Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
[redacted]
r 2024

Case No:35713/19

In the matter between:

INVESTEC BANK LIMITED Applicant

and

GREGORY JEFFREY JOSEPH ROBERTS NO First Respondent

LERISA JEFFREY JOSEPH ROBERTS NO Second Respondent

(the Trustees of the Roberts Family Trust
Registration Number [redacted])

GREGORY JEFFREY JOSEPH ROBERTS Third Respondent

LERISA JEFFREY JOSEPH ROBERTS Fourth Respondent

JUDGMENT

SK HASSIM J

[1] On 13 December 2019, the applicant applied for, and obtained, default judgement against the first and second respondents, the trustees of the Roberts Family

Trust, for amongst others payment of R6,671,622. 92. The hypothecated property ("the property") which is the third and fourth respondent's primary residence is owned by the Roberts family trust. At the instance of the applicant a valuator inspected the property on 15 August 2018 [1] and assessed its market value to be R6,500,000.00 and its forced sale value to be R 5,200,000.00. The municipal statement issued on 24 January 2019 reflected the municipal value as R649 000.00. The valuation and the municipal account formed part of the record on 13 December 2019 when the default judgment was granted and the property declared specially executable subject to a reserve price set at R5 200 000.00.

[2] According to the Sheriff's report [2] the reserve price set by the court was not attained at the sale in execution on 3 October 2022. Even though twenty-five individuals registered to bid at the sale in execution, only one offer was received. Mr M offered R2,800,000.00. On 6 March 2023, Mr M sent an e-mail to the applicant's attorney in which he offered R3 700 000.00 for the property. The applicant's attorney informed the respondents' attorneys of this, and it was suggested to them that the respondents engage with Mr M regarding a private sale

[3] The applicant applies for the reconsideration of the reserve price which was set on 13 December 2019 at the forced sale value of the property at the time which was R5 200 000.00 and suggests that the reserve price should be set at R4 000 000.00.

[4] The respondents delivered the answering affidavit outside of the period allowed in rule 46A(6)(d)(i). In the answering affidavit they request that their failure to deliver an answering affidavit timeously be condoned. Considering that the application impacts upon the respondents' right to housing, I am inclined to condone the late delivery of the answering affidavit.

[5] The respondents contend that the sale in execution was flawed because it had not been properly advertised and properly held. And that an offer received at such a sale in

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1 The valuation report was prepared on 24 April 2019.

2 Filed in terms of in terms of rule 46A(9)(c) and (d).

execution is not reflective of what can be achieved at a sale in execution that has been properly advertised and conducted. They seek the dismissal of the application.

[6] The respondents blow hot and cold on whether they are averse to a sale in execution and are advocating for a sale by private treaty; or whether they are averse to a sale in execution where less than the forced sale value of the property may be realised. They aver on the one hand that the applicant "is not entitled to a reduction in the reserve price" and that the property "should not be sold for less than the forced value" and on the other hand aver that the property "can be sold privately and would achieve a much higher sales prices [sic] in the process." The result of the latter contention is that this court is being called upon to revisit the order that the property is specially executable. Whilst the court's power under rule 46A(9)(c) is sufficiently broad to revisit the order of executability granted on 12 December 2019, that power is exercised where the court has information that the circumstances of the matter have changed such that an order of executability is no longer warranted. [3]

[7] The disputes in this application are:

(i) whether the deponent to the affidavit in support of the reconsideration application ("**the supporting affidavit**") has personal knowledge of the facts in the supporting and supplementary affidavits?

(ii) whether the sale in execution was flawed because it was not properly advertised and conducted?

(iii) whether the conditions of sale were misleading?

(iv) whether the market value of the property exceeds R6,500,000.00 which was assessed in 2018 as the market value?

(v) whether the order declaring the respondents' property specially executable should be revisited?

(vi) Whether the order granted on 13 December 2019 should be amended by reducing the reserve price from R5 200 000.00 to R4 000 000.00 so that

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[3] Nedbank v Mabaso 2023 (2) SA 298 at 302D-E

the order declaring the property specially executable, can be effectively executed? [4]

[8] The respondents raised *in limine* in the opposing affidavit that the deponent to the supporting affidavit "cannot have personal knowledge of this matter considering the negotiations between [the respondents] and the Applicant's representatives prior to the signature of the Applicant's Founding Affidavit on 26 October 2022 which did not involve the deponent." This objection is raised in relation to the supplementary affidavit as well. Additionally, the respondents suggest albeit obliquely that the averments in the applicant's affidavits constitute inadmissible hearsay evidence.

[9] In my view there is no merit to the objection to the applicant's affidavits.

[10] The deponent to the supporting affidavit makes no mention of any negotiations in either her affidavits. Additionally, the respondents do not raise negotiations which may have preceded the delivery of the supporting affidavit as a basis for opposing the application. Therefore, on the respondents' own showing the negotiations, if any, have no bearing on the issues in this application.

[11] I am satisfied that the applicant has produced admissible evidence in support of its application. The deponent to the supporting affidavit avers that she has personal knowledge of the facts in the affidavit and where she did not have personal knowledge her knowledge was derived from what had been conveyed to her by others. Several documents are attached to the supporting affidavit to substantiate the averments. The facts material to the application are supported by the documents which are attached to the supporting affidavit.

[12] The respondents' resist the reduction of the reserve price from the forced sale value of R5 200 000.00 to R4 000 000.00. Their case is that the reserve price was not attained at the sale in execution on 3 October 2022, not because the reserve price was too high as contended by the applicant but, because the advertisement of the sale in

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4 Cf. Standard Bank of South Africa v Tchibamba 2022 (6) SA 571 (WCC) at 584A-B.

execution, as well as the way in which the sheriff conducted the sale in execution, were flawed.

[13] They have, however, not disclosed why they claim the sale in execution was not properly advertised. The notice of the sale in execution was published in the Government Gazette on 16 September 2022. It unambiguously states that the property would be sold in execution subject to a reserve price of R5 200 000.00. The copy of the notice of the sale in execution published in the Government Gazette is legible, but the notice published in The Star newspaper is not. However, considering that it was not argued before me that there are discrepancies between the notice of the sale in execution published in the Government Gazette, and that published in The Star, I have assumed that there were no discrepancies and therefore the notice of sale in execution in The Star also unambiguously stated that the property will be sold in execution subject to a reserve price of R5 200 000.00.

[14] The respondents contend moreover that there are "material errors" in the conditions of sale. They also challenge the propriety of the way in which the sheriff conducted the sale in execution. They maintain that the reserve price was not attained because of these errors, and therefore the lack of interest in the property is not an accurate measure of the interest the property can attract and the price it can command. The nub of this complaint is that it was not clear to potential purchasers whether the property was offered for sale subject to a reserve price or not. This, they claim discouraged potential buyers from bidding. The respondents refer to two incidents to support their case that the process leading up to the sale in execution as well as the way in which the sheriff conducted the sale, were flawed.

[15] They contend that the conditions of sale were misleading because clause 2.1 provided that the property will be sold without a reserve price while clause 2.2 provided that "no bid of less than R1 000 … will be accepted". These averments do not accurately reflect these conditions, in fact the failure to fully quote clause 2.1 and especially 2.2 is misleading.

[16] Clauses 2.1 and 2.2 read as follows:

"2.1 The property shall be sold without reserve … to the highest bidder subject to a reserve price of R 5,200,000.00 (five million two hundred thousand Rand).
2.2 The sale shall be for South African Rands and no bid of less than R1 000.00 (one thousand Rand) in value above the preceding bid will be accepted."

[17] There is no inconsistency between clause 2.1 and clause 2.2. Clause 2.1 deals with the price for the property. Whereas clause 2.2 deals with bid increments.

[18] There is however an inconsistency within clause 2.1. But the respondents do not rely on this inconsistency, and I have not been addressed on the matter. In any event, if potential buyers understood clause 2.1 to mean that the property will be sold free of a reserve price, they would have been encouraged to participate in the bidding as opposed to being discouraged. It is more likely that buyers would be discouraged from participating in a sale in execution because the reserve price is considered too high, than due to believing that the property is being offered free of a reserve price. If prospective buyers understood the clause to mean that the property will be sold subject to a reserve price of R5,200,000.00, which is what was intended, it is more likely that the reserve price was seen to be too high which discouraged prospective buyers resulting in diminished interest in the property. A belief that the property would be sold without a reserve price would have heightened interest in the property; not diminished it.

[19] The second incident the respondents rely on is the Sheriff's error in commencing the sale by inviting an offer of R1 000.00 instead of the reserve price. They contend that the sheriff's error caused uncertainty and confusion and argue that this "would have negatively impacted the confidence which potential bidders had in the sale and would have resulted in reduced bids".

[20] The applicant discloses in the supporting affidavit that the sheriff commenced the sale in execution by inviting an offer of R1 000.00 for the property. Of the twenty-five registered bidders, one bidder (Mr M) offered R2 800 000.00. Upon realising that the sale was subject to a reserve price, the sheriff announced that the court had ordered a sale subject to a reserve price of R5,200,000.00 (five million two hundred thousand Rand) and re-commenced the auction by inviting an opening bid at the reserve price.

No bids were received. To gauge the interest in the property, the sheriff then invited bids free of a reserve price. Mr M who had earlier offered R2 800 000.00 repeated his offer. In my view, what this shows is that potential purchasers were not inclined to offer the reserve price for the property. Furthermore, it also shows that there was no interest in purchasing the property above R2 800 000.00. In my view, the sheriff's error, did not negatively impact upon the interest in the property.

[21] The respondents suggest that R4 000 000.00 is half of the true value of the property. [5] According to them the property is valued between R9 300 000.00 to R9 450 000.00. In support they attach two letters [6] from seemingly two unrelated and independent estate agents dated 12 October 2022 and 13 October 2022 respectively. The wording of the valuations is so strikingly similar that it brings into question the impartiality and independence of the estate agents. I am not satisfied that these valuations are reliable. Additionally, I am not satisfied that these estate agents are qualified to express an opinion on the value of the property. Moreover, and apart from not being confirmed under oath, the valuations are firstly tentative and subject to the caveat that the author is not a sworn valuator and secondly, the facts informing the opinion of the market value of the property are not disclosed. In my view these valuations have no probative value.

[22] As indicated in paragraph [6] above it is not clear whether the respondents contend that the property should be sold by private treaty and not at a forced sale or whether they contend that the property should not be sold for less than the forced sale value of R5 200 000.00 reflected in the applicant's valuator's report dated 24 April 2019. [7] According to the valuation report attached to the replying affidavit which is dated 27 March 2023, and flowed from an inspection on 11 September 2020, the forced sale value is R4 900 000.00. This is a R300 000.00 reduction in the forced sale value.

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5 CL010-11, answering affidavit para 31.

6 The respondents refer to these letters as valuations.

7 The report on the face of it was prepared following an inspection held on 15 August 2018. The valuation was attached to the affidavit in support of the application for default judgment and to declare the property specially executable.

[23] The evidence before me is that:

(i) the market value of the property is R6 500 000.00;

(ii) the municipal value at 24 February 2023 was R1 500 000.00 having increased from R649 000.00;

(iii) the forced sale value of R5 200 000.00 as per the valuation dated 24 April 2019, was not realised at the sale in execution on 3 October 2022;

(iv) the forced sale value of the property flowing from an inspection of the property on 11 September 2020 [8]according to the valuation of 13 April 2023[9] is R4 900 000.00; [10]

(v) an offer of R2 800 000.00 was received at the sale in execution which was increased by the prospective buyer (Mr M) on 6 March 2023 to R3 700 000.00.

(The respondents have not refuted these values by admissible evidence despite having had the opportunity to do so.)

(vi) The respondents do not dispute that the applicant was entitled to default judgment. They claim they made payments after the default judgment was granted and were paying the monthly instalments when the sale in execution was held. This is not disputed. Nor is it disputed that even before default judgment was granted the respondents had been making some payments

(vii) They do not dispute that the judgment debt has not been paid in full.

(viii) According to the certificate of balance dated 10 March 2023 the respondents were indebted to the applicant in an amount of R6 443 583.08 on that date. The respondents dispute the correctness of the certificate of balance on the basis that they continued to pay the monthly instalment up to 17 July 2022. The applicant attached to its replying affidavit, a

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8 Annexure RA3: CL 12-23 at CL 12-32.

9 Annexure: RA3: CL 12-23 at CL 12-25

10 Annexure RA3: CL 12-23 at CL 12-24

statement of account for the period 9 December 2019 to 27 March 2023 which had been sent to the respondent's attorneys of record at their request on 17 October 2022. The statement of account shows that payments were made after the default judgment.[11] However between 17 July 2022 and 5 October 2023 there were no payments.

(ix) On 2 January 2024 the respondents were indebted to the applicant in the amount of R6 543 722.44.

(x) The property, while owned by a Trust, is occupied by the third and fourth respondents who are the trustees of the Trust. The respondents have not disclosed whether there are other occupants.

(xi) The respondents have been given the opportunity to repay the judgment debt. On 9 March 2022, they signed an acknowledgment of debt in terms of which they undertook to repay[12] the total indebtedness of R6 036 407.17 by no later than 31 May 2022 unless by that time the property had been disposed of by private treaty or an offer for the property was pending. Notwithstanding the undertaking that the total indebtedness would be repaid by 31 May 2022, on 1 June 2022 the respondents' indebtedness to the applicant was R5 979 676.23.

(xii) During September 2023, the respondents entered into an agreement with the applicant's attorneys of record that they would pay R60 000.00 per month to it and that the property would be refinanced by no later than 3 December 2023. It is common cause that the respondents paid R60,000.00 for the months of October to December 2023 and for January 2024. The applicant disputes the respondents' claim that these payments constituted the monthly bond instalment as averred by the respondents. The

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11 A payment of R60 000.00 was made on 9 December 2019 being three days before the default judgment was granted

12 No less than R52 000 by 10 March 2022.

(i) No less than R75 000.00 by 31 March 2022.

(ii) No less than R103 000.00 by 30April 2022.

(iii) The remaining indebtedness estimated to be R5 806 407.17 by no later than 31 May 2022 or subject to a private sale of property/ pending offer at the time.

> applicant's case is that the loan facility was cancelled and the agreement in September 2023 was an indulgence to enable the respondents to refinance the property. On the respondents' own version, the property had to be refinanced by no later than 3 December 2023. In my view, the fact that a credit committee of an undisclosed financial institution had not approved a mortgage bond over the property due to the intervening December holidays does not excuse the respondents' non-compliance.

[24] In my view, it is unlikely that the respondents will be able to sell the property privately. They contemplated selling the property privately as far back as 9 March 2022, being the day, they signed the acknowledgement of debt. The respondents have not disclosed whether they have been approached by prospective private buyers and if so, what offers they have received. Nor have they explained whether they have given a mandate to an estate agent to market the property. Insofar as refinancing the property is concerned, it did not happen between September 2023 and January 2024. The applicant avers that the respondents had previously undertaken to refinance the property but were not successful in doing so.

[25] Despite the opportunity to place facts before the court why the court's discretion should be exercised in their favour, the respondents have not disclosed what assets they own apart from the property nor whether they are employed and what they earn. They have not as much as disclosed their occupations. It is consequently not possible to assess whether there is any possibility that the judgment debt will be liquidated within a reasonable period without execution against the property. The prospect of that happening on the papers appears to be remote, if not non-existent. Default judgment was granted more than four years ago. Additionally, the respondents had undertaken to liquidate the debt by no later than 31 May 2022 and later, by 31 December 2023.

[26] While it is so that payments have been made by the respondents and were made after the default judgment was granted, no payments were made between 17 July 2022 and 5 October 2023. I am not satisfied that the respondents have shown that the

circumstances of the matter have changed such that an order of executability is no longer warranted.

[27] Considering that the forced sale value according to the latest valuation before me is R4 900 000.00, and the offer of R 3 700 000.00 made by Mr M on 6 September 2023, it is unlikely that the judgment can be effectively executed if a reserve price is set at R5 200 000.00. Counsel for the parties were in agreement that a reserve price may be set, and if not achieved, the property may be sold in execution free of a reserve price. I intend setting R4 900 000.00 as the reserve price. If that is not achieved, the property may immediately be sold free of a reserve price. The sale in execution on 3 October 2022 was held at the Sheriff's office. I intend to direct that the sale in execution is held at the property. This may garner more interest in the property. The applicant's counsel requested an order that the notice of sale can be served on the respondent's attorney. The order I intend issuing caters for this and will address any attempt to evade service by the respondents.

[28] The applicant seeks attorney client costs on the grounds of the respondents' dilatoriness. The respondents have indeed been dilatory. The applicant has accommodated them by allowing them an opportunity to secure a private buyer and to refinance the property. The answering affidavit was also delivered late. The respondents have reneged on undertakings given by them over the years. Whilst they have made payments after the default judgment was granted, there were extended periods over which no payments were made. In my view, the respondents' dilatoriness warrants punitive costs on the attorney own client scale. Apart from this clause 12.1 of the terms and conditions of the agreement between the parties entitles the applicant to attorney own client costs.

[29] Consequently, I make the following order:

(a) The respondents' failure to deliver an answering affidavit within the period stipulated in rule 46A(6)(d)(i) is condoned in terms of rule 46A(8)(c) (ii).

(b) The reserve price set on 12 December 2019, is reduced to R4 900 000.00.

(c) In the event of the reserve price not being achieved at a sale in execution the property may immediately be sold free of a reserve price

(d) Any future sale in execution must be held at the property described as erf [redacted] M[redacted] Estate Extension [redacted], Registration Division J.R., province of Gauteng.

(e) Any documents which the applicant is required to serve on the respondents in terms of the rules of court or applicable legislation must also be served on the respondents' attorneys of record.

(f) The respondents shall pay the costs of the application on the attorney own client scale.

[redacted]

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S K HASSIM
Judge: Gauteng Division, Pretoria
(electronic signature appended)

Applicant's Counsel: Adv De Oliveira
Respondent's Counsel Adv Braga

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 September 2024.