

EXECUTION SALE: INSIGHT INTO THE PROCESS & DIFFICULTIES WHEN THE COURT DETERMINED RESERVE PRICE IS NOT MET

Hancock and Another v Nedbank Limited and Others (905/2018) [2019] ZAFSHC 219 (14 November 2019)

This judgment sketches bits of the practicalities of the new process whereby courts must determine a reserve price for properties to be sold in execution. What made it more intricate was that the highest price received at the sheriff's auction was way below the price determined by the Court. The sheriff however approached a judge in chambers to order that the lower price be accepted, as the procedure requires, unaware that the property owner had secured a much higher price in the meantime and had communicated that to the bank (the judgment creditor).

The Judgment can be viewed [here](#).

FACTS

In January 2019 Mr and Mrs Hancock's immovable property was declared specially executable by the Bloemfontein High Court and a reserve price of R3 million for the auction was set in terms of Rule 46A(8)(e). (In the bank's application, it was mentioned that the bank had valued the property at R6 million.) At the subsequent auction proceedings, the highest bid received was for R2,2 million.

Mr Hancock advised that he was informed by Nedbank's attorney that an application would have to be made to the High Court for further directions in terms of Rule 46A and that he would be informed when such an application would be heard.

While awaiting the date of the application to the High Court, Mr Hancock himself began to search for a purchaser and managed to find someone who offered to buy the property for R 5,38 million. Mr Hancock's attorney immediately advised the bank's attorney hereof and provided the latter with a copy of the offer.

However, on the same day that the new offer was conveyed to the bank's attorney, the Sheriff submitted a report to a judge in chambers, in terms of Rule 46A(9)(d), and an order was made that same day. None of the parties were aware that such report would be considered on that day.

The law provides that:

- Rule 46A(9)(c) - if a reserve price is not achieved at a sale in execution, the Court must, on a reconsideration of certain prescribed factors, order how execution is to proceed. (This subrule is couched in mandatory terms, and the Court must order how execution is to proceed where the reserve price was not achieved.)
- Rule 46A(9)(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 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)”
- Rule 46A(9)(e) states that the Court may, after considering the factors, order that the property be sold to the person who made the highest offer or bid.”
 - These subrules grant the Court a discretion to either order that the property be sold to the person who made the highest bid, or not sold to that person.

The report submitted by the Sheriff contained only the following information:

“Please take notice that the Sheriff of Bethlehem presents his report in terms of Rule 46A(9)(d) and request that a judge in chambers make an order in terms of the said rule on a sale that took place on 27 August 2019 at 12:00 at the Sheriff’s sale room ... on the immovable property described as ... I confirm that the bid made was R 2 200 000-00. Buyer name: Tradeshack 120 CC ...”

The news about the new offer was never conveyed to the judge at the time that she had to decide the matter, apparently because the Sheriff was never informed. For this, both Hancock’s and Nedbank’s attorneys were to blame as they should have appreciated that the Sheriff had to submit his report to the High Court within 5 days of the date of the auction, and that a decision by the judge in chambers could follow at any time thereafter.

The order made by the judge read as follows:

“Having considered the Notice of Motion and the other documents filed of record, and having heard Counsel for Applicants, it is ordered that:

1. *The Application is granted in terms of Section 46A(9)(d) in terms of prayer 1.*

By Order of this Court.”

Both the Hancocks and Nedbank agreed that the order presented difficulties, as there was no application before the judge in chambers; there was no Notice of Motion which had to be considered; and no counsel appeared before the judge in chambers when the matter had to be considered. The judge only had the Sheriff’s report on the table and nothing else. The phrase “in terms of prayer 1” presents a further difficulty. There were no documents before the judge containing a prayer 1.

The Hancocks then approached the Court for a declaratory order to the effect that the court order did not constitute a direction that the sale of the property for less than the reserve price be accepted and condoned. In the alternative, they requested that the court order be rescinded and set aside, and that the matter be set down again for determination, this time with proper notice to the relevant parties.

Tradeshack CC (the entity that made the offer for R2,2 million) opposed the application and filed a counter application seeking an order to the effect that the order granted by the judge in chambers be varied and be substituted with an order confirming that the Sheriff may proceed to sell the property to the highest bidder in the amount of R 2,2 million.

HELD

- Rule 42(1)(b) provides that a court may rescind or vary an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. The general approach is that the sense and the substance of the order must not be altered when a variation of the order is granted.
- In the present matter, however, it was not possible to grant an order as requested by Tradeshack, as the

order under discussion was too unclear. It could not be said by any stretch of the imagination that the order was meant to convey the message that the property was to be sold to Tradeshack. The variation sought by Tradeshack would alter the sense and the substance of the order, which is not allowed.

- The only reasonable conclusion in the circumstances was that the judge in chambers had not made any order or determination in terms of Rule 46A(9)(c) or (e).
- The present court must therefore consider the facts before it and make an order in terms of Rule 46A(9)(c) and (e) in the absence of any prior court order in terms of these sub-rules. Rule 46A(9)(e) provides clearly that the court may, after considering the information in the Sheriff's report and any other relevant factor, order that the property be sold to the person who made the highest offer or bid. The fact that R5,380 million was offered after the auction and paid into the trust account of Mr Hancock's attorney is no doubt a fact that falls under "any other relevant factor". This Court was entitled to take that offer into account.
- There can be no doubt that the offer of R5,380 million should prevail. The offer of R 2,2 million made by Tradeshack CC was far below the reserve price set by the Court and there was no reason why such offer should be preferred to the much higher offer that was later received.

CONCLUSION

The Court accordingly found in favour of the Hancocks.