IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: D5020/2019

In the matter between:

NEDBANK LIMITED — **APPLICANT**

and

ROANA MUNIAH N.O — **FIRST RESPONDENT**

RAKESH SINGH N.O — **SECOND RESPONDENT**

ACHISH SINGH N.O — **THIRD RESPONDENT**
(In their capacity as Trustees of the time being of the Rohith and Roana Covenant Trust IT 1044/2013D)

ORDER

The following order is made:

1 The application is dismissed.

2 The Applicant is ordered to pay the respondents' costs on scale A.

JUDGMENT

Sibiya AJ

Introduction

[1] Before this Court is an application for the reconsideration of a reserve price pursuant to rule 46A(9)(c) of the Uniform Rules.[1] The matter arises from an order of Ploos Van Amstel J, granted on 27 July 2020, declaring the residential immovable property belonging to the Rohith and Roana Covenant Trust (Trust) specially executable and setting a reserve price of R4.49 million.

[2] The applicant, Nedbank Limited, having obtained default judgment against the respondents in the sum of R3 400 021.78 together with interest thereon, now seeks an order directing that the property be sold to it for R1.7 million, being the highest bid achieved at the sale in execution conducted on 22 February 2023. In the alternative, the applicant seeks the court's direction on how execution should proceed.

[3] It is common cause that the order declaring the property specially executable had as its genesis an action instituted by the applicant arising from a breach of a mortgage loan agreement secured by the immovable property. In initiating the reconsideration application, the applicant delivered an affidavit[2] without a notice of motion. The affidavit was filed at court on 24 March 2023, together with the Sheriff's report as envisaged in rule 46A(9)(d).

[4] In opposing the applicant's request for the court to ratify the sale to it as the highest bidder, the respondents, as a preliminary issue, contended that the applicant did not comply with the practice in this division which directs that in all reconsideration applications in terms of Rule 46A(9)(c), the procedure as set out in *Changing Tides 17*

[1] Rule 46A(9)(c) provides that '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.'

[2] Index to reconsideration application, Vol 2: page 137 – 147.

*(Pty) Ltd N.O v Kubheka and Another*3 (and 3 others cases) shall be followed. Counsel for the respondents, *Mr Tucker*, contended that in the absence of a notice of motion, there was no application properly before this Court for consideration.

[5] As regards its opposition on the merits, the respondents allege that it would not be just and equitable for the property to be sold for a third of its value to the applicant. The effect of such an order would leave the Trust with a residual debt of approximately R1.5 million. Furthermore, the applicant's suggested price of R 1.7 million constitutes merely thirty-seven percent of the set reserve price, and only thirty percent of the applicant's own recorded forced sale value of R5.52 million. They submit that the amount of the set reserve price was already R1 million less than the forced sale value of the property.

[6] They are of the view that the applicant did not do enough to market the property in order to attract the reserve price set by the court. They further take issue with the applicant's failure to deliver an updated valuation report and the sheriff's failure to provide the details of persons who registered to participate in the auction.

[7] I turn now to consider the preliminary point raised by the respondents regarding the procedural requirements for applications of this nature.

Point *in limine*

[8] Counsel for the applicant, *Mr Rudling*, submitted that there is no legal requirement for the applicant to file a notice of motion for the court's reconsideration of the reserve price. He averred that the order of Ploos Van Amstel J permits the delivery of the applicant's affidavit without the 'second notice of motion' because the order specifically grants the applicant leave to approach the court on the same papers, supplemented as far as it is necessary, without the applicant having to bring an interlocutory application.

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[3] *Changing Tides 17 (Proprietary) Limited N.O. v Kubheka and Another; Changing Tides 17 (Proprietary) Limited N.O. v Mowasa and Another; Changing Tides 17 (Proprietary) Limited N.O. v Bucktwar; Changing Tides 17 (Proprietary) Limited N.O. v Horsley* (13719/2016; 14932/2016; 14488/2017; 11647/2019) [2022] ZAGPJHC 59; 2022 (5) SA 168 (GJ)) ('*Changing Tides*').

[9] The order of the court declaring the property executable, had the following conditions at para 4:

'(a) any sale of the immovable property shall be subject to a reserve price of R 4 490 000.00'

(b) where the reserve price is not achieved at a sale in execution,

(i) the applicant is granted leave to approach this Court on these papers, supplemented in so far as may be necessary, for an order directing how execution is to proceed; and

(ii) the sheriff shall submit a report to the court, within 5 days of the date of the auction, which report shall contain-

(aa) the date, time and place at which the auction sale was conducted;

(bb) the names, identity numbers and contact details of the persons who participated at the auction;

(cc) the highest bid or offer made; and

(dd) any other relevant factor which may assist the court in directing how execution is to proceed.'

[10] It is necessary at this juncture to address the legal framework governing applications for reconsideration of reserve prices.

Discussion

[11] The starting point of the enquiry is rule 46A(9)(c), (d), and (e) which provides that:

'(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 reconsidering 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.'

[12] The difficulty that presents itself in this matter is the interpretation and practical application of these provisions. It is instructive to consider the judgment in *Changing Tides*,[4] wherein the court aptly noted that Rule 46A(9) is not framed with precision as to the process to be adopted, considering the importance of the balancing of rights in the process of reconsideration of the reserve price.[5] The constitutional imperatives in s 26 of the Constitution, which are protected by the enactment of Rule 46A generally and in connection with the determination of the reserve price were held to be fundamental.

[13] Similarly, Binns-Ward J in *Standard Bank of South Africa Ltd v Tchibamba and Another*,[6] encapsulated the challenges in the practical workings of rule 49A(9) in the following terms:

'Van Loggenberg, Erasmus, Superior Court Practice Vol 2 (Juta) observes 'paragraph (c), (d) and (e) of subrule 9 are not clearly worded'. 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.'

[14] Having considered the jurisprudence on rule 46A (9), it becomes necessary to examine the procedural requirements for applications generally. Rule 6(1) of the Uniform Rules provides that, save where proceedings by way of petition are prescribed by law, every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. The provision is peremptory. The notice of motion or form 2(a) informs a respondent about the relief sought and also of a 'stated day' on which the application will be heard in the absence of notice to oppose. This is in compliance with rule 6(5)(b)(iii).

[15] The importance of proper notice was emphasised in *Meme-Akpta and Another v The Unlawful Occupiers of ERF 1168, City and Surban,44 Nugget Street, Johannesburg and Another;*[7] where the court, in the context of an eviction application,

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[4] Ibid.
[5] Ibid at para 9.
[6] *Standard Bank of South Africa Ltd v Tchibamba and Another* [2022] ZAWCHC 169; 2022 (6) SA 571 (WCC) at para 11.
[7] *Meme-Akpta and Another v The Unlawful Occupiers of ERF 1168, City and Surban,44 Nugget Street, Johannesburg and Another* [2022] ZAGPJHC 482; 2023 (3) SA 649 (GJ) at para 18.

held that the omission of a 'stated day' in a form 2(a) notice of motion is fatal to the application.

[16] The critical question that arises in *casu* is whether the procedure adopted by the applicant meets these requirements. The relief sought by the applicant is found in the last paragraph of the affidavit initiating the proceedings. It cannot be deemed a fair process to expect a respondent to peruse the applicant's bundle of documents in search of the relief sought. This is particularly pertinent given that our courts regularly encounter unrepresented respondents who must be able to comprehend what is required of them in dealing with court processes.

[17] In *Changing Tides*,[8] the court in rejecting a submission made to the effect that the relief under rule 46A(9)(c) – (e) is not claimed by way of application, held that 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, in the form of an application or a summons. It held further that the fact that the rule does not specify the form that the approach to the court should take should not be construed as an invitation to depart from the norm. Having recognised the lack of uniformity in how applications in terms of rule 46A(9)(c) were being placed before the courts,[9] it directed that an application for reconsideration should at least seek specific relief in the notice of motion and should be brought as interlocutory to the main application so that a court is afforded access to all documents in the main application and all other interlocutory matters.

[18] The procedure employed by the applicant is akin to what Binns-Ward J set out in *Standard Bank v Tchibamba*,[10] in holding that:

'[T]he 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 . . .'.

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[8] See *Changing Tides* above fn3 at para 25.
[9] Ibid at para 37.
[10] *Standard Bank of South Africa Ltd v Tchibamba and Another* above fn6 at para 38.

[19] By stating that the rule would have provided for the institution of a new application, if the legislature intended so, Binns-Ward J neglected to consider his initial acknowledgement that the rule is not crafted in clear terms. He conceded that the gaps in rule 46A meant that the courts are unavoidably thrown back on their own devices to fill the gaps.[11] His concession is also evidenced by his direction that his judgment be brought to the attention of the Rules Board so that the gaps could be attended to.

[20] In order for justice to be done and seen to be done, uniformity of practice is desirable. *Standard Bank v Tchibamba*,[12] acknowledges the importance of uniformity of practice. There, it was held that the object of the Uniform Rules 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.

[21] Jafta J, in *Mukaddam v Pioneer Foods (Pty) Ltd and Others*[13] pointed out the court's powers to regulate its own proceedings as follows:

'In our constitutional dispensation everyone is guaranteed access to a competent court to have their dispute resolved by the application of law and decided in a fair manner. But this guarantee does not include the right to choose the method of approaching and placing a dispute before a particular court. The determination of the process to be followed when litigants approach courts is left in the hands of the courts.

Section 173 of the Constitution recognises and preserves the courts' power to determine how disputes are to be placed before them. Our superior courts enjoyed this power even before the adoption of the Constitution. . .' (footnotes omitted.)

[22] I turn now to consider the applicant's submission regarding the interpretation of Ploos Van Amstel J's order. Counsel for the applicant, while acknowledging the practice directive[14] of this division which mandates following the procedure directed in *Changing Tides* when dealing with matters where at a sale authorised in terms of rule 46A the reserve price has not been achieved and the plaintiff requires that

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[11] Ibid at para 13.
[12] Ibid.
[13] *Mukaddam v Pioneer Foods (Pty) Ltd and Others* [2013] ZACC 23; 2013 (5) SA 89 (CC0; 2013 (10) BCLR 1135 (CC) at paras 1-2.
[14] Practice directive 26.3 – 15 January 2024 version

determination to be reconsidered in terms of rule 46A(9)(c) submitted that the present matter is distinguishable due to the specific wording of the order setting the reserve price. This submission cannot be sustained. The order of Ploos Van Amstel J, in directing the applicant to approach the court on supplemented papers, was made cognizant of this division's practice directives. The wording of the order in no way absolved the applicant from engaging the jurisdiction of this court in accordance with the rules and practice directives of this division.

[23] A further consideration in determining whether the applicant has met the procedural requirements as envisaged in rule 46A(9)(c) – (e) is the necessity to include, in the application, updated information relating to the property so that the court can determine whether it is just and equitable to ratify the sale of the property to the applicant, as the highest bidder, at R1.7 million.

[24] In its application in terms of rule 46A for the declaration of the immovable property specially executable, the applicant had attached to its founding affidavit a Windeed valuation report dated 14 February 2019[15] evidencing municipal valuation of the property at R3, 5 million; the estimated market value at R 5,65 million and the lowest expected selling price at R 4, 49 million. In setting the reserved price at R 4.49 million, the court had considered the lowest expected selling price of the property.

[25] The sheriff's report reflects that, as at 26 January 2023, the market value of the property was R 4,04 million and the rateable value R 3,92 million.[16] The amount owed to the Ethekwini Municipality for rates and other charges[17]was a sum of R 617, 140 - 64. The applicant's assertion that there was a general chatter to the effect that the reserve price is too high cannot be sustained considering the sheriff's failure to

[15] Index to reconsideration application; Vol 1 page 25 – 29
[16] Index to reconsideration application, Vol 2: page 128
[17]Index to reconsideration application, Vol 2: page 129

provide a report on recent sales of properties in the Kloof area, and an updated valuation of the property.

[26] In *Changing Tides*,[18] the court, in asserting the purpose of rule 46A to protect the homeowner's investment in the property, held as follows:

'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".

[27] The applicant submitted that if the court does not confirm the highest bid fetched the applicant may have to sue for damages because of a failure to honour the purchase agreement signed with the sheriff. In reply, *Mr Tucker,* on behalf of the respondents submitted that there is no way that the applicant can sue because the purchase agreement pursuant to the highest bid does not have a suspensive condition. I find the applicant's submission to be misplaced. The order of Ploos Van Amstel J, in declaring the property specially executable, has a condition that, in the event the reserve price is not achieved at a sale in execution, the applicant is granted leave to return to this court for directions on how execution is to proceed.

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[18] Ibid para 10.

Conclusion

[28] Having regard to the totality of the evidence and the applicable legal principles, I find that the applicant's filing of the affidavit initiating the proceedings, without a notice of motion, renders the application defective. The procedure employed by the applicant, in seeking relief in its affidavit, does not constitute an application as envisaged in rule 6.

[29] The applicant's failure to include updated valuation report of the property and the sums owed to the municipality falls short of compliance requirements as envisaged in rule 46A(9)(c) – (e). The court has not been provided with updated information on which to issue directives.

[30] As regards costs, the general principle that costs follow the event finds application in this matter. Having regard to the nature of the issues and the complexity thereof, I find that the issues dealt with were not novel or complex to warrant a high scale of costs as envisaged in rule 67A read with Rule 69. I am therefore of the view that a cost order on Scale A is warranted.

Order

[31] In the circumstances, the following order is made:

1 The application is dismissed.

2 The Applicant is ordered to pay the respondents' costs of the application on scale A.

[redacted]

B SIBIYA

Acting Judge of the High Court,

Kwazulu-Natal Division, Durban

Appearances:

For the applicant	: M Rudling (Mr)
Instructed by	: Tomlinson Mnguni James Incorporated
	Ref: T Jones/050N076201818
	Email: tamsinj@tmj.co.za
For the respondents	: M C Tucker (Mr)
Instructed by	: Meumann White Incorporated
	Ref: V Govender
	Email: vgovender@meumannwhite.co.za
Heard	: 22 July 2024
Delivered	: 25 October 2024