RELIABILITY OF PROPERTY VALUATIONS WHEN EXECUTION IS SOUGHT

SB Guarantee Company (Pty) Ltd v De Sousa **(2023/035447) [2024] ZAGPJHC 459 (6 May 2024)**

When a financial institution makes application to court to declare a person's home specially executable, submission of a reliable property valuation is crucially important. It enables the court to determine whether a reserve price should be set and, if so, the amount thereof. Given that a debtor in these circumstances is unlikely to have funds to procure their own valuation, they must also be able to rely on the expert valuation.

In these three matters, the court refused to use the professional valuations provided by widely-used valuation companies after establishing that the methods employed in providing professional valuations on affidavit rendered these affidavits unreliable. Without a dependable valuation, the court could not make a finding.

It is an exceptionally important judgment and likely to be noted by all courts across the country.

View the judgment here.

FACTS

This judgment deals with three similar applications brought by SB Guarantee Company (Pty) Ltd ('SBGC') for orders allowing it to sell the residential properties of the persons mentioned in the separate applications (respectively a Mr Ferris, Mr and Mrs De Sousa and Mr Scott). In all three matters, the proceedings were the result of steps that were instituted against the debtors after their bond repayments fell into arrears. The applications were not opposed.

An important component of such an application is the requirement in rule 46A (of the Uniform Rules of the Court) that the court must consider (i) whether there should be a determination of a reserve price for the property at the sale in execution, and (ii), if so, what the reserve price should be.

In order to be able to make such a determination, the court is guided by the valuation obtained by the creditor from a professional valuer, it being understood that a debtor in these circumstances is unlikely to have the financial means to obtain his or her own professional valuer to counter the facts placed before the court.

What came to light during the hearing of the three applications, was that the methods used by the property valuers involved in these matters, were insufficient and not reliable for the court to use to make a determination, as called for in Rule 46A.

In the De Sousa and Scott matters, the valuations of Mr. Butler were relied on by the creditor as evidence of the market value in each instance. Mr. Butler is a professional associate valuer whose services are regularly used by GAP (Pty) Ltd ('GAP') which is on the panel of valuers regularly used by financial institutions. The valuations manager employed at GAP explained that GAP carries out approximately 300 to 400 valuations for clients and institutions nationally every month. This translates into thousands of valuations conducted by GAP each year.

The valuations of Mr. Butler are ubiquitous in the Johannesburg High Court in applications for an order declaring property specially executable. Mr. Butler resides in Gqeberha, where GAP's head office is also situated. GAP however operates in all nine provinces of South Africa. Mr. Butler attested that work is "sent from regional offices" to be processed at "our head office" in Gqeberha and that when he is required to perform a valuation in a province other than Gqeberha (which seemed to be the norm), he extended "an ad hoc appointment" to various "property inspectors" who are employed by GAP. He does not himself inspect the property and he does not state the basis on which he is confident to accept the information provided to him by the property inspectors, for the purposes of his professional valuation.

These valuations are lent validity by the credentials of Mr. Butler, potentially in the absence of a professional valuation process which properly takes account of the basic requirements of appraisal. There is also no contact between Mr. Butler and the inspectors and neither is there any confirmation of their actual inspection or their qualification to do so. The format of each of the valuation affidavits is standard. It consists of a printed form which is completed by the inspector and then signed by Mr. Butler in his capacity as sworn expert valuer.

The manner in which GAP's standard form is configured is confusing. Both the names and signatures of Mr. Butler and the inspector in each instance appear on the same line immediately above the printed oath. The impression created by this layout is that the inspectors have made the affidavits under oath, together with Mr. Butler. This is not the case. The GAP inspectors do not take the oath, but merely compile the information contained in each report. Mr Butler then prepares "bulk valuations" which he signs electronically and then submits to warrant officer ('w/o') van den Berg (stationed at Humewood police station, near to where Mr Butler lives) who then acts as commissioner of oath for the "bulk affidavits". Mr. Butler conceded that he appended his electronic signature on each valuation form before the oath was administered (and apparently without appearing before w/o van den Berg at all).

In the Ferris matter, the valuation was undertaken by DPP Valuers (Pty) Ltd (DPP). Their process is slightly different, but essentially similar in that inspectors or candidate valuers are sent out to perform valuations. These are then forwarded to a Mr Padayachee, a professional valuer, for signature. It appears here too that signatures appended electronically and then sent to a third party, some months later, to sign it as a commissioner of oaths, as if Mr Padayachee had appeared before the commissioner and had the oath administered.

The upshot is that there are serious doubts as to whether a professional valuation had taken place. SBGC had no knowledge of the manner that the oath was being administered in a manner that was not consistent with the regulations.

HELD

Execution and Rule 46A

- Execution by force of law must follow a judgment against a person who does not pay his judgment debt. This is a fundamental part of commercial life. Mercifully, in this age of constitutional composure it has been recognised that certain considerations of fairness and justice are inalienable and should be weighed as part of the process of judicial execution for the common and commercial good and in the interests of justice. Unlike in the past, the sheer raw financial power difference between the credit giver and its much-needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities.
- It is in this spirit and with these constitutional imperatives and norms in mind, that rule 46A was promulgated in 2017.When considering an application under rule 46A, the court must consider whether a reserve price is to be set and, in making this determination, is required to take into account various factors, starting with market value.
- In *Absa Bank Ltd v Mokebe and Related Cases* the court held, in relation to the setting of a reserve price, that it was incumbent upon an applicant, as part of its obligation under the rule, to place all relevant circumstances before the court including "a proper valuation of the property (under oath)." Clearly, the need for such a valuation is not designed to put impediments in the path of a creditor's attempts at execution, and the debtor

is not absolved of responsibility in the process – but in reality, where a debtor fails to place facts before the court despite the opportunity to do so, the court is bound to determine the application without the benefit of the debtor's input and it should not have to hesitate to do so.

- Importantly, whilst a delinquent debtor may rightly understand that he should muster his resources to state his case, he should also be allowed to accept the veracity of the case put up by the creditor as applicant. But debtors in these circumstances rarely have the financial means with which to procure a separate independent expert valuation. A court should be placed in a position where it can feel similarly comforted by a reliable valuation.
- The evidence under oath of a person who is shown to be expertly qualified to determine value is a commercial forensic standard. In application proceeding expert valuations are routinely presented as attachments to the application in the form of an affidavit attested to by a valuer whose independence and expertise is disclosed.

The law pertaining to electronic signature of affidavits

- In all three instances, the court was not told in the application that the signature was appended electronically. Clearly, such omission of pertinent information has the potential to create confusion and such a state of affairs may be detrimental to the assessment of the application and the fundamental rights of the homeowner. The manner of the drawing of the report – i.e. compilation of the report by an unqualified person which is then signed off by a professional valuer on the basis of the information provided - is open to abuse.
- There have been some instances where our courts have allowed for deviation from the required method to administer the oath, but in each instance, there were exceptional circumstances. In any event, the courts have emphasised that it was not open to a person to elect to follow a different mode of administering the oath to that which is statutorily regulated; rather, a court has a discretion to allow the commissioned document, if the circumstances presented to it warranted this.
- In the present instance, the court was loathe to exercise its discretion in favour of SBGC. Nonetheless, the fact that a regulation is directory does not mean that a party may deliberately set out to achieve substantial compliance with such regulation rather than comply with its requirements. The electronic signature in all three of the cases was not disclosed by the deponents in the application papers and not properly commissioned.
- This approach seems to serve the convenience of those who issue the valuations. "That hundreds of affidavits have been and continue to be commissioned in this chosen manner is of concern to this court."

What form should a sworn valuation take?

- The Property Valuers Profession Act 47 of 2000 ('the Valuers Act') provides for the establishment of a statutory Council of Property Valuators (the Council) to oversee and administer a profession which is recognised, controlled and administered under the Valuers Act and known as the property valuer's profession. The Valuers Act, the regulations promulgated and Code of Conduct produced thereunder, form the legislative scheme which provides for educational norms and standards for the property valuers profession and for a national registration of certified valuators and candidate valuers. The Act empowers the Council to register appropriately qualified persons onto a national data base of professional valuers on their application.
- Registration entails the process of assessment of competency of applicants for registration. It requires that the Council be satisfied that the applicant meets certain criteria as to age (21 and over) residency (ordinarily resident in the Republic) and the passing of prescribed examinations and the acquisition of practical experience in the field of property valuation.
- The Valuers Act closely regulates the activities and conduct of those involved in the valuation of property. This administration is clearly for the purposes of protecting consumers and allowing for commercial certainty.

The question is thus whether courts should insist on reports of professional valuers when requiring forensic evidence.

- Whilst there may be occasions where a non-professional may be qualified as an expert, courts would require evidence of acceptable expertise to be provided under oath. Such a qualification would require disclosure of the fact that the person seeking to be qualified is not a professional valuer and reasons why the expertise and independence of the person should be acceptable to a court notwithstanding that he or she is not statutorily accredited.

- The persons employed by GAP are said to be property "inspectors" but no information is provided as to their credentials or training. The fact that the data collected by them is not provided under oath potentially creates an evidential difficulty.
- Whilst Mr. Butler purportedly proposes for the purposes of each valuation that it be accepted by the court (and generally) that the information provided to him by the employees of GAP is accurate and independently sourced it is in effect, hearsay. As I have said there is no indication of what contact is had between these inspectors and Mr. Butler beyond the fact of the duly completed form and the indication that the property has been inspected.
- If an expert report is a collaboration between two people, only one of whom has the necessary expertise, qualification or credentials, this should be expressly brought to the court's attention.
- All parties involved in the valuation process must set out clearly, on affidavit under oath, the source of their knowledge of the facts related to their involvement in the valuation.
- The valuations should, in the absence of other evidence which may satisfy a court as to expertise of the person who has determined that value, be those of accredited professional valuers registered in terms of the Valuers Act.
- The valuations must be confirmed under oath taken in terms of regulation 3(1) of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

CONCLUSION

In the circumstances, the valuations in any of the cases under consideration cannot be said to be valid and reliable. In addition, the Council of Property Valuers may have an interest in this judgment as may the Command at the Humewood Police Station. The court thus asked the Registrar to deliver copies of this judgment to these bodies.