REPUBLIC OF SOUTH AFRICA

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

Case Number: 28015/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: ~~NO~~ YES
(3) REVISED. NO

05-02-2021
DATE

SIGNATURE

In the matter between:

NEDBANK LIMITED Applicant

And,

SANDILE DAVIE MZIZI Respondent

Case Number: 4257/2020

In the matter between:

NEDBANK LIMITED Applicant

And,

JOHANNES FREDERICK DEYZEL First Respondent

MADELEINE DEYZEL Second Respondent

Case Number: 35970/2019

In the matter between:

NEDBANK LIMITED Applicant

And,

NONTSIKELELO SIBONGILE MBETHE Respondent

JUDGMENT

Summary: Applications in terms of rule 46A - an internal bank valuation is not sufficient in and of itself to establish a reserve value unless it contains or is accompanied by evidence of independent verification as to value. Thus, either independent valuations should be obtained or further information as to value should be used, in addition to the bank's valuation, to satisfy the court as to the appropriate reserve value. In all instances, the valuation should be proven by an affidavit of a person who has actually conducted the valuation him or herself and who is properly qualified in this respect

FISHER J:

Introduction

[1] These three matters came before me in the unopposed motion court. All three cases involved requests for judgment by default and accompanying applications in terms of Rule 46(1) – i.e. for an order allowing for the execution of the immovable property of the defendant in each instance and rule 46A(9).

[2] Rule 46A(9) provides that the court 'may' set a 'reserve price' for a sale in execution. In the Full Bench decision of *Absa Bank Limited v Mokebe and other matters*[1] it was held in this Division that, save in exceptional circumstances, a reserve price should be set by a court in all matters where execution is granted against immovable property which is the primary residence of a debtor where the facts disclosed justify such an order.

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[1] 2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 485; 2018 (6) SA 492 (GJ) (12 September 2018).

[3] Rule46A is a relatively recent amendment to the Rules. It seeks to ameliorate the devasting effects of a debtors inability to meet the payments of a mortgage loan and the inevitability of execution against his or her home. One of its aims is to protect debtors by ensuring that homes are not sold in execution for prices which are not market related, as was a prevalent iniquity in the recent past. The rule enjoins the court to take into account the market value of the property in making the determination as to what a fair reserve price would be. For this purpose, the applicants routinely rely on sworn valuations by property valuers. This is, after all, the traditional way of satisfying courts as to market value of property.

[4] In the **Mzizi case** the valuation relied on consisted of an affidavit by Mr Wynant Nel who describes himself as a Regional Manager of Valuators employed by Nedbank Limited. Mr Nel qualifies himself as having 'such qualifications and experience that qualify me as an expert in the valuation of immovable property'. He does not however elaborate on these qualifications. Attached to the affidavit and ostensibly relied on as proof of the value of the property, is a document referred to as a 'property assessment'. It bears the Nedbank logo and states that an 'external assessment' of the property was done. Presumably this means the property was viewed from the outside by the assessor. The document is signed as at 19 February 2019 by an 'assessor' with the reference 'Assessor NB206528- Mbulelo Jacobs' under the following declaration: 'I/WE DECLARE THAT I/WE HAVE INSPECTED, ASSESSED AND IDENTIFIED THE PROPERTY(sic)HAVE NO PECUNIARY INTEREST INTHE GRANTING OF THIS LOAN'. Although the evidence is framed as that of Mr Nel there is no indication that he valued the property himself and it appears that reliance is placed entirely on the assessment. There is no affidavit from the assessor and neither is he qualified in the documents as a valuer.

[5] In **Deyzel** an 'assessment' in the same format is relied on this time by 'Assessor NB206939 - Ndlvhuwo Nengovhala'. There is no covering affidavit by a valuer in this matter. The same deficiencies hold good in relation to the assessment in this matter and specifically the assessor is neither qualified nor does he make a valuation under oath.

[6] In **Mbethe** the papers are drawn in the same manner. An 'assessment' in the same form is used, this time by 'Assessor NB029906 - Shadrack Vilikazi'. Again, he is not qualified and neither is the valuation on oath.

[7] The same attorneys act for Nedbank in the Deysel and Mbethe matters while a different attorney acts in Mzizi. It seems to me that the attorney in Mzizi was alive to the fact that the property assessments, on their own, were insufficient to found evidence of value. It was thus sought to lend more weight thereto by the evidence of Mr Nel. As I have said this covering affidavit does not serve to render the assessment a valuation under oath. It seems to me that this attempt to pass off the hearsay and unqualified assessment as that of Mr Nel is nothing more than sleight of hand.

[8] Thus, the evidence of value of the properties is, in my view, deficient on two bases. First, they are not sworn valuations by a qualified valuer and second, they arguably lack independence. As I have said, in all three cases, the valuations relied on to establish market value were valuations by valuers employed by or attached to the bank.

[9] All three applications must obviously fail on the first basis. However, I consider the question of whether financial institutions should be allowed to use their own valuations to found applications under rule 46A an important one to consider.

[10] Ms Fine and Ms van Aswegen sought to move for the orders in Deyzel and Mbethe and Mzizi respectively. Both, at my request, filed heads of argument in relation to the latter issue – for which I am grateful. I now turn to deal with the issue.

Reliance on bank's own property assessment

[11] In terms of rule 46A(9)(a) the court is required ('must') in every application under rule 46A to consider whether a reserve price is to be set on sale in execution. In terms of rule 46A(b) In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court is required to('shall') take into account—

'(i) the market value of the immovable property;

(ii) the amounts owing as rates or levies;

(iii) the amounts owing on registered mortgage bonds;
(iv) any equity which may be realised between the reserve price and the market value of the property;
(v) reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);
(vi) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;
(vii) the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;
(viii) any prejudice which any party may suffer if the reserve price is not achieved; and
(ix) any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.'

[12] The enquiry to be undertaken by the court is rigorous. Thus the establishing of the true market value of the property is essential to the court's determination of an application for foreclosure and would, to my mind, have to be the starting point from which the court's evaluation proceeds in each case.

[13] It is an important part of the business of banks to determine and even dictate property values for their own security purposes. Thus, the primary reason for the existence within the bank of departments which cater to valuation is the protection of the Banks's interest.

[14] The tension at play in the determination of the rule 46A application as to reserve price is that the bank seeks a price which is as low as possible because in this way there is a greater chance of a sale in execution whilst the court is called on to peg the reserve price at a level which does justice to the rights of the debtor to obtain fair value in respect of the property. It must be borne in mind that these applications are usually brought as part of the taking of judgment by default and thus there is generally no information before the court as to the reserve price save that put up by the bank.

[15] The question thus arises as to whether an internal valuation of a bank is acceptable as evidence of market value. The nature of valuation is such that there is an element of subjectivity to it. Generally whether a value is pegged high or low is

advantageous to one or the other party to litigation. Property valuation in the context of mortgage lending from the bank's perspective is geared towards the protection of the bank as opposed to the debtor. This is a bent which cannot be ignored by a court in making its assessment.

[16] The constitutional imperatives which are protected by the enactment of R46A generally and in connection with the determination of the reserve price are so fundamental, that, to my mind, any potential conflict inherent in the information provided must be given due weight in the determination of the reserve price. If a price set is less than true market value the debtor is liable to lose the investment made in the property and still be left indebted to the bank for more than is fair. For most homeowners the investment in the mortgaged property is the largest and most important of their lives. Rule 46A creates a discretionary weighing up process which must be judicially exercised. In my view this process calls for reliance on evidence which is independent of the financial institution itself. The municipal valuation of the property is insufficient as it often bears no relationship to the true value.

[17] Ms Fine and Ms van Aswegen argue that the application is served personally on the defendant and thus the defendant has the opportunity to put forward his or her own valuation to counter that of the bank. Ms Fine points out that there is independent information available to the public as to comparative sales prices in any given area. She cites for example, a company known as Lightstone Properties. She argues that it would accordingly not be difficult for a defendant to gain access to this information. Whilst this may be so, it does not relieve the bank of the burden of putting up proper evidence of value or the court from making its assessment on the basis that it properly considers any potential conflict of interest which may be at play. To the extent that independent evidence of value is available to the public it is likewise available to the banks.

[18] In Mokebe and other matters[2] the court made reference to the argument of the lender banks in the matter thus:

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[2] Mokeba – ibid at [54].

'The lender banks or mortgagees argued that by setting a reserve price the interest of prospective purchasers would be reduced and therefore make it less likely for them to find a buyer. The allegation appears to be without foundation, but even if it is so, we can see no reason why the court cannot be approached for a variation of an existing order making it more likely to find a buyer, should the perceived difficulties arise. According to the affidavit filed by the banks, the information is readily available. They employ external valuers to do an analysis of the sale price of a property, which valuation also takes into account the distressed property value. It will therefore not increase costs to place the facts so gathered before the court by way of affidavit. (Emphasis added.)

[19] Ms van Aswegen argues that the same considerations of lack of impartiality will hold sway even if the bank employs an external valuer in that he or she would still be beholden to the bank. I disagree. The independent valuation industry is such that most valuers guard their reputations and that of the industry at large jealously. It is less likely that a valuer will give a skewed valuation if he or she has to go on oath in relation thereto.

Conclusion

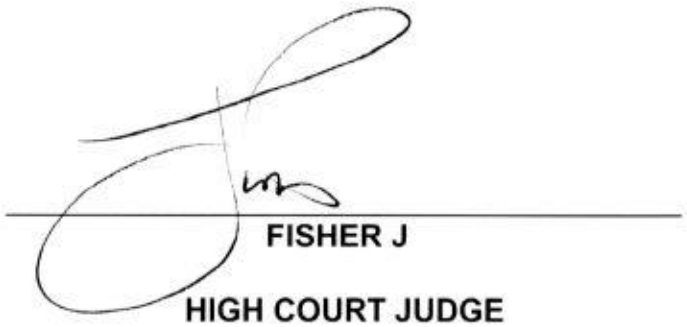
[20] To my mind, an internal bank valuation is not sufficient in and of itself to establish a reserve value unless it contains or is accompanied by evidence of independent verification as to value. Thus, either independent valuations should be obtained or further information as to value should be used in addition to the bank's valuation, to satisfy the court as to the appropriate reserve value. In all instances, the valuation should be proven by an affidavit of a person who has actually conducted the valuation him or herself and who is properly qualified in this respect.

Order

[21] In the circumstances I make the following order under each of these case numbers:

1. The application in terms of rule 46A is postponed *sine die* for the purpose of it being supplemented with further evidence as to value.

2. No order is made as to costs.



FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 7 October 2020.

Judgment Delivered: 05 February 2021.

APPEARANCES:

In Case Number: 28015/2019

For Applicant : Adv S Van Aswegen.

Instructed by : Rossouws Lesie Inc.

For the Respondent : Unopposed.

In Case Number: 4257/2020 and 35970/2019

For Applicant : Adv V Fine.

Instructed by : Hammond Pole Majola Inc.

For the Respondents : Unopposed.