

EXECUTION SALE RESERVE PRICE NOT EASILY SET AT R NIL

Absa Bank Limited v Lekhethoa (33086/2019) [2023] ZAGPJHC 967 (28 August 2023)

Our law has strict rules regulating the sale in execution of a person's home as this affects a person's constitutional right to adequate housing. This judgment deals with an application by the judgment creditor for an order that the court determines the reserve price at Rnil, because two previous execution sales failed to meet the reserve prices set by the court. Although reducing the amount of the reserve price, the court indicated why it is loath to make it Rnil, even though there is a strong argument to be made out that the property should be sold sooner rather than later, as the debt and municipal rates just keep piling up.

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

FACTS

On 20 August 2020, the Gauteng High Court (Johannesburg) granted an order in which Ms Lekhethoa's sectional title unit was declared specially executable, this after she failed to meet her bond repayment obligations to ABSA. The Court authorised the Sheriff to sell the property on public auction with a reserve price set at R375 000,00.

At the subsequent auction in January 2022 no bid was received, despite 30 prospective bidders attending. The reason advanced by the Sheriff in his report, was that the reserve price was higher than the market value and that, in addition, the outstanding rates and levies of R22 048.00 and R100 000.00 respectively (which a successful bidder will have to pay for) made the property unattractive to bidders.

ABSA again approached the Court in August 2022 and succeeded in obtaining an order reducing the reserve price to R240 000,00. The second auction was no more successful than the first and no bids of any amount were received from any of the bidders that attended the auction.

ABSA accordingly approached the court again, in the present application, for authorization to the sale of the immovable property without a reserve price.

HELD

- The Rules of Court relating to the setting of reserve prices when property is to be sold in execution aim to ensure that property is not sold for an amount that has no bearing on its value and relevant circumstances. The very purpose of Rule 46A is to avoid a homeowner's investment in his or her property from being impinged upon and to protect indigent debtors who are in danger of losing their homes. Ultimately this ensures that effect is given to section 26 of the Constitution which provides that everyone has the right to have access to adequate housing.
- Therefore courts are obliged to consider various facts in setting a reserve price. Similarly, when a reconsideration of the reserve price must be undertaken, the High Court Rules (46(9)(c), (d) and (e)) direct as follows:

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- “(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 considering 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.”

- The discretion that the Court exercises arriving at a reconsideration must be based on facts put forward by one or both of the parties and the Sheriff. The court will also take note of the fact that earlier reserve prices, as set, were not met and the reason therefore. The underlying obligation to balance the rights of the execution debtor and their constitutional right to housing, remains paramount throughout.
- There is no statutory calculation or formula to be used in reconsideration of a reserve amount. Had there been bids at prior auctions, courts sometimes take “the real-life scenario” that played out at the auction which “is the clearest and most accurate indication yet of the property’s value” and set the reconsidered reserve price accordingly. (Otherwise, when setting a reserve price initially, some courts apply the so-called “Opperman formula”, being the average of the market valuation and the municipal valuation, less 30%, less the outstanding municipal charges.)

What facts are relevant in this matter presented by the Sheriff and the parties?

- The Sheriff’s return and report confirmed the inability to successfully auction the immovable property at the reserve price that was set by the court, on two different occasions. (For the sake of comprehensiveness, the Sheriff’s report must include details about the date, time and place at which the auction sale was conducted; the names, identity numbers and contact details of the persons who participated in the auction; the highest bid or offer made; and any other relevant factor which may assist the court.) It also confirmed that the outstanding rates and taxes increased from R 22 048,60 since the first auction to R 25 252,66; and that the outstanding levies from R100 397,52 to R 125 476,47.
- ABSA advanced that it is faced with a situation where every time it approaches the court for a reconsideration of the reserve price, the municipal charges and the interest payable on the amount due by the execution debtor have all increased. This is besides the Sheriff’s costs associated with each unsuccessful auction. Ultimately then, both the creditor (ABSA) and the debtor (Lekhethoa) are prejudiced by the delay in ABSA’s inability to sell the property at an execution sale for an amount equaling or in excess of the court ordered reserve price. ABSA argues further that the likelihood of recovering its judgment debt decreases, as prospective buyers are already disinterested in the property due to the high municipal and body corporate amounts outstanding. On the other hand, Lekhethoa’s exposure and liability towards ABSA increases daily. This unfortunate situation will continue until such time that the immovable property is successfully sold at an auction. Aside from the aforementioned prejudice to be suffered by both parties, this court should also take into account that ABSA had explained previously that the court’s intervention, for a third or fourth time, resulting in a gradually reducing reserve price is not tenable.
- Lekhethoa did not submit papers.

Consideration

- Granting an order that a property be sold without a reserve price may result in the property being sold for a pittance, which defeats the purpose of the auction to begin with, especially in circumstances where the debtor will be held liable for the shortfall in any event.

- Rule 46A must also be considered. It is meant to protect indigent debtors who were in danger of losing their homes and give effect to section 26 of the Constitution. The sole purpose of judicial oversight in all cases of execution against immovable property is to ensure that the orders being granted did not violate section 26(1) of the Constitution and that the judgment debtor is likely to be left homeless as a result of the execution.

CONCLUSION

Taking these considerations into account, it is not proper to grant an order allowing the sale of the property without a reserve price. A further reserved price should be determined. The previous reserved price of R240 000,00 was not achieved. In line with the Opperman Formula, a further 30% reduction instead of granting a zero-rated reserve price. The reserve price is therefore set at R192 000,00.