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

CASE NUMBER : 43955/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~ / NO

(3) REVISED

20 March 2023

DATE SIGNATURE

In the matter between:

SB GUARANTEE COMPANY (RF) PROPRIETY LIMITED **Applicant**

(Judgment Creditor)

(Reg No: 2006/021576/07)

and

MEERAN CHETTY **Respondent**
(ID No: […]) **(Judgment Debtor)**

Summary: Application for Leave to Appeal

Uniform Rule 46A(9)(c)

O R D E R

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1. The application for leave to appeal is dismissed with cost.

JUDGMENT

VAN HEERDEN AJ

1. This matter became before me as an opposed application. The applicant seeks relief, in terms of Uniform Rule 46A(9)(c) to have the reserve price reconsidered in circumstances where:

> *"If the reserve price is not achieved at a sale in execution, the Court must, on a reconsideration of the factors in paragraphs (b) and its powers under this rule, order how execution is to proceed."*

2. The respondent opposed the relief sought.

3. At the hearing of this matter the applicant was represented by Adv Coertzen and the respondent (Mr Chetty) appeared in person. Although Mr Chetty appeared in person, he certainly did not appear to be a novice in the field of law. Mr Chetty filed a comprehensive practice note as well as full heads of argument in his own name. Similarly, the respondent filed the application for leave to appeal as well as his written submissions, all under his own name.

4. After this matter was initially argued I found in favour of the applicant and made an order on 22 November 2022 in accordance with the relief contained in the notice of motion which was incorporated in a draft order which I had marked “X”.

5. The Order read as follows:

*"1. That pursuant to the judgment granted in favour of the applicant/judgment creditor against the respondent/judgment debtor on **13 August 2021**, and further pursuant to the order of execution granted against the immovable property of the respondent, described as:*

(1) A Unit consisting of – _

a) Section No. 8243 as shown and more fully described on Sectional Plan No. SS 000000087/2018 in the scheme known as THE HOUGHTON in respect of the land and building or buildings situated at HOUGHTON ESTATE TOWNSHIP, local authority CITY OF

JOHANNESBURG METROPOLITAN MUNICIPALITY of which section the floor area, according to the said section plan, is 139 (ONE HUNDRED AND THIRTY NINE) SQUARE METRES in extent; and

b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said section plan.

Held by Deed of Transfer Number ST 000025172/2018 and subject to such conditions as set out in the aforesaid Deed and more especially subject to the conditions imposed in favour of HOUGHTON ON THE GREEN PROPRIETARY LIMITED Registration Number 2010/006832/07.

(2) An ***exclusive use area*** *described as* ***PARKING P12823*** *measuring 13 (THIRTEEN) SQUARE METRES being as such part of the common property, comprising the land and the scheme known as THE HOUGHTON in respect of the land and building or buildings situated at HOUGHTON ESTATE TOWNSHIP local authority CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY as shown and more fully described on Sectional Plan No. SS 000000087/2018 held by NOTARIAL DEED OF CESSION number SK 000001616/2018 and subject to such conditions as set out in the aforesaid Notarial Deed of Cession;*

*(3) An **exclusive use area** described as **PARKING P12824** measuring 13 (THIRTEEN) SQUARE METRES being as such part of the common property, comprising the land and the scheme known as THE HOUGHTON in respect of the land and building or buildings situated at HOUGHTON ESTATE TOWNSHIP local authority CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY as shown and more fully described on Sectional Plan No. SS 000000087/2018 held by NOTARIAL DEED OF CESSION number SK 000001616/2018 and subject to such conditions as set out in the aforesaid Notarial Deed of Cession. ('the immovable property');*

*And further pursuant to the fact that the reserve price set by the Court was not achieved at a sale in execution on **26 May 2022**;*

IT IS FURTHER ORDERED:

2. That the sheriff is authorised to sell the immovable property at a sale in execution to the highest bidder, without a reserve price;

3. The sheriff is authorised to conduct the sale in execution in terms of this order at the physical address of the immovable property, where it is situated;

4. That the respondent is ordered to pay the costs of the application on a scale as between attorney and client."

6. Importantly, the respondent did not request reasons for such order as a result of which any application for leave to appeal should either be premature or be regarded as a nullity as a result.

7. On 9 December 2022 the respondent summarily, without having requested reasons for the order, filed an application for leave to appeal. In January 2023 I invited the parties to submit written argument pertaining to the Application for leave to appeal. Both parties filed their submissions timeously and I have considered same.

8. I will consequently first set out my reasons for the order issued, and secondly, I will deal with the application for leave to appeal ("the LTA").

9. The relevant background to the Rule 46A(9)(c) application is as follows:

    9.1 The application was brought by way of an interlocutory application in circumstances where in the main application the applicant applied for an order for payment against the respondent. The applicant also applied for an order that the respondent's immovable property, be declared executable. The respondent opposed the main application which was argued in the opposed motion Court in August 2021.

    9.2 On 13 August 2021 my sister, Hassim AJ made the following order in the main application:

> *"Judgment is granted in favour of the applicant against the respondent for:*

1. *Payment of the amount of R6 223 224.01;*

2. *Interest at the prime lending rate of 7% less 0.55% per annum from 11 August 2021 to date of payment;*

3. *The immovable property of the respondent is hereby declared executable;*

4. *The Registrar is authorised to issue a writ of execution against the movable property. The writ is hereby suspended for a period of two months from date of this order;*

5. *The reserve price of R3 250 000.00 is hereby set in terms of Rule 46(9)(a). Should the reserve price set in terms hereof not be achieved at a sale in execution the provisions of Rule 46A(9)(c), (d) and (e) will apply;*

6. *The respondent is to pay the applicant's cost of the application on a scale as between attorney and client."*

9.3 The respondent also appeared in person in this main application.

9.4 Accordingly, the Registrar issued a writ of execution on 26 October 2021. The sheriff attached the immovable property and scheduled a sale in execution for 26 May 2022. The sale was advertised in the Government Gazette and Citizen newspaper on 13 May 2022.

9.5 On 26 May 2022 the sheriff conducted an auction at the offices of the Sheriff Johannesburg North situated at 51-61 Rosettenville Road, Unit B1, Village Main, Industrial Park, Johannesburg. From the sheriff's return and from the sheriff's report in terms of Uniform Rule 46A(9)(d) the property was not sold at the auction as no bid was received at the set reserved price. The report also reflects the outstanding rates, taxes and levies as being R205 377.00 and R371 637.49 respectively. From the report it appears that 18 registered bidders attended the auction and participated. The respondent personally attended the auction.

10. For purposes of this application and for this Court to reconsider the reserve price the following:

10.1 The failure to have achieved the reserve price at the auction triggers the right to a reconsideration of the order in terms of which the reserve price was set.

10.2 The applicant averred that the respondent purchased the property for investment purposes. The respondent never intended, according to the applicant, to occupy the property. The respondent was furthermore unable to sell the property privately, despite the mandate given to an estate agent during 2019.

10.3 It is common cause that no bid was received at the auction. The applicant submitted that it was as a result of the fact that the reserve

price was set too high. The respondent on the other hand submitted that it was a case of divine intervention.

10.4 During August 2021, and after the date of the order, Spurgeon Property estate agents forwarded a proposed unsigned offer to purchase ("OTP"), to the applicant, on behalf of an entity known as Siyanda Gas Distribution (Pty) Ltd, for the purchase of the property for an amount of R4 250 000.00. It is evident that the *"offer"* exceeded the reserve price set by the Court by R1 000 000.00. On this basis the Bank informed the respondent on 22 September 2021 that the Bank would be willing to, pursuant to the OTP, make payment of the outstanding fees and charges owing to the Body Corporate and the local authority at the time, for the transfer to proceed. This was on condition that the respondent remains liable for the shortfall that remains due after registration of transfer. If this sale proceeded the applicant would have been in a more favourable position. However, on 27 September 2021 the respondent telephonically informed the applicant's attorney that the purchaser withdrew the OTP. The sale therefore did not materialise, and the offer became irrelevant.

10.5 On 17 December 2021 the respondent provided the applicant with an offer from his fiancé to purchase the property at the reserve price. The applicant however believed that a higher offer could be obtained at a sale in execution and informed the respondent accordingly on 13 January 2022. The applicant was therefore not prepared, or legally

obliged, to accept the offer. In view of the terms of the order, the applicant was entitled to proceed with the sale in execution. It is significant that the respondent's fiancé did not attend the auction, and that she did not enter a bid, either in accordance with her *"offer"*, or at all. As a matter of law, and in terms of paragraph 5 of the order, the provisions of rules 46A(9)(c), (d) & (e) now apply. The applicant submits that the respondent's willingness to sign an acknowledgement of debt for the remainder of the debt is without any substance.

10.6 After the auction on 26 May 2022, and since no bids were received, and in an attempt to avoid a further application to Court, the applicant's attorney proposed that the applicant will be willing to market and sell the property on public auction, subject to the current reserve price. It was proposed that an auctioneer, well versed in the process will vigorously market the property on various websites (and other forms of advertising) to attract more potential purchasers. The proposal included that the respondent be willing to authorise the applicant in terms of a Special Power of Attorney to proceed. The applicant expressed its opinion that it would be in the best interest of all parties to achieve the best possible price of the property to minimise the shortfall. The respondent was not willing to provide the applicant with a power of attorney in this regard.

10.7 On 3 June 2022 the respondent again proposed that his fiancé should purchase the property at the reserve price, but this time

"inclusive of all outstanding fees and transfer costs". The respondent again offered to sign an acknowledgement of debt for the shortfall, and to immediately *"start making monthly repayments"*. On 13 June 2022 the applicant's attorney informed the respondent that the applicant cannot consider offers below the current reserve price of R3 250 000.00, set by the Court, and that all offers are subject to the reserve price, and excludes costs and charges.

10.8 On 20 June 2022 the respondent contended by email that only in the event of a sale in execution, the reserve price is exclusive of outstanding fees. The respondent again proposed to sell the property at the reserve price, inclusive of all outstanding fees on the property. The respondent repeated his willingness to sign an acknowledgement of debt. The respondent's *"offer"* was not acceptable to the applicant. The outstanding amounts due to the Body Corporate and the local authority were simply too substantial. The respondent failed to state how he proposed to make payment of the existing judgment debt, interest and costs, and in addition how he proposes to pay the arrear fees and charges due to the Body Corporate and the local authority, if these fees and charges were simply added to the existing judgment debt. The respondent did not even pay the arrear amounts owed to the Body Corporate or the local authority. The respondent was simply unable to honour the then current judgment debt, much less the substantial additional amounts for which he proposed to also assume liability, in terms of an acknowledgement of debt.

10.9 On 18 August 2022 the applicant's attorney (before filing the replying affidavit), finally proposed to the respondent that the respondent must submit a signed offer to purchase by the respondent's fiancé at the current reserve price, for consideration, subject to certain requirements regarding the approval of a mortgage bond. In respect of the respondent's willingness to sign an acknowledgement of debt for the amount due after transfer, the respondent was requested to provide his bank statements for the past six months and proof of income for the last three months, together with a list of income and expenditures.

10.10 On 24 August 2022 the respondent contended that the applicant's requirements were unjust. The respondent wished to present his case to the Court. According to the respondent he will provide any information that the Court deems necessary to *"confirm"* the offer and/or to *"rescind the current order"*. The respondent's default in terms of his substantial home loan instalments, led to the order being granted against him in the first place. The respondent has not placed any evidence before the Court of his ability to satisfy the judgment debt, or any additional amounts which may become due after transfer.

1. <u>THE BASIS UPON WHICH THE INITIAL RESERVE PRICE WAS SET</u>

11. The property concerned is a residential apartment unit within a luxury apartment building complex and part of the well-known Houghton Hotel. The

property comprises of an open plan lounge and dining room, kitchen, two on-suite bedrooms and a balcony overlooking the inner court yard of the hotel and apartment building and the Houghton Golf Course.

12. In the main application the applicant relied on a valuation of the property conducted on 25 June 2020. In terms of such valuation the market value of the property was determined as R4 300 000.00 and the forced sale value of the property was R3 250 000.00. The respondent did not place a valuation before the Court in the main application.

13. For purposes of this application before me however, the applicant obtained a second valuation of the property, performed on 8 February 2022. The updated comparable sales and listings, the location of the property, the extent and good conditions of the unit and the current fairly depressed upper income property market, the current market value of the property was again determined as R4 300 000.00 and the forced sale value of the property still remained at R3 250 000.00. The municipal value of the property is R6 255 000.00. The municipal value is reflected as such in the municipal account dated 3 March 2022.

14. No sworn valuation was put before Court on behalf of the respondent.

15. At the hearing of the main application the respondent submitted as follows:

"Although the property is not my primary place of residence it is the only asset I have which could absolve me of this debt."

16. At a meeting held on 26 September 2019 the respondent indicated to the applicant's attorney that he originally purchased the property as an investment, and that it was vacant. The respondent even gave a mandate to Pam Golding Properties during 2019 to sell the property privately for a mandate price of R7 000 000.00.

17. It was common cause at the hearing of the main application that the respondent never occupied the property. In fact, the respondent rented out the property to the Houghton Hotel in terms of a written lease agreement which only expired shortly after the date of hearing of the main application.

18. According to the respondent he only took occupation of the property on 1 December 2021 together with his fiancé. The respondent therefore took occupation of the property after this Court granted judgment against him and declared the property executable as set out *supra*. The applicant launched the main application on 3 September 2020.

2. <u>EVIDENCE PUT BEFORE COURT WITH RELATION TO THE ARREAR AMOUNTS ON THE RESPONDENT'S ACCOUNTS</u>

19. The last payment made to the Bank on the respondent's Home Loan Account was on 1 June 2019 in the amount of R51 000.00. The respondent has not since the date of the judgment made any payment to the applicant or to the Bank for that matter.

20. On 3 March 2022 the amount due by the respondent to the City of Johannesburg, being the Local Authority, was an amount of R196 068.31, as

opposed to an amount of R136 236.73, previously owed to the local authority as on 3 February 2021.

21. The respondent's account in respect of outstanding levies due to the Houghton Body Corporate on 1 April 2022 at that time stood at an amount of R361 698.80.

22. Under the aforementioned circumstances this Court is of the view that the Sheriff should be allowed to sell the property without a reserve price. The history and the nature of the matter dictates that it will simply be impractical, unnecessary and unrealistic to proceed with a further sale in execution, subject to a reserve price, under these circumstances.

23. Moreover, in view of the judgment of the Supreme Court of Appeal in ***Petrus Johannes Bestbier and Others v Nedbank Ltd***[1] it was held that:

> *"Rule 46A was 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."*

24. I simply see no need to protect the respondent as a judgment debtor. The respondent is neither indigent, nor in danger of losing his home because of a sale in execution to satisfy the judgment debt. The applicant has a right to

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1 Case No 150/2021 [2022] ZASCA 88 (13 June 2022)

execution against the respondent's immovable property where the respondent is simply unable to satisfy the judgment debt by any other alternative means.

25. The massive amounts owing to the local authority and to the Body Corporate is the reason why prospective buyers most probably were not prepared to enter into a bid at the reserve price.

26. The applicant is justifyingly fatigued in its endeavours to obtain execution of the immovable property.

27. Importantly, it is only the reconsideration of the reserve price which remains the subject matter of this present matter before me.

28. In the premises I have satisfied myself that the order (*supra*) was competent and proper and that the applicant has made out a proper case for such relief in the notice of motion. Accordingly, the order was duly made an Order of Court.

3. APPLICATION FOR LEAVE TO APPEAL

29. I will continue to refer to the parties as aforesaid. The respondent being the party requesting leave to appeal.

30. The respondent seeks leave to appeal my order dated 22 November 2022 *supra* on the basis that:

30.1 the execution , without a reserve price now befalls the respondent's primary residence; and

30.2 the execution should not be held at the place of the immovable property;

30.3 the Court *a quo* did not have jurisdiction.

31. Section 17(1) of the Superior Court's Act[2] is very much prescriptive where it provides as follows:

> *"1. Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that:*
>
> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgment on the matter under consideration;*
>
> *(b) The decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
>
> *(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[2] Act 10 of 2013

32. The respondent's Application for leave to appeal does not conform to the requirements of both section 17(1)(a)(i) as well as section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 ("*the Act*").

33. Under section 17(1)(a) of the Act, leave to appeal "may only be given" where one of these two requirements are satisfied, namely either where "*the appeal would have a reasonable prospect of success*" or secondly, where "*there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration*".

34. Importantly, the respondent should accept that the standard which the respondent is required to meet in terms of section 17(1)(a)(i) is that "another Court would come to a different decision".

35. The mere listing or describing of the findings sought to be impugned and alleging that the Court erred in making such findings, is insufficient.

36. In this regard, our Courts have held that:

> *"I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that sub rule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the*

Court of the points to be raised. Accordingly, insofar as Rule 49 (3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet - see, for example, ***Harvey v Brown 1964 (3) SA 381 (E) at 383; Kilian v Geregsbode, Uitenhage 1980 (1) SA 808 (A) at 815*** *and* ***Erasmus Superior Court Practice B1-356-357*** *and the various authorities there cited. It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory."*[3]

37. The respondent ought to have stipulated in his grounds of appeal why the Court erred in making the findings in question. This is especially so since the Act imposes a heavy onus on an applicant in an application for leave to appeal to establish that another Court would come to another decision.

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[3] ***Songono v Minister of Law and Order 1996 (4) SA 384 (E) 385E to 385B. Smit v Greylingstad Village Council 1951 (4) SA 608 (T) at 613A – C***

38. The respondent does not explain how the Court misdirected itself in reaching its conclusions. He does not contend that the Court erred in applying or interpreting the law or failed to apply the law to the facts; and/ or failed to apply its mind in relying on certain facts or evidence.

39. Indeed, it is apparent from a conspectus of the LTA that the respondent simply attempts to re-argue his case in a vacuum rather than demonstrate, with reference to the Order (the reasons omitted at that time), why there is a reasonable prospect that another court would come to a different decision.

40. It appears that the respondent wants to litigate on appeal, without any reasonable prospects of success and without any other clear and obvious reasons why the appeal should be heard.

41. In fact, no cogent reasons were put before me, by virtue of which another Court would find differently.

42. Such defects are fatal to the Applicant’s application for leave to appeal.

43. The application for leave to appeal is furthermore misdirected in circumstances where it also aimed at the original order granted on 13 August 2021 by my sister Hassim AJ in terms of which the respondent’s immovable property was declared executable and in terms of which a reserve price was set.

44. In considering the application for leave to appeal this Court had reference to the matter of *Trincon Construction (Pty) Ltd v Industrial Development*

Corporation of South Africa Ltd and Another[4] where the Constitutional Court held that:

"An appellate court must read the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, and appellate court's power to interfere may be curtailed by broader policy considerations. Therefore whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.

When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised judicially or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

45. The respondent has not shown that a reasonable prospect exists that a Court of Appeal would interfere with the discretion exercised by me.

[4] CCT198/14 [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015)

46. There is nothing to suggest that I did not exercise my discretion judicially or that it was influenced by wrong principles or that I could not reasonably have reached the decision that I have.

47. The respondent has not shown that a reasonable prospect exists that another Court would not have authorised a second sale in execution without a reserve price or that another Court would not have authorised a sale at the site of the property.

48. Finally the respondent, where it contends that it has come to his attention that the Court *a quo* did not have jurisdiction to entertain the matter, has simply not shown that a reasonable prospect exist that another Court would find that the Court *a quo* did not have jurisdiction to hear the matter, first of all. Secondly, this point was never raised before me, as the respondent never disputed the jurisdiction of the Court *a quo,* not in the main application and not as part of the interlocutory application.

49. Accordingly the application for leave should fail.

50. The application for leave to appeal is dismissed with cost.

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DJ VAN HEERDEN
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing:	LTA filed on 9 December 2022; Written submissions filed on 20 January 2023
Date of judgment:	20 March 2023

APPEARANCES

For the applicant:

Adv Y Coertzen
Instructed by:
Newtons Inc, Pretoria

For the respondent:
Mr Chetty
(In person)