IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Hancock v Nedbank Limited [2019] JOL 46274 (FB)

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 905/2018

In the matter between:

HANCOCK	1st Applicant
HANCOCK	2nd Applicant

and

NEDBANK LIMITED	1st Respondent
TRADESHACK 120 CC	2nd Respondent
THE SHERIFF, BETHLEHEM	3rd Respondent
THE REGISTRAR OF DEEDS	4th Respondent

HEARD ON: **31 OCTOBER 2019**

JUDGMENT BY: **LOUBSER, J**

DELIVERED ON: **14 NOVEMBER 2019**

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[1] This is an application concerning the provisions of Rule 46A of the Uniform Court Rules, and more particularly the provisions of subrule (9)(c), (d) and (e) thereof. The application was filed after an immovable property belonging to the Applicants was auctioned in execution by the Sheriff of Bethlehem, at which auction the highest bid received was well below the reserve price fixed by the Court. The facts of the matter, and what transpired after the auction, are more fully set out hereinafter.

[2] On 17 January 2019 the immovable property in question was declared specially executable by the Court, and a reserve price of R 3 million for the auction was set by the Court in terms of Rule 46A(8)(e). The Applicants are an elderly couple married in community of property. In their Founding Affidavit, they described the property as Portion 1 of the farm De Molen in the district of Bethlehem. They further state that the property is their primary residence, and that they have always gained an income from a guesthouse they conduct on the farm. In the First Respondent's application to have the property declared specially executable, it was mentioned that the property was valued at R 6 million by the First Respondent prior to the application.

[3] The auction took place on 27 August 2019 at the premises of the Sheriff in Bethlehem. The highest bid received was that of the Second Respondent for an amount of R 2.2 million, which was R 800 000-00 below the reserve price set by the Court. According to the First Applicant, he was subsequently informed by the attorney acting for the First Respondent (Nedbank) that an

application would have to be made to the High Court for further directions in terms of the Court to Rules, and that he would be informed when such an application would be heard. In the meantime, and while awaiting the date of the application in the High Court, the First Applicant himself began to search for a purchaser for value, and he found one who offered to buy the property for R 5.380 million. On 20 September 2019 at approximately 8:15 in the morning the First Applicant's attorney telephonically informed the attorney for Nedbank of such offer, and on 23 September 2019 the signed offer to purchase was delivered to the attorney of Nedbank. The offer was to purchase for cash, and by 30 September 2019 the whole purchase price of R 5.380 million was already paid into the trust account of the first Applicant's attorney.

[4] On the same day that the new offer was conveyed to the attorney of Nedbank, namely 20 September 2019, a report submitted by the Sheriff in terms of Rule 46A(9)(d), was considered by a Judge in Chambers and an Order of Court was subsequently made on the same day. None of the parties were aware that such report would be considered on that particular day. I will return later to the order that was made by the Judge in Chambers.

[5] At this juncture, I deem it appropriate to refer to the relevant provisions of Rule 46A, to the report of the Sheriff and to the order that was made by the Judge in Chambers. It is necessary to do so in order to put the above-mentioned events into perspective. Rule 46A(9)(c) provides as follows:

> *"(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."*

This subrule is couched in mandatory terms, and the court must order how execution is to proceed where the reserve price was not achieved.

[6] Rule 46A(9)(d) reads as follows:

> *"(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 –*
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> (i) *the date, time and place at which auction sale was conducted;*
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> (ii) *the names, identity numbers and contact details of the persons who participated in the auction;*
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> (iii) *the highest bid or offer made; and*
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> (iv) *any other relevant factor which may assist the court in performing its function in paragraph (c)"*

[7] The provisions of Rule 46A(9)(e) are stated as follows:

> *"(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."*

In terms of this subrule, the Court has a discretion to either order that the property be sold to the person who made the highest bid, or to order that the property not to be sold to that person.

[8] Subsequent to the auction on 27 August 2019, the Sheriff submitted the required report to the Registrar of the High Court, Bloemfontein. The report is dated the same day, namely 27 August 2019. Although the report is also addressed to the Applicant, to the Second Respondent as purchaser below reserve and to Nedbank, there is no indication on the papers that any of them ever received the report. The information required by the rule are contained in the report, and the first unnumbered paragraph of the report states the following:

> *"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 at Sheriff Bethlehem, 5 Lindley St., Bethlehem on the immovable property described as Portion 1 of the Farm De Molen 1808, district Bethlehem, Free State Province. I confirm that the bid made was R 2 200 000-00. Buyer name: Tradeshack 120 CC (Denise Thompson)"*

[9] It appears to be common cause between the parties that this report contained the only information that was placed before the Judge in Chambers. To put it differently, the news about the new offer was never conveyed to the Judge at the time that she had to decide the matter. This is probably so because nobody had bothered to inform the Sheriff immediately when the new offer was negotiated. Had the Sheriff been informed, he would surely have brought the new developments to the attention of the Judge before the determination was made. For this sad state of affairs the attorneys for the Applicants and for Nedbank have to carry the blame, for they should have known that the Sheriff had to submit

his report to the High Courts within 5 days of the date of the auction, and that a decision by the Judge in Chambers could follow at any time thereafter. This brings me to the order made by the Judge on the information presented in the Sheriff's report.

[10] I quote the whole order made by the Judge verbatim 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:*
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> 1. *The Application is granted in terms of Section 46A(9)(d) in terms of prayer 1.*
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> *By Order of this Court."*

The parties were *ad idem* at the hearing of the application before me that this Court Order presented with a number of difficulties. In the first place, there was no application before the Judge in Chambers, nor was there any Notice of Motion which had to be considered. It is further common cause that no counsel for the Applicant appeared before the Judge in Chambers when the matter had to be determined. The Judge only had the Sheriff's report on the table and nothing else.

[11] As mentioned already, there was no application that could be granted in terms of Section 46A(9)(d). If the Judge had intended to refer to that Rule, then the order made is still difficult to understand, because the said Rule only provides that the Sheriff must submit a report containing certain information. As we have seen earlier, it was only in terms of Rule 46A(9)(c) and (e) that the

Judge could make any order. The phrase “in terms of prayer 1” presents a further difficulty. There were no documents before the Judge containing a prayer 1. The paragraphs in the report by the Sheriff were not numbered at all, and if the Judge had actually intended to refer to the first paragraph of the report, the reference to prayer 1 still provides no clarity. This is so because the Sheriff only requested in his first paragraph that a judge in chambers make an order in terms of the Rule.

[12] It is no wonder that this Court Order spurred the parties into action without any further ado. The Applicants filed an application seeking, inter alia, a declarator that the Court Order of 20 September 2019 does not constitute a direction that the sale of the property for less than the reserve price be accepted and condoned. In the alternative, they pray that the Court Order be rescinded and set aside, and that the matter be set down again for determination, this time with notice to the Applicant, and probably the other interested parties as well. The Second Respondent opposed this application as could be expected, and simultaneously with its answering affidavit, filed a counter application seeking an order to the effect that the Order granted by the Judge in Chambers be varied in terms of Rule 42(1)(b) 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 2 200 000-00.

[13] This Court is now called upon to decide the application of the Applicant and the counter application filed by the Second Respondent. The Sheriff and the Registrar of Deeds have not filed

any papers in the applications, while the First Respondent (Nedbank) has filed a Notice to Abide by the decision of the Court.

[14] To begin with the counter-application, Rule 42(1)(b) provides that the 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 appears to be that the sense and the substance of the order must not be altered when a variation of the order is granted[1]. Mr. Van der Merwe, appearing for the Second Respondent, urged the Court to interpret the order made in chambers to mean that the property is to be sold to the Second Respondent, and that the order should therefore be varied to reflect that intention more clearly.

[15] I do not agree. If the Judge in Chambers had that intention in mind, the Judge could have said so when the order was made. On a proper construction of the terms of the order, it cannot be said by any stretch of the imagination that it was meant to convey the message that the property was to be sold to the Second Respondent. The variation sought by the Second Respondent would therefore alter the sense and the substance of the order, which is not allowed. Such a variation would completely substitute the order with something different, to put it differently.

[16] To my mind, the only reasonable conclusion in the circumstances would be that the Judge in Chambers had not made any order or

[1] **Mostert NO *v* Old Mutual Life Assurance Co (SA) Ltd. 2002 (1) SA 82 (SCA) at 86 D-E**

determination in terms of Rule 46A(9)(c) or (e) at all. This becomes even more apparent when regard is had to the Court Order of Daffue, J on 17 January 2019 when he declared the property specially executable. He made an additional order that if the reserve price of R 3 million is not achieved at the sale in execution, the Court must, on a reconsideration of the factors in Rule 46A(9)(b) and its powers under this Rule, order how execution is to proceed. It speaks for itself that this was not done.

[17] It is therefore now incumbent upon this Court to consider the facts before it and to 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. Mr. Van der Merwe has urged the Court that, if such an approach is adopted, it should not consider the offer that was received a day or two later after the Judge in Chambers had dealt with the matter. This Court should then consider the matter only on the same information that was available on 20 September 2019, the argument went. The offer of R 5.380 million should therefore be ignored if the matter is reconsidered.

[18] This argument is also without any substance. 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 R 5.380 million was offered after the auction and paid into the trust account of the Applicant's attorney is no doubt a fact that falls under "any other relevant factor". This Court is entitled to take that offer into account.

[19] Since all the interested parties are presently before the court, and since the parties have submitted all the facts and the arguments to this Court to advance their respective cases, common sense and the interest of justice demand that this Court now bring finality to the issues in question without any further delay.

[20] There can be no doubt that the offer of R 5.380 million should prevail. The offer of R 2.2 million made by the Second Respondent is far below the reserve price set by the Court, and there is no reason why such offer should be preferred to the much higher offer that was later received. The counter-application filed by the Second Respondent can therefore not succeed. On the other hand, the Applicants have made out a proper case for the relief they seek.

[21] Although it was already found that the Judge in Chambers had made no order as envisaged by the Rule, that order should be rescinded in any event for the sake of clarity. As for costs, I deem it inappropriate in the special circumstances of this case to make any order of costs at all.

[22] The following order is made:

1. The main application succeeds.
2. The Court Order in this matter dated 20 September 2019 is rescinded and set aside.
3. In terms of Uniform Court Rule 46A(9)(c), it is ordered that the property, Portion 1 of the farm De Molen 1808, District of Bethlehem, be sold to the person

who made the highest offer of R 5.380 million for the property on 23 September 2019.

4. The counter-application is dismissed.
5. There is no order of costs.

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P.J. LOUBSER, J

For the Applicants:	Adv. S.J Reinders
Instructed by:	Marinda Bender Attorney Inc. c/o Pieter Skein Attorneys Bloemfontein

For the First Respondent:	Adv. R. Van der Merwe
Instructed by:	Badenhorst Attorneys Bloemfontein