IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 50963/17

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

20/11/2019
DATE

SIGNATURE

In the matter between :

FIRST RAND BANK LIMITED — **APPLICANT**

and

LUSINDISO MPHAKATHI — **FIRST RESPONDENT**

OLGA MPHAKATHI — **SECOND RESPONDENT**

JUDGMENT

A.J. LOUW AJ

[1] The Applicant applies for an order that the immovable property of the First and Second Respondents be declared executable in terms of Rule 46A.

The facts and circumstances of the matter are somewhat depressing. The facts are depressing because the First and Second Respondents intended to use the relevant immovable property as their primary residence. They are unable and have been unable since purchase thereof, to take occupation of the immovable property due to the fact that the house is occupied by unlawful occupiers that are aggressive and could not be evicted to date. This, primarily, is due to the fact that the First and Second Respondents do not have the financial means to go through the process of evicting the unlawful occupiers.

[2] This application concerns Erf 1386, Naledi Township, Registration Division I.Q., Province of Gauteng (situated at 1386 Legwale Street, Naledi (hereinafter "the immovable property"). The immovable property is mortgaged under mortgage bond B29926/2016 and held under deed of transfer T47407/2016 by the Respondents.

[3] Default judgment for the sum of R275 037.95 plus interest thereon at the rate of 14.59% per annum calculated from the 1st July 2017 to date of payment plus costs on the scale as between attorney and client was granted in favour of the Applicant on the 16th April 2018 by the Registrar of this Honourable Court.

[4] The arrears on the bond account as at date of the issue of the application, namely the 9th October 2018 amounted to R99 255.12. The only issue of note between the parties is the question whether a reserve price must be set for purposes of a future sale in execution. The Applicant says that the

immovable property should be sold without a reserve price or alternatively subject to a reserve price of R302 398.44 or alternatively such reserve price as may be set by the court.

[5] The Respondents on an online property portal saw the immovable property. They contacted one Daniel Maphila who identified himself as the estate agent marketing the immovable property. They could not view the immovable property due to the fact that "volatile" unlawful occupants occupied the immovable property. Yet the Respondents purchased the property, with the promise by the estate agent that he would assist or ensure that the unlawful occupants be evicted. Nothing came of this promise.

[6] The Respondents never obtained occupation of the immovable property and also failed to launch any eviction proceedings. The Respondents accordingly purchased the immovable property knowing of the unlawful occupiers.

[7] The Respondents find themselves in an invidious position: they cannot afford paying rent at their present residence and also keep up the bond payments on the immovable property. Due to this circumstance they fell in arrears and in the final instance the inevitable followed, namely the default judgment.

[8] This is accordingly a matter where principally two innocent parties, on the one hand the Applicant and on the other hand the Respondents suffer as

a result of the unlawful conduct of the unlawful occupants of the immovable property.

[9] The Respondents admit that there is no alternative to break the current deadlock but to sell the immovable property in execution. In this regard I quote from the Heads of Argument of the attorney representing the Respondents Ms Mlapisane:

> *"14. The Respondents concede that re (sic) is no other alternative to break the current deadlock with the squatters in their property, except to sell. However they seek the setting of a reserve price, to reduce their remaining debt to the Applicant. The property might not be their primary residence and they are not occupying it but it is their sole property. They invested their lifesavings to secure it, with every intention of primarily residing in it."*

[10] Only two issues remain, namely the question whether a reserve price should be set and what that reserve price should amount to if indeed a reserve price is to be set.

[11] Although the immovable property does not constitute the primary residence of the Respondents, it clearly was purchased with the purpose of being the primary residence of the Respondents. Had it not been for the unlawful occupants, the immovable property would have been the Respondents' primary residence.

[12] The purpose of Rule 46A clearly is to prevent, as far as possible, the sale in execution of primary residences and if this should occur, it must occur in the circumstances where the best assistance possible is granted to

minimize the adverse financial consequences for the owner of a primary residence that must be sold in execution.

[13] I diverse and refer to the fact that the replying affidavit should have been filed on the 11th February 2019. It, however, was only filed on the 12th March 2019. Nothing was made of the delay by the Respondents and it is clear that no additional, new or any tangible prejudice was suffered by the Respondents as a result of the late filing of the replying affidavit. The non-timeous filing of the replying affidavit is explained in the replying affidavit and I condone the late filing thereof.

[14] The arrears of R99 255.12 as at date of issue of the application are not in dispute. It is also common cause that the monthly instalment on the bond payments is R5 477.57, payable to the Applicant.

[15] The Applicant proposes that no reserve price should be set and, should a reserve price be set, it must be for the sum of R302 398.44. This is disputed by the Respondents whose case is that they will suffer prejudice if a reserve price is not set. The Respondents do not propose what the reserve price should be.

[16] Although the immovable property is not the primary residence of the Respondents, the intention all along clearly was that this house must be the primary residence of the Respondents. Having regard to the purpose of Rule 46A, I find that a reserve price must be set in order to, as far as possible, protect the Respondents from further prejudice.

[17] The question then is for what amount the reserve price must be set.

[18] The home loan was concluded for a bond amount of R390 000.00, with monthly repayments of R5 477.57 as referred to earlier.

[19] The Applicant explains with reference to a number of factors that it determines a buy-in figure for each property that must go on auction in a sale in execution. The factors taken in account in this regard is explained to be the marketability and location of the property, a percentage of the estimated market value, the outstanding balance, arrear rates and taxes, outstanding levies, costs associated with the purchase of the property, the costs of registration of transfer of the property and the holding costs during the period the property is being marketed until such time as the property is sold in the open market.

[20] The Applicant will attend the sale in execution through a representative who will bid on behalf of the Applicant at the sale in execution to ensure that the immovable property is sold for at least the buy-in figure. If the immovable property is not sold for the buy-in figure, then the Applicant itself would buy-in the immovable property whereafter it will market and resell the property in the open market.

[21] The Applicant is opposed to a sale with a reserve price on the basis, *inter alia*, that it would attract, potentially, a greater number of bidders if there is no reserve price set and the greater number bidders will in turn create competition which will result in a higher price ultimately being achieved.

[22] In my respectful view there is no basis to assume that a sale without reservation will attract better competition and a higher price.

[23] I in any event already found that the immovable property is virtually the primary residence of the Respondents and that a reserve price must be set.

[24] In this regard the following must be taken into account: the outstanding balance as at date of issue of the application on the mortgage bond amounted to R375 037.95 plus interest and costs. The municipal valuation of the property, evidenced by a tax invoice from the City of Johannesburg is the sum of R220 000.00. The amount owing to the City of Johannesburg for municipal rates, taxes and other dues as at date of the issue of the application (as stated before, the 9th October 2018) amounted to the sum of R4 486.78. The rates and taxes accumulate monthly at the rate of R506.13.

[26] Although the factors were provided as to how a reserve price is determined, no calculation is provided for the conclusion reached, namely that the reserve price should be R302 398.44.

[27] The market value of the property is R550 000.00 evidenced by a valuation report from FNB Property Valuations. I need to digress here: the valuation, concluding that the market value of the immovable property amounts to R550 000.00 is not under oath. Accordingly the document

does not constitute evidence. The approach to attach an unsworn valuation is unacceptable.

[28] I am prepared to accept the unsworn valuation because it is not disputed by the Respondents. Secondly I take into consideration the provisions of the Amendment Act on the Law of Evidence 45 of 1988. Having regard to the factors mentioned in section 3 of that Act, I allow the unsworn valuation. The Applicant ought not approach the vitally important evidence as required by Rule 46A in this unacceptable manner. However, the alternative would have been to postpone the application in order to have the valuation report introduced in evidence by way of an affidavit. This certainly would delay this long outstanding matter unnecessarily and to the detriment of both the Applicant and the Respondents. A practical approach in the circumstances if to accept the valuation report as it stands.

[29] Common sense in the circumstances dictates that one of two amounts could constitute the reserve price: either the sum of R302 398.44 as proposed by the Applicant or the outstanding amount of the default judgment, namely R375 037.95.

[30] Setting the bar too high will serve no purpose and will again delay the process as, under Rule 46A(9)(c), the court must reconsider the matter.

[31] The Applicant failed to give the calculation of how the sum of R302 398.44 was calculated. Giving the set of factors does not assist without taking

the court into its confidence as to how precisely the sum as the buy-in value is calculated. On the other hand the Respondents proposed in argument a reserve price of R390 000.00. There is no sound basis in any evidence before me for this amount.

[32] This leaves me in the circumstances with no alternative but to set the reserve price at the capital amount of the default judgment, namely R375 037.95. This amount still constitutes some R175 000.00 less than the market value of the immovable property.

[33] Having regard to the purpose of Rule 46A, I must err on the side of the Respondents in this regard. Therefore the reserve price will be R375 000.00, being the sum of R375 037.95 referred to in paragraph 32 above rounded down to R375 000.00.

[34] One further comment is necessary: I agree with the approach of the full court of the Gauteng Local Division of the High Court in the matter of ***Absa Bank Ltd v Mokebe and Related Cases*** 2018 (6) SA 492 (GJ) at para 29 – 33 and 47 that the money claim as well as the claim for execution ought to be brought at the same time in one proceeding.

[35] The mortgage bond is not available and accordingly I do not grant attorney and client costs. In addition, further, having regard to the purpose of Rule 46A and the nature of the litigation, I am not prepared to grant costs on a higher scale than party and party scale.

[36] In the circumstances the following order is made:

1. The Respondents' immovable property, Erf 1386 Naledi Township, Registration Division I.Q., Province of Gauteng (situated at 1386 Legwale Street, Naledi), mortgaged under Mortgage Bond B29926/2016 and held under Deed of Transfer T47407/2016 is declared specially executable for the sum of R375 037.95 (THREE HUNDRED AND SEVENTY FIVE THOUSAND AND THIRTY SEVEN RAND NINETY FIVE CENTS) plus interest thereon at the rate of 14.59% per annum from 1 July 2017 to date of payment plus costs on the scale as between party and party;

2. The Registrar of the above Honourable Court is authorised to issue a warrant of attachment;

3. The Sheriff of the above Honourable Court is authorised to execute the warrant of attachment;

4. The said immovable property shall be sold by the Sheriff subject to a reserve price of R375 000.00;

5. Should the reserve price not be met at the sale in execution Rule 46A(c), (d) and (e) of the Uniform Rules of Court must be complied with;

6. Costs of suit.

AJ LOUW AJ