

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

CASE NO: 2019/20373

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
DATE	SIGNATURE

In the application by

FIRSTRAND BANK LIMITED

Applicant

And

And

DAVID NIEL KAHN

1st Respondent

ARLETTE KAHN

2nd Respondent

DAVID KAHN AND ASSOCIATES

3rd Respondent

IMPAN BASHR OMAR KASSAM

4th Respondent

**SHERIFF OF THE HIGH COURT
JOHANNESBURH NORTH**

5th Respondent

In re:

CASE NO: 2019/20373

FIRSTRAND BANK LIMITED

Applicant

And

DAVID KAHN AND ASSOCIATES

1st Respondent

DAVID NIEL KAHN

2nd Respondent

ARLETTE KAHN

3rd Respondent

Summary:

ORDER

1. The sale of the property described as Portion 5 of Erf 1[...] M[...] N[...] Township, Registration Division I.R., Province of Gauteng, measuring 640 square meters and held by Deed of Transfer No T143165/2000, which corresponds with No. [...] C[...], P[...] Avenue, M[...] N[...], Johannesburg to the fourth respondent in the amount of R 3,010,000.00 at a sale in execution conducted by the fifth Respondent on 1 June 2023 is hereby confirmed.

2. The fifth respondent is ordered to forthwith proceed with the registration of the transfer of the property into the name of the forth respondent.

3. Cost of the application on the scale as between party and party are to be paid by the first, second and third respondent jointly and severally.

JUDGMENT

Raubenheimer AJ:

Introduction

[1] The application is in terms of Rule 46A(9)(e) for the authorisation of a sale of an immovable property (“**the property**”) to the highest bidder at the third sale in execution where the reserved price was not met. The purchase price at this sale was R3,010,000.

[2] Alternatively the applicant seeks an order cancelling the sale in execution coupled with an order authorising the sale in execution of the property provided that a reserve price of R3.3 million be fetched at the sale. Should the reserve price not be met the Applicant is authorised to sell the property immediately without a reserve price.

[3] The fourth respondent, who is the purchaser at the third sale in execution supports the application, whilst the first and second respondents being the execution creditors, opposes the application.

The factual matrix

[4] The property known as Portion 5 of Erf 1[...] M[...] N[...] Township, Registration Division I.R., Gauteng was declared specially executable subject to a reserve price of R5 million in terms of a court order on 25 February 2020. A writ of execution was issued against the property on 28 July 2020. The property constitutes the primary residence of the first and second respondents.

[5] The last payment by the respondents to the applicant was made in October 2018 and no arrangements were made for payments in the meantime.

[6] When the applicant attempted to execute against the moveable assets of the respondents the Sheriff was actively prevented from executing.

[7] The judgment debt for which the judgement was granted amounted to R4,593,094.58 plus interest and costs on the scale as between attorney and client.

[8] The first sale in execution on 19 November 2020 fetched a price of R2,000,000.00 only after the Sheriff restarted the sale without the reserve price of R5 million.

[9] The applicant launched an application in terms of Rule 46(9)(c) –(e) for confirmation of the sale alternatively cancelling the sale and setting a lower reserve price. The cancellation and the setting of the lower reserve price of 3,700,00.00 was granted on 11 October 2021.

[10] The second sale in execution occurred on 10 February 2022 and a selling price of R3,870,000.00 was achieved. This sale was however cancelled on 19 January 2023 due to breach by the purchaser.

[11] At the third sale in execution on 1 June 2023 no bids were received when the auction commenced with a reserve price of R3.7 million. The Sheriff consequently restarted the auction without a reserve price and the forth respondent submitted the highest bid in the amount of R3.010,000.00 and also paid the sheriff's commission in the amount of R46,000 and the deposit of R301,000.00. The purchaser also signed the terms and conditions of the sale on the date of the sale namely 1 June 2023. It is the confirmation of this sale that is before the court.

[12] The terms and conditions included that the highest bid will provisionally be accepted pending confirmation by the court in terms of rule 46A(9)(e)

[13] The amount owing to the applicant at the time of the sale had increased from the initial R4,593.094 to in excess of R7,000,000.00 and the amount owing to the City of Johannesburg had increased from R491,054.17 to in excess of R900,000.00.

[14] At the time of the third sale in execution the property was valued at R6,500,000.00 with a forced sale value of R5,200,000.00 and a municipal value of R7,106,000.00.

[15] The respondents endeavoured to sell the property through a private agency for the first time in 2023 after the applicant launched the application for confirmation of the selling price obtained at the third sale in execution. No offers was however received.

[16] The purchaser indicated that he was prepared to proceed with the purchase and to adhere to the terms of the sale as contained in the conditions of sale.

The statutory position

[17] Rule 46A(9)(d) deals with the situation where the reserve price is not achieved. In such a case the sheriff is to submit a report to the court addressing the following aspects:

- (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 [sic] other relevant factor which may assist the court in performing its function in paragraph (c)."*

[18] In terms of the mentioned paragraph (c) the court must on reconsideration of the factors it had to take into consideration in determining the initial reserve price as mentioned in paragraph (b) namely the market value of the property, amounts owing in respect of municipal services and the bond, any equity to be realised between the market value and the reserve price, reduction of the indebtedness, whether the property is occupied and the circumstances of the occupation, the likelihood of the reserve price not being realised, any prejudice to any of the parties and lastly any other aspect regarded by the court to be considered in respect of the protection of the interests of the parties and its powers under Rule 46A make an order as to how the execution is to be proceeded with.

[19] Where the reserve price has not been achieved the court can in terms of Rule 46A(9)(e) order the property to be sold to the person who made the highest offer or bid.

Application

[20] A court has a wide discretion in terms of rule 46A(9)(c) – (e)¹. When the reserve price has not been met the right to a reconsideration is activated, the purpose of which is to determine the methodology to be followed going forward.²

[21] The selling price achieved at a sale in execution is regarded as an accurate indication of the true value of the property.³

[22] Of importance is the conditions of the sale in execution. If the conditions do not mention that the sale is subject to a reserve price and if the reserve price is not achieved the property may be sold to the highest bidder the courts have not been inclined to make an order in terms of 46A(9)(e), authorising the property being sold to the highest bidder.⁴

[23] Where the conditions of sale provided for the property to be sold to the highest bidder if the reserve price was not achieved courts have had no difficulty in authorising the sale to such a bidder.⁵

[24] The applicant provided the court with sworn valuations of the property. The respondents failed to provide the court such information and prevented the valuer from gaining access to the property to complete his evaluation.

[25] The court is consequently deprived of input from the debtor and is consequently bound to determine the matter without such input.⁶

[26] The respondents provided the court with information that the property was entered into the market to be sold by private transaction for an amount of R6 million and anticipated that the property would be sold by the end of April 2024. At the time of hearing no offers had been received. The selling price of R6

¹ Changing Tides 17 (Pty) Ltd NO v Kubheka and Others 2022 (5) SA 168 (GJ) para 28).

² Changing Tides 17 (Pty) Ltd NO v Kubheka and Others (note 1 above) par 27 & 32

³ Nedbank Ltd v Mabaso and Another 2023 (2) SA 298 (GJ)

⁴ Nedbank Ltd v Mabaso and Another (note 3 above) par 17

⁵ Standard Bank of South Africa Ltd v Tchibamba and Another 2022 (6) SA 571 (WCC).

⁶ Absa Bank Ltd v Mokebe and related cases 2018 (6) SA 492 (GJ) para 59

million was arrived at by a Mr Berger, who is not a sworn valuer, neither does he provide any basis for the calculation of the mentioned price.

[27] The value to be ascribed to this information is negligible.

[28] The respondents contend that the property is their residential property, that they are elderly and unemployed and would have nowhere to go should the property be sold.

[29] The respondents consented in February 2020 to the order granting judgement against, declaring the property preferentially executable and authorising the sale in execution.

[30] The judgment debt is increasing on a monthly basis in the amount of approximately R75 000.00 and the municipal account by approximately R10 000.00.

[31] Despite two previous sales in execution the reserve price has not been met and consequently, the possibility of the reserve price being met is diminishing.

[32] Coupled with the monthly increase of the debt without any arrangements to effect payment thereof the interest of the judgment creditors are under substantial and increasing risk.

[33] The sale of the property does not have to result in the entire debt of the debtor being extinguished. The purpose of the setting of a reserve price and the confirmation of a selling price is to ensure a just and equitable process in accordance with the law.⁷

[34] The sale in execution is part of the normal economic life⁸ and the necessary balancing procedures have been adhered to.⁹

⁷ Absa Bank v Mokebe (n 6 above) par 59

⁸ Gundwana v Steko Development and Others 2011 (3) SA 608 (CC) para 54

Conclusion

[33] For all the reasons as set out above I make the order in paragraph 1.

Raubenheimer AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **17 September 2024**

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DATE OF ARGUMENT: 27 May 024

DATE OF JUDGMENT: 17 September
 2024

⁹ Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) para 58