



**SUBMISSIONS ITO OF RULE 46 REGARDING THE CONCERNS OF SHERIFFS OF BANKS PRACTICES TO CIRCUMVENT THE SHERIFF'S ROLE AND LEGAL PROCEDURES IN THE ATTACHMENT AND SALE OF FIXED PROPERTY AND WHERE THE DISCLOSURE OF THE RESERVE PRICE IS JUSTIFIED.**

The profession has been subjected to various illegal practices devised by banks to control the sale of fixed property attached in execution.

Not all of these are suspect as we as the profession believe that a debtor should be afforded the option to settle his or her indebtedness and prevent their most important asset, being their home, from being sold. It is however our view that this procedure of payments made by debtors to banks to stay the sale of their property should have some judicial oversight controlled by sheriffs.

The concern we have is that the out of court practices do not end up saving the home from being sold as it rather creates a practice whereby the banks and their lawyers discredit the legal process with various methods of intimidation of the debtor whereby the debtor is made to believe that the alternative to a sale in execution is the best way out for such a person in financial jeopardy to deal with the indebtedness to the bondholder and selling the property by private treaty at a supposedly higher price which is supposed to benefit the debtor.

The debtor is informed that the sheriff's sale will not raise a reasonable price and that such debtor will be left with a huge debt after such sale. This scare tactic is used to convince the debtor to sign a power of attorney in favour of the creditor. This ultimately defeats the object of a civil legal procedure.

What the banks and their lawyers do not inform the debtor is that such a sale will have various other costs factors and that the increased commission and additional advertising of such a private sale will in fact erase the supposed benefit at the end. The debtor would in fact be liable for most of the costs.

Debtors are placed under duress to sign a power of attorney to the banks who in turn have agents on their panels who are given the minimum unilateral price decided upon by the banks and a mandate to sell in terms of the signed power of attorney for the sale of such property by private agencies before the sheriff's auction takes place. The banks, at their own convenience, determine such minimum amount, which usually only covers themselves and which is not under legal scrutiny and they accept written offers to purchase in the ordinary course of their business.

This removal of the control over the property from the debtor and from the legal process gives the creditor Carte Blanche control.

In all cases the sheriff is not given this 'reserve price' while such price is arbitrarily determined by the bank and sold in terms of an offer to purchase which is not subjected to the scrutiny of the court.

When the sales are cancelled the debtor still remains with the unpaid amount of his debt which can be followed up by the bank for recovery through the existing civil judgement.

Sheriffs have questioned this because various buyers at sheriff's auctions have indicated that they would be prepared to challenge such price by way of open auction sales and will definitely be prepared to pay more for the property concerned. This procedure in fact gives the banks the power to determine a reserve price and it allows the offer price being challenged by way of higher bids in an open auction.

It is our submission that the existing practice is depriving the debtor from the possibility of a higher price being obtained at the auction and it may deprive the second writ or other judgment creditors from the possibility of sharing a surplus of proceeds, and then ultimately, should there be a free balance after distribution of the proceeds by the sheriff, of the benefit of receiving such surplus.

The Rules Board is currently reviewing the Rule 46 procedures and one of the issues under consideration is the setting of a reserve price at a sale in execution which is open and transparent. The banks are opposed to this proposal and are quite eager to maintain the status quo in order to control themselves. This matter was discussed on various platforms where we as SANAPS have indicated our support for such determination which is regulated by law and managed by the sheriff.

Sheriffs nationally are experiencing an out of court practice run by the banks and their lawyers where execution sale are cancelled while many buyers are attending to sheriffs auctions. These are literally cancelled a few minutes before the sale. This creates and discredits the sheriff's auction with the resulting effect that serious buyers waste their time and money attending to execution sales as 99 % of these scheduled auctions is cancelled minutes before they start. Needless to say what the effect of this is having for the respect for the Civil Justice System and sheriff's sales in general. In essence the continuous cancellation of sales under these circumstances discourages genuine buyers from attending auctions and thereby reducing competitive bids.

It is our contention and we have various examples that prove sheriffs sale do raise realistic proceeds and in most cases a price in excess of the reserve price determined by the banks.

In order to curb this manipulation of the legal system, which definitely impact on the rights of the debtor, it is suggested that the Rules Board, in its effort to rationalise the Rule 46 procedures, include the following:

Any proposed sale by private treaty or offer to purchase of a property under attachment and subject to a sale in execution considered by the banks should be tested at the scheduled sale in execution. In essence such offer or sale proposal will become an official bid that will serve as a starting bid at the sheriffs scheduled auction and this bid will be subjected to challenges by other buyers attending the auction.

Such offer to purchase accepted by the banks must be handed to the sheriff who will announce at his/her auction that a bid has been received which will become the opening bid.

This will create a transparent and fair process whereby the purchase price will undergo a more rigorous competitive bid.

Such offer to purchase should be handed to the sheriff at least one week before such sale where after the sale in execution may not be stayed by the creditor. If there is any private offer within this week, such potential purchaser should be encouraged to attend the sheriff's sale and declare his/her higher offer via a bid.

Should the debtor settle his/her indebtedness or make sufficient arrangements to prevent the sale of the property, such arrangements should be accepted by the execution creditor and considered by the sheriff before such sale is cancelled. In such a case of a debtor not losing the property, the sale may be stayed any time before the sale by the sheriff who shall satisfy himself that both the debtor and the execution creditor jointly agreed to such cancellation and giving detail of the amounts so paid over to the creditor to facilitate such staying of the sale. Such writ should be returned to the execution creditor for re-issue by the competent court reflecting all amounts paid by the debtor.

The above proposal will open up the arrangements to a transparent procedure which will be under the legal scrutiny of the sheriff and court and will ensure that the debtor obtain the best possible benefit for the property attached and sold.

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