronicle the events, as they

[8] The noun '*return*' is not specially defined in the Act. The relevant definition given in the *Oxford Dictionary of the English Language* is 'an endorsement or report by a court officer or sheriff on a writ'.

were set out in the affidavit of the judgment creditor's attorney, in some detail to illustrate just how grave and deserving of remedial attention the practical consequences of the shortcomings in subrule (9) can be. To remark that in the current case they exposed a gaping chasm between the evident objectives of the subrule and their effective achievement would be an understatement.

[17] After the Sheriff had produced his report the judgment creditor brought an application in February 2022 seeking the same relief that the Sheriff does in the current application. Attempts were made to get the application heard as a matter of urgency on 14 February 2022, but in the circumstances described in a letter by the judgment creditor's attorney to the Judge President quoted below, the registrar allocated 17 August 2022 as the date on which the matter might be enrolled on the ordinary unopposed motion court roll.

[18] Concerned about the obviously prejudicial implications of the delay between February and August, the judgment creditor's attorneys addressed a letter, dated 4 March 2022, to the Judge President seeking directions as to the manner in which matters arising for reconsideration in terms of rule 46A(9)(c) should be dealt with. In its most pertinent part, the letter went as follows:

> 'This matter was initially placed on the urgent court roll for 14 February 2022, after the service of the application via e-mail on the execution debtors as well as on the purchaser. The honourable Judge Slingers was on duty in the urgent roll on the said date and Judge Papier was on duty in Third Division. Judge Slingers suggested to our counsel that the matter should be referred to Judge Papier in Third Division. Judge Papier refused permission to enrol the matter in Third Division and advised our counsel that applicant should apply for the allocation of a date for the hearing on the prescribed form. A copy of the prescribed form is also annexed to this letter. We specifically indicated that it was an interlocutory application in terms of rule 46A(9)(c). As would appear from annexed application for the allocation of a trial date, the registrar allocated a date 6 months in advance, namely 17 August 2022 for the hearing of the application.

Apart from the reasons for urgency as set out in the founding affidavit of the interlocutory application (see ...) these applications are, in our opinion, always of an urgent nature, due to the following considerations:

1. The highest bidder at the auction in the attached matter ... paid a 10% deposit amounting to R70 000.00 as well as the Sheriff's commission amounting to R24 150.00 (a total of R94 150.00) to the Sheriff as long ago as 7 December 2021;

2. In many matters where properties are eventually sold in execution by the Sheriff after all attempts by the Bank to enter into a payment arrangement with the judgment debtor [have] failed, it often happens that the properties are vacated on the day of the sale in execution and are therefore subject to being vandalised or being occupied by illegal occupants;

3. In many cases, the properties are also left uninsured, which will expose the bondholder to the total loss of their security in the event of the property burning down or being vandalised.

There currently seems to be a total lack of uniformity as to how these applications for the reconsideration of the reserve price together with the Sheriff's report should be "placed before a Judge".

We are of the opinion that it is not a reasonable outcome to expect the highest bidder to wait a period of nine months before he will know whether his provisional offer will be accepted or not, whilst his deposit and commission amounting to more than R94 000.00 is lying on the trust account of the Sheriff. Applicant [ie the judgment creditor] is also being prejudiced as no instalments are being paid pending the outcome of the application for the reconsideration of the reserve price and applicant's security is being eroded every month an instalment is not paid.

On behalf of applicant, we respectfully request Your Lordship to issue guidelines so that everyone in this Division can be on the same page as to how these interlocutory applications should be enrolled.'

[19] The forementioned letter was taken, together with the court file, to the Judge President's registrar. On 18 March 2022, the judgment creditor's attorney received a letter in response from the Judge President's registrar in the following terms:

> 'I refer to your letter dated 4 March 2022 and wish to inform you that the Judge President directed that this matter can be heard in open court before a Judge as soon as possible.
>
> Trust the above is in order.'

[20] The reply did not assist the judgment creditor's attorneys in determining how the matter might be brought be before a judge in open court expeditiously. They therefore sought clarity in this connection and received the following advice in a further letter from the Judge President's registrar, dated 24 March 2022:

> 'The Judge President did not direct that this matter should go on the 3rd division roll. Please consult with Zane Booysen [a clerk in the Chief Registrar's office]. He will be able to assist as I sent this file to him.'

(The 'Third Division' is the expression used in the Western Cape Division of the High Court to refer to the court reserved for the hearing of unopposed applications and divorces.)

[21] A candidate attorney in the employ of the judgment creditor's attorneys was thereupon instructed to advance the matter in accordance with the advice received from the Judge President's registrar. It seems that his instructions must have been to seek a date for the hearing of the matter sometime in April. He was directed, presumably by Mr Booysen - although whether that was so is not spelled out in the papers - to the Third Division registrar. The latter sent him on to another clerk in the Chief Registrar's office, one Unati, because the earliest opening for a hearing that the Third Division registrar could offer at that stage was in November 2022. According to the judgment creditor's attorney's affidavit, Unati indicated that if a hearing were required in April 2022, the matter would have to be referred to the Chief Registrar, Ms David.

[22] The attorney testified that the file was taken to Ms David's office on 30 March 2022, whereafter attempts were made at the office of the Chief Registrar to speak to Ms David about the

matter on six separate dates between 8 and 28 April 2022. An interview with Ms David was obtained only on 3 May 2022. The candidate attorney was then informed that Ms David had discussed the matter with the Judge President and that she had been instructed that use should be made of Rule 46A(9)(d) and that an application should be brought by the Sheriff, not the judgment creditor. (Rule 46A(9)(d) contains nothing about an application by the Sheriff.) The Chief Registrar advised that once an application had been brought by the Sheriff, she would allocate a court date.

[23] On 11 May 2022, the judgment creditor's attorney again approached the Judge President's registrar by email to seek clarity concerning the information given by the Chief Registrar because he was unable to understand why the Sheriff, rather than the judgment creditor, should bring the application. As I shall explain, below, it is clear that in this regard the attorney was of the same mind as the learned judge in *Changing Tides* supra. The Judge President's registrar responded that she was unable to be of further assistance.

[24] The attorney then sought clarity from the Chief Registrar in an email dated 17 May 2022, as follows:

> 'We refer to the aforesaid matter where the property was sold on 7th December 2021 below the reserve price.
>
> The Sheriff submitted his report in terms of Rule 46A(9)(d) which was annexed to our interlocutory application in terms of Rule 46A(9)(c) & (e). We attempted to set the matter down for hearing on 14th February 2022. The matter was not heard due to uncertainty on which court roll it should be enrolled. After months of trying to obtain answers from the High Court, Mrs David confirmed to our candidate attorney ... that she liaised with the Judge President and that the Sheriff (not the [judgment creditor's] attorney) should bring the application.
>
> We are confused as the Sheriff, in terms of 46A(9)(d), should only file a report. However, this is not what Mrs David instructed.

> Accordingly let us have clarity regarding the identity of the person who needs to bring this application.'

[25] The judgment creditor's attorney informed the Sheriff about the instructions reportedly received by the Chief Registrar. He testified that the Sheriff was 'just as confused' as he was, but it was decided by both of them that the Sheriff should bring the application supported by an affidavit by the judgment creditor's attorney on behalf of both the judgment creditor and the purchaser in terms of the sale in execution in order '*to move this matter forward and obtain clarity on this important legal matter*'.

[26] The Chief Registrar then responded on 11 June 2022 to the judgment creditor's abovementioned email of 17 May. Her reply went as follows:

> 'Your e-mail below refers, sorry for the delayed response.
>
> The rule is unclear as to who brings the application. The instruction that it should be the Sheriff comes from the Judge President.
>
> Other Sheriffs processed the application through the chamber book in the past.
>
> However, our latest directives issued on 1 June 2022 indicate that the Judge who set the price must attend to the matter. [As will appear presently, that was not an entirely accurate statement. The practice directive is quoted in full in para 27, below.]
>
> In this case Acting Judge Sievers who is no longer on the bench, set the reserve price.
>
> According to our latest directives the judge president must be approached to refer the matter to a judge for determination in open court.
>
> I will take your e-mail to the Judge President indicating that you wish to obtain clarity on his instruction.
>
> I will revert with his response.'

There is nothing further in the papers concerning a response from the Judge President.

[27] The 'latest directives' referred to by the Chief Registrar were issued by the Judge President on 1 June 2022. They provide as follows in relevant part:

> '**33A RESERVE PRICE / RULE 46A**
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> 1) In applications to adjust the reserve price in the sale of immovable property in terms of rule 46A where the reserve price set is not achieved, it shall be in the sole discretion of the Judge fixing the initial price to order that he or she will retain the matter and this must be reflected in his or her order. The application should ideally be heard in open court before a judge.
>
> 2) In the event that the latter is not available, the Judge President must be approached to allocate a judge to give appropriate directives.
>
> 3) Papers shall be served on all the parties. Personal service on the judgment debtor is required.'

I shall revert to the directives later in this judgment.

[28] The matter came before me in the Third Division on 1 August 2022. There was nothing on file to indicate that its enrolment there happened pursuant to the latest directives. I was not allocated by the Judge President 'to give appropriate directives'.

[29] By that stage the application had become 'opposed' by the judgment debtors. Opposed matters are ordinarily referred from the Third Division for hearing on a predetermined date on the opposed motion court roll. Apparently resigned to the conclusion that Rule 46A(9) reconsiderations were not afforded priority in the Court's allocation system, the judgment creditor's legal representatives asked for the matter to be further postponed to 26 January 2023 on the opposed motion court roll, which was the earliest date that could be obtained from the registrar's office. It does not appear to have been appreciated by any of the parties that the reconsideration prescribed by rule 46A(9)(c) is a procedural requirement; it is not a process that

can be opposed. It is a process in which the court must consider any relevant evidence put before it, but the process is *not* an adversarial one.

[30] Appreciating that the situation was entirely unsatisfactory, and at odds with the indications in the subrule and the considerations of practicality that enjoined that these matters be disposed of expeditiously, I decided *mero motu* to retain the matter and hear it on the earliest feasible subsequent date, namely 23 August. I issued directions for the exchange of papers to render the matter ripe for hearing on that date.

[31] In their 'opposing' affidavit, the judgment debtors took a misjoinder point. They contended that the Sheriff did not have standing to bring the application. The point was bad, as I shall explain presently. They also, misdirectedly, objected to the matter being entertained as a matter of urgency and contended that there was no justification for '*dispensing with the time limits and rules applicable to applications in general*'. Seizing on a statement in *Changing Tides* at para 37 that the judgment creditor should satisfy the court that the sale had been properly advertised, the judgment debtors contended that the judgment creditors had failed to discharge their duty to do so. In my view, their contention was misconceived. The reconsideration posited by rule 46A(9)(c) does not impose an onus on the litigants. If any party contends that the sale was not properly advertised, it is for them to raise the issue and adduce evidence in support of their contention, which, if it were good, would probably result in the setting aside of the sale as invalid rather a reconsideration of the reserve price. In the absence of such evidence, a court will apply the maxim *omnia rite esse acta praesumuntur*. But the very fact that these palpably bad points could be taken by the judgment debtors, who were legally represented, affords further illustration of the prevailing uncertainty and confusion concerning the operation of subrule (9).

[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 46A(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 the rule 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.

[34] It is not surprising in the circumstances that resort has been had to a variety of procedural methods in an endeavour to make the subrule work; necessity is after all the mother of invention. The examples that came before Fisher J in *Changing Tides* were signally misconceived, however, because, for the reasons identified by the learned judge, they fell lamentably short of equipping the court to properly undertake the reconsideration consonantly with the subrule's express requirements.

[35] Leaving aside certain types of application properly brought *ex parte*,[9] the notion of an application posits an adversarial proceeding. As evident from the discussion above, that is plainly how the judgment debtors and their legal representatives in the current matter perceived the process. They thought that the judgment creditor or the Sheriff had to make out a case, and that

[9] Curatorship applications in terms of rule 57 are one example.

the proceedings fell to be governed by the procedural rules of evidence – hence their objection to the introduction of 'new matter' in the Sheriff's supplementary affidavits. In my judgment, the conception that an application process in the conventional sense is engaged is misconceived. The judicial reconsideration posited in rule 46A(9)(c) is plainly inquisitorial in character and, unlike in ordinary adversarial proceedings, the court must be able to call upon the Sheriff or the protagonists in the principal rule 46A application to supply it with any information it needs to do the task (see rule 46A(9)(b)(ix) and (d)(iv)). It is the rules of inquiry that are missing.

[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.

[37] It is also plain from the requirements of rule 46A(9) that the court can properly undertake the reconsideration prescribed in terms of para (c) thereof only with updated information and the opportunity for input from the protagonists in the original rule 46A application. The rule is deficient in that it does not provide for how those parties are to be given notice of the

reconsideration or as to in what manner and by when they should exercise their right to adduce evidence or address argument.

[38] In my view, the rule, properly construed, contemplates the reconsideration exercise prescribed in terms of Rule 46A(9)(c) to be an extension of the application provided for in subrule (3). 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 would expect the rule to provide for it. It does not. That does not surprise me. The exercise that is 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 46A(3) so that it can be effectively executed. The reconsideration does not occur in a new matter. Rule 46A(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.

[39] The unfortunate lacunae in subrule (9) require of the court itself to deal with the consequences pending the remedial intervention plainly called for from the Rules Board. The express provisions of the subrule necessarily imply that the registrar should place the Sheriff's report before a judge and make the necessary arrangements to render the prescribed reconsideration ripe for hearing in open court after a reasonable opportunity has been afforded to the interested parties (*viz*. the judgment creditor and debtor and the successful bidder at less than the reserve price (if there is one)) to adduce such additional evidence as they might be advised to.

[40] The aforegoing would not entail an altogether novel process. In this Division, for example, the registrar sets down case management matters for consideration by case manager judges on defined dates upon notice to the litigants that they must file pre-trial minutes by a stipulated date

before the case management meeting is to take place. It would require only minor adjustments to that well-established system to make an equivalent system in respect of subrule 46A(9) workable.

[41] The registrar would, in the system that I envisage, determine in consultation with the Judge President –

(i) to which judge the Sheriff's report should be referred;

(ii) the date upon which the reconsideration in terms of Rule 46A(9)(c) would be heard in open court;

(iii) the date(s) by which the interested parties would be required to file supplementary affidavits and heads of argument, and

issue a notice to the interested parties timeously informing them of the aforegoing.

All of these measures would be undertaken mindful of the relative urgency with the rule maker, for good reason, contemplated that the prescribed reconsideration should take place, but also remembering that a reasonable time would in many such matters be needed for updated property valuation reports to be obtained. I cannot think of any good reason why an interval of more than 3-4 months should ordinarily be necessary between the date of the filing of the Sheriff's report and the reconsideration of the reserve price in open court.

[42] As mentioned, practice directive 33A (quoted above) has been issued in an endeavour to assist in matters in which a reserve price has to be reconsidered. Counsel reported during the hearing before me that the directive has not addressed all the difficulties that practitioners were experiencing with rule 46A(9). The essence of the practice directive is not incongruent with the system that I have ventured above might be adopted to meet those difficulties. So, in a case where a judge had determined, when fixing a reserve price, that he or she would retain the matter, the

registrar would place the sheriff's report before that judge and inform the parties of the relevant timetable for the reconsideration hearing to take place before that judge rather than a judge allocated by the Judge President.

[43] The practice directive must obviously be construed consonantly with the rule. The proper construction of the rule, and subrule (9) in particular, has been undertaken above. The reference to 'applications' in para 1 of the directive accordingly falls to be interpreted to mean the reconsiderations prescribed in rule 46A(9)(c), and thus *not* to imply fresh proceedings on notice of motion. The statement in para 1 that the judge determining the '*initial price' may 'retain the matter*' is consistent with my construction of subrule (9). Retention can only refer to an extant matter. The verb 'retain' means 'to keep in possession';[10] one cannot 'retain' an application that has yet to be made. Para 1 of the directive thus recognises the implication in subrule (9) that the judge who initially fixes the reserve price is not *functus* until the contemplated sale in execution has been concluded at or above the determined reserve price. In my opinion, the prescribed reconsideration must take place in open court, rather than only 'ideally' so. For the reasons I have sought to articulate, it is an extension of the proceedings commenced in terms of rule 46A(3). Such proceedings are ordinary motion proceedings, and thus subject to the general requirements of s 32 of the Superior Courts Act 10 of 2013.[11] I cannot in any event imagine how a court could properly undertake a consideration of the factors set out in rule 46A(9)(b) other than in open court with regard to the submissions thereanent by the interested parties.

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[10] The *Oxford Dictionary of the English Language* defines the word in the relevant sense as '*continue to have (something); keep possession of*'.

[11] Section 32 provides: '*Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.*'

[44] It will be clear from the foregoing discussion that I consider that subrule 46A(9) is deserving of further consideration by the Rules Board. I shall therefore incorporate in the order to be made a direction that this judgment be brought to the Board's notice.

[45] Turning now to the reconsideration required in this case.

[46] The judgment debtors are employed, and in receipt of an income that will enable them to obtain alternative accommodation if they are required to vacate the property if it is sold in execution. As I shall describe presently, they have in fact entered into an agreement to sell the property.

[47] The property is valued at R1 450 000 on the municipal valuation roll. The current asking prices for properties in the neighbourhood range between R1,78 and R2,495 million. The judgment debtors have refused to allow a valuer appointed by the judgment creditor access to the property to assess the condition of the buildings from the inside. I have already referred in this regard to the Sheriff's report, which suggests that an internal inspection would show that considerable renovation is required. The judgment debtors accept, however, that a fair forced sale value determination for their property would be R1,1 million and they asked for the reserve price to be revised upwards accordingly. If they are right, and especially having regard to the forementioned reported asking prices in the neighbourhood, there should be bidders aplenty at R1,1 million. If that does not turn out to be the case, it would powerfully suggest that their estimate of the property's forced sale value is wrong. Factors such as the reported condition of the interiors and the presence of defaulting lodgers on the property afford plausible bases to distinguish the subject property from others in the neighbourhood that are being marketed without such unfavourable features.

[48] The forced sale value of a property is very much a matter of opinion. What a property will fetch in a forced sale is determined by what happens when the property is auctioned. In the current matter, it is clear that there was bidding interest and that, even in a competitive context, the highest bid obtained nine months ago was well below what the pundits' estimates suggested would likely be forthcoming. The purpose of the sale in execution is to achieve the satisfaction of the judgment. The procedure does not safeguard the judgment debtor's interest in obtaining a market-related price; on the contrary, involving a forced sale, it inherently does quite the opposite. The purpose of rule 46A, on the other hand, is to ensure that execution against a judgment debtor's primary residence does not occur in a manner inconsistent with s 26 of the Constitution, which is an entirely different matter. To the extent that para 10 of the judgment in *Changing Tides* might be read to conflate the two considerations, I must respectfully differ. Clearly, however, the disposal of anyone's home on an exploitative or starkly unfair basis would unjustifiably impinge on that person's right to access to housing, and it is that connection that the fixing of a reserve price in terms of rule 46A comes into play.

[49] In the current matter the only feature that makes me think that the highest bid price obtained thus far might have been bettered is the fact that the sale took place at the Sheriff's offices rather than on-site. If the subject property is surrounded by other properties that are evidently marketable at prices much higher than the R700 000 that was fetched at the auction at the Sheriff's offices, which appear to be situated in an industrial area, conducting the sale in execution onsite might enhance the prospect of more market-price related offers being received.

[50] The judgment debtors have however concluded a sale of the property privately for R1,9 million. A copy of the deed of sale was handed up the hearing under cover of an affidavit by their attorney, Mr Price. The judgment debtors would, of course, not be able to perform in terms of the

contract without obtaining the release of the property from judicial attachment, but I understood from the judgment creditor's counsel that the mortgagee would have no objection to the private sale proceeding, provided that it did so without undue delay.

[51] The deed of agreement provides for the payment of a deposit of R190 000 and the sale is subject to approval by a financial institution on or before 9 September 2022 of mortgage finance to cover the balance of the purchase price. A date for the payment of the deposit is not expressly stipulated in the agreement, but the implication is that it was payable upon acceptance of the purchasers' offer by the sellers. The judgment debtors' attorney stated in his affidavit that he had '*been informed that the purchasers have effected payment of the deposit but still await documentary proof of payment thereof*'.

[52] In the circumstances, I propose to make an order that will allow a reasonable opportunity to the judgment debtors to give transfer of the property in terms of the private sale agreement, failing which the judgment creditors will be authorised to readvertise a sale in execution without a reserve price to be conducted at the site of the property. It shall be a condition of any such sale in execution that if the highest bid obtained at the readvertised sale does not exceed that obtained at the auction held on 7 December 2021, the sale to the purchaser at that auction (Sara Harding, represented by Yaeesh Soles) will be deemed to have been confirmed.

[53] The judgment debtors' counsel advanced certain submissions as to why the judgment debtors should not be mulcted in costs in respect of the reconsideration proceedings. I propose to make no order as to costs, but it nevertheless remains open to the plaintiff bank, if it wishes, to enforce the terms of the mortgage contract which bind the mortgagors to pay any costs incurred by the mortgagee to recover the mortgage debt.

[54] An order will issue in terms of Rule 46A(9)(c) and (e) as follows:

1. The judgment debtors are directed to procure the delivery on or before 14 September 2022 of an affidavit deposed to by their attorney, Mr Timothy Oliver Price, confirming (i) that payment of the deposit due by the purchasers in terms of the deed of sale, dated 21 August 2022, entered into by the judgment debtors in respect of the attached immovable property has been made and that the funds are being held in the trust account of the conveyancing attorneys, Cohen Shevel and Fourie Attorneys, and (ii) written approval (a copy of which must be attached) has been obtained by the purchasers from a registered financial institution in respect of the provision to them of loan financing for the payment of the balance of the purchase price in the sum of R1 710 000.

2. The original of the affidavit must be filed of record and a copy thereof, stamped by the registrar, must be served on the judgment creditor's attorney of record.

3. In the event that an affidavit as provided for in terms of paragraph 1 is not delivered, or in the event that, notwithstanding the delivery of the affidavit, transfer of the property to the purchasers in terms of the deed of sale is thereafter not effected by 16 November 2022, or such later date as the court (per Binns-Ward J) may, on good cause shown, on application made in chambers before that date, direct, the judgment creditor is authorised to readvertise the sale in execution of the attached property in the manner provided in the rules of court.

4. The sale in execution contemplated in paragraph 3 shall be conducted as provided in the rules of court, provided that the Sheriff is directed to conduct the auction at the site of the attached property.

5. It shall be a condition of the sale in execution contemplated in paragraph 3 that in the event of the highest bid at such sale not exceeding the highest bid obtained at the sale in execution of the property conducted on 7 December 2021, the property shall in that event be deemed to be sold to Sara Harding for the sum of R700 000 and in terms of the conditions of sale pertaining to that sale in execution (save as to reserve price).

6. There is no order as to costs in respect of the reconsideration of the previously fixed reserve price.

7. The Chief Registrar is directed to forward a copy of this judgment to the Secretary of the Rules Board for Courts of Law with a request that it be placed before the Board for consideration.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Judgment creditor's counsel:	**M. Alexander**
Judgment creditor's attorneys	**Marais Müller Hendricks inc.** **Cape Town**
Judgment debtors' counsel:	**N. van Zyl**
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