Execution against residential immovable property in terms of high court rule 46A

2021 Stell LR 47

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Abstract

This article provides an overview of and commentary on High Court Rule 46A, which deals with the procedural rules for executing a judgment debt against residential immovable property. Rule 46A focusses on two main aspects: determining if it is justified to sell the debtor's home in execution and, if a sale is ordered, setting a reserve price at which the property is to be auctioned. Therefore, this article analyses the provisions of rule 46A that pertain to these two components, which also serve as two layers of protection for a debtor facing the loss of his or her home.

Keywords: High Court Rule 46A; sale in execution; residential immovable property; mortgage foreclosure; reserve price

1. Introduction

The Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa ("High Court Rules") and the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa ("Magistrates' Courts Rules") are made by the Rules Board for Courts of Law ("Rules Board"), with the approval of the Minister of Justice and Correctional Services. [1] For both the High Court and the Magistrates' Courts, the rules pertaining to the sale in execution of residential immovable property were substantially amended with effect from 22 December 2017. [2]

Since the rules for the two courts are very similar, only the High Court Rules will be discussed, more specifically rule 46A, titled "Execution against residential immovable property". [3] Aspects of this rule were previously included in rule 46, which concerns execution against immovable property in general, but the intricacies surrounding the execution of judgment debts against residential property have necessitated a separate rule to deal with this category of immovable property. Although the new rule deals with several

important procedural matters inspired by the constitutional developments surrounding the sale in execution of a judgment debtor's home, the major innovation is that the court is empowered to set a reserve price at which the property must be put up for auction. Developments leading to the introduction of rule 46A have been traced extensively in literature [4] and thus it is not necessary to repeat the details here. Some necessary references are made to the jurisprudence on this topic in the discussion of the provisions of rule 46A below. Reference is also made to relevant aspects of chapter 10.17 of the Practice Manual of the Gauteng Local Division of the High Court of South Africa ("Gauteng Practice Manual"), [5] which contains specific practical arrangements regarding execution against residential property for that division. [6]

Therefore, this article examines the salient features of the new rule 46A, which contemplates two layers of protection for a debtor faced with a creditor's application to have his or her home sold in execution. First, the rule gives procedural effect to the constitutional principles that a person may only be evicted from his home if a court authorises it, after having considered all the relevant circumstances of the case so that an arbitrary eviction is avoided, [7] and that a home may only be lost if the resultant limitation of the debtor's right of access to adequate housing [8] is justifiable. [9] The second layer of protection in rule 46A relates to after the sale passed the test in the first layer and, thus, when the property is to be attached and put up for auction. In this regard the rule provides that the court may set a reserve price at which the house must be sold. The rationale is that this mechanism should prevent homes from being sold at unreasonably low prices. [10]

Consequently, the first layer is aimed at trying to avoid a sale of the property in favour of alternative ways to satisfy the creditor's claims, while the second layer is aimed at protecting the debtor's interests when a sale cannot be avoided, by ensuring that the sale is conducted in a fair and reasonable matter. [11] The discussion below is structured according to these two layers: first the provisions in rule 46A pertaining to the application for an execution order, and second, the provisions concerning the court's power to set a reserve price.

2. Applying for an execution order

2.1 Introduction

The discussion that follows provides an overview of the provisions in rule 46A that relate to the first layer of protection for a debtor facing the loss of his or her home, namely, to ensure that a constitutionally unjustifiable forced sale of the home is not sanctioned. As explained below, the emphasis is on ensuring that a home is sold only as a last resort and only after it is clear that there are no alternative ways to give effect to the creditor's rights other than by selling the debtor's home.

2.2 Scope of application of rule 46A

Rule 46A applies to all instances where an "execution creditor seeks to execute against the residential property of a judgment debtor". [12] First, this confirms that the requirements of the rule must be followed whether or not the relevant property is bonded as security for the claim of the execution creditor. [13] Furthermore, it is clear that the rule does not apply if the property in question is not residential in nature, for instance if it is commercial or agricultural property. [14] If the property has a mixed use (both residential and commercial or agricultural), rule 46A probably applies as well. Although not a qualification for applying rule 46A, one of the factors that the court must consider is whether the property is the *primary residence* of the debtor. [15] In other words, although rule 46A should in principle be followed even if the debtor owns another property or properties, the fact that he or she has a second home – and thus will not be left homeless – will count against the debtor when the court exercises its powers under rule 46A. [16]

Rule 46A does not apply to all residential property; it only applies if the property sought to be attached is the residential property of the *judgment debtor*. Thus, the rule is not relevant if, for instance, the property is owned by the judgment debtor but is occupied by persons other than the debtor, such

as tenants. [17] This limitation raises several questions. For example, what is the position if ownership of the property is registered in the name of a company or a trust but occupied for residential purposes by a shareholder of the company or a beneficiary of the trust? On face value, it seems that rule 46A will not apply if the judgment debtor is a legal person. However, in many of these instances a member of the entity, who also occupies the property for residential purposes, is in reality the true debtor. Although there is authority that rule 46A should be interpreted

purposefully so as to apply in such cases as well, [18] this question remains open to debate and thus requires further study.

The use of the term "judgment debtor" in rule 46A appears to denote that the rule only applies if a money judgment has already been granted by the time that the application for an execution order is made. However, rule 46A does not preclude the common practice of applying simultaneously for a money judgment and execution order when foreclosing a mortgage. [19] In fact, when enforcing a mortgage against residential property, the two applications must be heard or postponed together. [20]

2.3 General approach of the court in terms of rule 46A

When a court hears an application in terms of rule 46A, the court must do two things. [21] It must first establish whether the property is the *primary residence* of the *judgment debtor*, [22] and second whether the judgment debtor can offer *alternative means* by which he or she can service the debt, other than by execution against the primary residence. [23] If at all possible, the ideal

is to find a way, for example, to maintain the mortgage agreement and to restore the debtor to a position where he or she can service the mortgage debt sustainably. [24]

The rule does not specify what the possible alternatives to a sale in execution might be, but one option is to sell other assets, like movables, to settle the debt. [25] A further option [26] is if the debtor can indicate his or her ability (via a payment plan) to settle the arrears within a reasonable time and thereby reinstate the credit agreement. [27] If the loan has already existed for a significant period of time, the payment plan could include paying only the interest portion of the current instalment for a brief period, while possibly also extending the loan repayment period, to allow the debtor some breathing room to bring the arrears up to date. [28] Another alternative is to refer the matter to a debt counsellor so that, if financially viable, a debt rearrangement order can be considered. [29]

The rationale for seeking alternatives is that, all things being equal, the sale in execution of a home will only be constitutionally justifiable if it is the last resort. If execution goes ahead despite that there is an alternative way to settle the debt or bring the arrears up to date, it is probable that the proportionality test in section 36 of the Constitution of the Republic of South Africa, 1996 ("Constitution") will not be satisfied, since the means (selling the home) will not justify the ends (debt collection) if there is a less invasive way to achieve the same end. The court in *Williams v Standard Bank of South Africa Ltd* put it as follows:

> "[T]he fundamental task of the Court seized with an application in terms of Rule 46A is to ensure that execution against the primary residence of the judgment debtor would not be disproportionate in all the circumstances of the case – hence the requirement that execution may only be authorised when there is no other satisfactory way to satisfy the judgment debt."

Rule 46A, therefore, confirms two interrelated principles: (1) the court should consider whether there are alternative means by which the debt can be satisfied other than by a sale of the house; and (2) the court should only declare the property executable if there exists no other satisfactory means to service the debt. [31] However, when deciding such cases, the court should find a "just and equitable balance" between the rights of all parties concerned. [32]

2.4 Judicial oversight

Rule 46A(2)(b) establishes that the court may not authorise the sale of the debtor's home unless the court determines that this course of action is "warranted" (justified) after considering "all relevant factors". [33] A similar instruction previously formed part of the proviso to rule 46(1)(a)(ii), which was added to the High Court Rules on 24 December 2010 to require judicial oversight before a home is sold in execution. [34] Furthermore, rule 46A(2)(b) also reflects the wording of section 26(3) of the Constitution, which provides that no one may be evicted from their home without a court order that was granted after the court had considered all relevant circumstances.

The principle reflected in rule 46A(2)(b) is also similar to the judicial oversight requirement that was read into section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 by the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz*. [35] Although the latter case dealt with the enforcement of small unsecured debts against state-subsidised homes in the magistrates' courts, the Constitutional Court in *Gundwana v Steko Development* subsequently confirmed that judicial oversight is also a constitutional requirement for the sale in execution of homes in proceedings before the high court.

The fact that judicial oversight must now form part of the execution process is so well entrenched that not much more needs to be said. The underlying principle is that, because the loss of a home implicates an important socio-economic right (namely, access to adequate housing and by extension the right to dignity), a home may only be sold in execution if a court authorises it after evaluating all the surrounding circumstances. However, the court in *Absa Bank Limited v Mokebe* ("*Mokebe*") [37] stressed that the judicial oversight requirement is not there to "thwart the mortgagee's right to execution" or "to

preclude sales in execution", but "to regulate them" and "to secure a just and equitable outcome". [38]

In addition to requiring judicial oversight to determine whether an execution order should be granted, the rule also stipulates that the registrar of the court may not issue a writ of execution against the property unless a court has granted an order authorising the sale in execution of the property. [39] The reason why it was necessary to add this proviso is the general rule permitting the registrar to issue a writ of execution against immovable property in the event that the sheriff issues a *nulla bona* return indicating that there is no or insufficient movable assets available to satisfy the judgment debt. This eventuality would typically occur where the property is not encumbered with a mortgage bond containing a standard clause for special executability and, thus, the creditor first sought execution against movable assets. Normally, in these cases, it would not be necessary to obtain another order from the court and, therefore, the registrar can issue the writ of execution against the immovable property on the basis of the *nulla bona* return alone. However, as an exception to the aforementioned general practice, if the immovable property is residential in nature, a further court order is required in terms of rule 46A after the *nulla bona* return is obtained. [40]

2.5 Application by the creditor and response by the debtor

2.5.1 Notice of application and supporting affidavit

If a creditor wants to apply for an execution order, [41] its notice of application must be substantially in accordance with Form 2A of Schedule 1 to the High Court Rules. [42] The creditor must also notify the judgment debtor and any other persons who may be affected by the execution of the application that is to be brought. [43] Other persons that must be notified include: preferent creditors (such as other mortgagees), the local authority (if the property is rated), and the

body corporate (if the property is a sectional title unit). [44] Notably, it appears that a homeowners' association that is not a body corporate of a sectional title scheme does not have to be notified even if there are amounts owed to it relating to the property.

The notice of application must contain certain information. [45] The notice must state the date on which the court will hear the application. [46] Second, the notice must inform the respondent (the judgment debtor or any other affected party) that if he or she intends to oppose the application or make submissions to the court, an affidavit in that respect must be filed within ten court days after the notice was served on him or her. The notice must also invite the respondent to appear in court on the date of the hearing. [47] The date on which the application will be heard must be at least five court days after the expiry of the aforementioned ten-day period. [48]

The notice must, moreover, indicate a physical address at which the applicant (judgment creditor) will accept service of all documents pertaining to the proceedings. The address must be within fifteen kilometres of the office of the registrar. [49] If available, the notice must also contain the applicant's postal, facsimile or electronic mail address. [50]

The creditor's application should be supported by an affidavit that must "set out the reasons for the application and the grounds on which it is based". [51] By implication, the affidavit should also set out the information that is evidenced by the supporting documents [52] that must accompany the application. [53] Furthermore, it appears that the affidavit should set out why the creditor believes there are no alternatives to a sale in execution of the property. [54] The affidavit should also include "details of attempts made by the applicant to contact the respondent in order to negotiate terms of settlement to prevent foreclosure". [55]

2.5.2 Personal service of the notice of application

The notice of application must be served by the sheriff on the judgment debtor personally, although the court can order that service may be effected in

any other manner. [56] The Gauteng Practice Manual [57] similarly requires personal service and provides that, if personal service is proven to be impossible, the court may authorise service at the debtor's place of employment, on a Saturday, on a person older than sixteen at the debtor's *domicilium citandi*, or in any other manner that might bring the matter to the debtor's attention. The Gauteng Practice Manuel also requires that the creditor attach any emails or other communication that might be relevant to its application to show that the debtor was made aware of the date of the hearing. Evidence of such communication could provide support in an application for condonation in the event of a failure to effect personal service or when application is made for permission to effect service in an alternative way. [58]

In *Mokebe*, the court pointed out that the requirement of personal service "should go some way to address the complaint that defaulting parties only discover that the judgment had been granted against them sometime thereafter". [59] In *Standard Bank of South Africa Limited v Hendricks* ("*Hendricks*"), [60] the court held that, where personal service is not possible, the court must be approached for an order that service can take place in another way. [61] The court also found that sufficient information must be placed before the court to enable it to make an order regarding alternative modes of service. Furthermore, to obtain an order regarding an alternative mode of service, more must be done than simply to provide a report by the sheriff that the debtor was not present or could not be found at the premises.

2.5.3 Supporting documents

Each application must be supported by documents that evidence the information set out in the creditor's affidavit. [62] First, evidence must be provided of the market value and local authority valuation of the property. [63] Second, details should be supplied of all amounts owing under any mortgage loans relating to the property. [64] This probably includes debts owed to mortgagees other than the applicant. The rule does not specify whether the full outstanding capital amount or only the amounts in arrears must be provided, but it can be assumed that both amounts must be provided.

Third, the creditors must supply documentary evidence of the amounts in rates and other fees owed to the local authority and, if the property is a sectional title unit, the amounts in levies owed to the body corporate of the sectional title scheme. [65] It seems that the debtor has no duty to place such

information before the court, since the rule expressly requires the creditor to include it in the documents supporting its application. However, it is not clear how the creditor is supposed to obtain such information from the local authority and body corporate. If the creditor does not supply the information required, the court is empowered to order the local authority and body corporate to supply the necessary information. [66] If the debtor is requested to supply such information but fails to do so, the court might hold it against the debtor. [67]

Finally, evidence should be supplied of any other factor that may be required for the court to set a reserve price. [68] Rule 46A(9) lists specific information that must be provided by the creditor in this regard, which information should, therefore, also be furnished in the supporting documents accompanying the application for an execution order. [69] If a bank already applies a mechanism to determine a reserve price during its own valuation of the property, information in that regard should also be placed before the court. [70]

2.5.4 Response by the judgment debtor or other affected party

When the respondent (judgment debtor or other affected party) receives the notice of application, he or she can respond by either opposing the application; by opposing the application and making submissions that are relevant to the court in making an appropriate order; or not oppose the application but make submissions that are relevant to the court in making an appropriate order. [71] If the debtor opposes the application, he or she must admit or deny the allegations set out in the creditor's founding affidavit and stipulate the reasons and legal grounds for why he or she opposes the application. [72] All oppositions and submissions must be set out in an affidavit. [73]

The debtor is probably in the best position to provide information to the court regarding his or her personal circumstances. Therefore, the debtor should preferably make submissions regarding matters such as: whether the property is his or her primary residence; whether his or her rights under the Constitution's housing clause will be limited; whether a sale of the property

would be disproportionate compared to other ways to enforce payment of the debt; and the amount at which a reserve price should be set. [74]

If the debtor wants to oppose the application and/or make submissions, this must be done within ten court days after the notice of application was served on him or her. [75] The respondent's wish to oppose or make submissions must be expressed by delivering the relevant affidavit, [76] presumably to the creditor. The debtor must then also indicate a physical address, within fifteen kilometres of the registrar's office, where he or she will receive service of documents. [77] Where available, the respondent's postal, facsimile or electronic mail address should be provided. [78]

On face value, it may appear odd that the rule also contemplates a situation where the debtor does not oppose the application but nevertheless wants to make submissions. In all likelihood, this applies to a situation where the debtor does not oppose the application for a forced sale of his or her property, but nevertheless desires to place information before the court regarding the setting of an appropriate reserve price or the timing of the sale.

Rule 46A is silent on the topic of summary judgment but when the debtor delivers his or her affidavit to oppose the application for execution, there appears to be no reason why the creditor should not be entitled, in terms of rule 32, [79] to apply for summary judgment regarding payment of the debt and simultaneously for an order declaring the property specially executable. The creditor would then have to comply with rule 46A, and the court, in turn, would have to apply rule 46A when hearing the application and deciding on whether to grant the execution order during the summary judgment proceedings. [80]

2.6 Powers of the court

When a court considers an application under rule 46A, it may make any of the orders discussed in the following paragraphs. [81]

2.6.1 Furnishing of information and condonation

The court may order the local authority and/or body corporate to furnish it with details of any debts owed to them by the debtor relating to the

property. [82] As mentioned above, this power could be relevant where the creditor did not supply this information and/or could not obtain it from the local authority or body corporate.

The court may, on good cause shown, condone any failure to provide any of the required documents as well as any failure to deliver an affidavit within the prescribed timelines. [83] This power was probably included to avoid situations where the application is dismissed for mere procedural reasons, or to accommodate scenarios where it was impossible for the creditor to supply certain information to the court.

2.6.2 Execution order, conditions of sale, and reserve price

If there is no other reasonable way to satisfy the debt, the court may grant an order authorising execution against the debtor's primary residence. [84] In other words, the court may order execution if the resultant limitation of the debtor's housing rights will be justifiable due to satisfying the proportionality test. [85]

Of its own accord, or on application by any affected person, the court may also order that any condition, which it may deem appropriate, be included in the conditions of sale. [86] Should the execution order be granted, the court is furthermore empowered to set a reserve price. [87]

2.6.3 Postpone the application

The court can postpone the application on terms that it considers appropriate. [88] The full bench judgments in *Mokebe* and *Hendricks* have authoritatively confirmed (at least for the Gauteng and Western Cape divisions

of the High Court) that, where applicable, the application for a money judgment and the application for the execution order should be postponed together so that they can be considered and granted together. [89] Therefore, the court should not grant the application for a money judgment while postponing the application for an execution order. [90] Presumably, this approach only applies to the enforcement of secured claims (such as with mortgage foreclosure), since the normal process of first seeking to execute a judgment against movable assets before seeking execution against immovable property [91] implies the granting of a money judgment separate from a future execution order against immovable property.

Rule 46A does not indicate the circumstances under which a court may postpone the application. It appears that the court could follow this route if, for instance, the arrears are insubstantial and/or the debtor has been in default for a relatively short period of time, and that, when the application is heard at the rescheduled date, it could be expected of the creditor to set out the efforts it had made to achieve a settlement and/or prevent foreclosure. [92] Another reason for favouring a postponement is to allow the debtor an opportunity to remedy his or her default and thereby reinstate the credit agreement as contemplated in section 129(3) of the National Credit Act. [93] The court can probably also decide to postpone the application if there is a procedural discrepancy that ought to be corrected before the matter is set down for hearing again.

The rule says nothing about how many times an application can be postponed but preferably it should not be postponed more than once, since it is important for these matters to be brought to an expeditious conclusion.

2.6.4 Dismiss the application

If the application has no merit, the court may dismiss it. [94] An application would probably have no merit when it is not supported by enough evidence to show, on a balance of probabilities, that a sale in execution of the debtor's home would be justifiable – for instance if the outcome would be disproportionate, if a sale is not the last resort, or if there are alternative ways to service the debt. [95] The word "merit" suggests that the power to dismiss the application applies to situations where the case is weak on substantive grounds, not where there are procedural problems with the application. As mentioned above, in the case of procedural flaws, the application can be postponed instead of dismissed, so that the procedural deficiency can be corrected before the matter is set down for hearing again.

It is not clear how a court should decide whether to postpone or dismiss an application. One guideline might be that procedural deficiencies could induce the court to postpone the application (unless such deficiencies are condoned), while substantive flaws in the creditor's case could cause the application to be dismissed. However, this cannot be a fixed rule, since certain serious procedural lapses could justify a dismissal while certain substantive weaknesses could justify a postponement instead. Much would depend on whether the order would be just and equitable on the facts of the case. Another rule of thumb could be that the application should be postponed when the creditor has a *prima facie* case but there is some reasonable uncertainty (based on the amount of the arrears or the period of default) as to whether the granting of an execution order is the last resort. On the other hand, the application should be dismissed if the information before the court reveals that the creditor does not have a *prima facie* case.

2.6.5 Cost order

The court may grant an appropriate cost order and may even grant a punitive cost order against any party that delayed the finalisation of the application. [96] A cost order may be granted against the debtor as well, for instance, if the latter is found to have abused the court processes to unduly delay the realisation of the creditor's rights. [97]

2.6.6 Any other appropriate order

The court is lastly empowered to make any other appropriate order. [98] One example is to grant the execution order but to postpone (suspend) the operation of the order [99] for a certain period to allow the debtor to acquire alternative accommodation or to reinstate the credit agreement before the sale in execution [100] is completed. [101] Another example is to grant an order in terms of which the debtor can bring his or her arrears up to date over the course of a specified period, thus by means of an alternative payment plan. [102] The debtor can even suggest such an alternative payment plan, [103] which the court would have to evaluate for reasonableness in view of all the circumstances. The court may even hold it against the debtor if he or she does not provide information regarding alternative ways to pay the debt. [104] The court's powers probably also include the granting of orders contemplated by legislation like the National Credit Act, such as declaring the agreement reckless, [105] referring the matter to a debt counsellor, or otherwise providing debt relief via a debt rearrangement order. [106]

3. The setting of a reserve price

3.1 Background and general approach of rule 46A

Before its amendment in late 2017, rule 46(12) provided that property attached in execution could be sold without reserve to the highest bidder. The only exception, set out in rule 46(5), was if a preferent creditor and/or the local authority stipulated a reserve price to cover amounts owed to them. The latter sub-rule also required preferent creditors and/or the local authority to agree in writing to a sale without reserve. The fact that a reserve price could only be set by a preferent creditor (like the mortgage bank) and/or the local authority – not by the debtor, the court or anyone else – regrettably resulted in many instances where homes were sold at prices unrealistically (and unconscionably) lower

than the estimated market value. [107] Regarding the phenomenon of properties being sold at auctions for nominal amounts, the court in *Mokebe* pointed out that this "occurs to the detriment of the defaulting debtor" because the latter

> "not only loses his or her home but remains indebted to a mortgagee for a substantial amount – even in cases where the on-sale of the property occurs to buyers at substantially higher prices than the prices realised during the sale in execution". [108]

The solution, namely a court-ordered reserve price, will according to the court in *Mokebe*,??"balance the misalignment between the banks and

the debtors where execution orders are granted" and "ensures that the debtor is not worse off due to unrealistically low prices being obtained and accepted at sales in execution". [109]

Although the constitutionality of rule 46(12) in its pre-2017 form has been challenged on the basis that requiring a sale without reserve violated the property and/or housing clauses in the Bill of Rights, [110] these challenges were unsuccessful. [111] An investigation into the accuracy of these findings is not possible here due to space constraints and it is also not necessary to do so for present purposes. [112] However, Rule 46A now provides for the setting of a reserve price by the court, which to a large extent addresses the constitutional concerns.

The 2017 amendments to the High Court Rules do not make the setting of a reserve price mandatory. The Rules Board instead removed the mandatory sale without reserve, which was previously provided for in rule 46(12), while also creating a discretion for the court to set a reserve price after considering certain factors, [113] as explained in more detail below. Therefore, the reference to "without reserve" has been removed from rule 46(12) while the sale to the highest bidder contemplated in rule 46(12) is now subject to the provisions of rule 46A. Consequently, the property can only be sold to the highest bidder if the latter's bid is higher than the reserve price (if any) or, where the reserve price is not reached, a court authorises a sale to the highest bidder.

3.2 The circumstances for setting a reserve price

As mentioned above, one of the things that the court is empowered to do when granting the execution order is to set a reserve price – the minimum price

at which the property must be put up for auction. Rule 46A(8)(e) provides that a court "may" set a reserve price, which suggests the court has a discretion to set a reserve price and is thus not compelled to do so. [114] However, rule 46A(9)(a) stipulates that the court "must" consider whether a reserve price should be set. In addition to deciding whether to set a reserve price, the court, if it does set a reserve price, must then also decide on the amount at which the reserve price should be set. In other words, two important questions are considered: Under what circumstances should a reserve price be set, and how should the amount of the reserve price be determined?

Regarding the question of when (or under which circumstances) a court should set a reserve price, the courts in *Mokebe* and *Hendricks* held that a reserve price should, as a general rule, be set in all matters where residential property is declared executable, unless the facts of a case convince the court that a reserve price should, as an exception to the general rule, not be set. [115]

The risk that the setting of a reserve price might (or will) reduce the interest of prospective purchasers in the property and would thus make it harder to find a buyer, will probably not be a basis for deciding against setting a reserve price. [116] However, the court might decide not to set a reserve price if there is evidence that the debtor has so much debt that the equity in the property is close to zero or even in the negative. [117]

3.3 The factors to be considered in setting a reserve price

As explained above, the court is obliged to consider whether to set a reserve price, while the setting of a reserve price should also be the rule instead of the exception. Therefore, it is paramount for all the facts that speak to this discretion to be placed before the court, without which the court will be unable to make a suitable decision regarding the reserve price. [118] In exercising its discretion, the court must consider several factors based on the information supplied by the parties. [119]

The first factor listed in rule 46A(9) is the market value of the property, which amount is presumably based on a report obtained from an expert valuer and supplied by the creditor. [120] Although not stated in the rule, the court can also consider the so-called "forced sale value", where in determining the price, expert valuers would take into account factors that would reduce the

market value. [121] The local authority valuation of the property is not listed as a factor either but it is included in the information that the creditor must provide in its affidavit and supporting documentation. [122] Hence, there is no reason why this valuation cannot also be considered when determining the reserve price. [123] If there is a difference between the market value and the local authority valuation, one option is to use the average of the two. [124]

The rule further requires that the court should consider the amounts owed to the local authority and/or body corporate. [125] Notably, the amount owed to a homeowners' association that is not a body corporate is not included as a factor. This omission could be a problem if the title deed contains a clause entitling the homeowners' association to embargo the transfer of the property until it is paid, since this right could qualify as a real right. [126] Realistically, amounts owing to a homeowners' association would have to be considered when the reserve price is set, because if the power to embargo stems from a real right, the homeowners' association will be entitled to payment as part of the costs of execution, thus before the execution creditor can receive payment.

The next factor is the amounts owing on all mortgage loans. [127] Presumably only the full outstanding debts under such mortgage loans are relevant because the amount of the actual arrears can hardly have any bearing on the sale price as such. However, accumulated costs should be factored in because these are usually covered by the mortgage.

Regarding amounts owed to other creditors – particularly any higher-ranking mortgagees, the local authority and the body corporate – rule 46(5) still provides (as it did pre-rule 46A) that creditors with a claim preferent to that of the judgment creditor (namely higher-ranking mortgagees, the local authority and the body corporate of a sectional title scheme) [128] must be notified of the sale and given an opportunity to set a reasonable reserve price. However, the right of such creditors to set a reserve price is now subject to rule 46A, which means that if the property is the debtor's primary residence, the preferent creditors' right to set a reserve price is replaced with the court's power to do so, albeit taking into consideration the amounts owed to these creditors.

Another factor to be considered is any "equity" that might be realised, that is, the difference between the purported reserve price and the market value. [129] Strictly speaking, the term "equity" refers to the difference between the outstanding debt and the market value and not the difference between the reserve price and the market value. Therefore, in most cases, one would probably try to set a reserve price that is equal to or more than the outstanding debt. Irrespective of whether any equity exists, the court should also factor in the amount with which the debt will be reduced by the sale. [130]

A further consideration is whether the property is occupied, who the occupiers are and the circumstances of such occupation. [131] The relevance of this factor probably rests in the bearing that occupiers and their circumstances would have on the price that the property is likely to achieve at an auction. For instance, in the case of tenants, the *huur gaat voor koop* rule requires that the property should be put up for auction subject to the rights of tenants unless the highest bid is not sufficient to cover the mortgagee's claim, in which case the property must be auctioned free of the lease. [132] If the property is to be put up for auction subject to the rights of tenants, this might place downward pressure on any expected sale price and thus this factor must be considered by the court when determining the reserve price. Similarly, if the property is occupied by unlawful occupiers, the costs of evicting them would have to be taken into account when setting a reserve price.

The court must also consider the likelihood that the reserve price will not be reached at the sale. [133] It is not clear how information regarding such probability would be obtained or presented to the court. One indication that the property might not be sold is if the debt or the suggested reserve price is too close to or higher than the estimated market value or forced sale value.

A further factor is any prejudice that any person may experience should the reserve price not be reached. [134] This could include aspects such as the amount of the debt with which the debtor will be left if the property is not sold for the reserve price, or even the loss that the bank

might suffer due to the unlikelihood of collecting any remaining debts.

Finally, the court is also mandated to consider any other factor deemed necessary to protect the interests of both the creditor and the debtor. [135] The wording used in this rule indicates that the setting of a reserve price is, therefore, not only meant to benefit the debtor by protecting his or her welfare and investment in the property, [136] but also the creditor (and presumably other preferent creditors, local authorities and bodies corporate). Indeed, it wil

undoubtedly be in all parties' interest if the property is sold for as high a price as possible. [137]

The factors to be considered should naturally be those that would indicate the price the property can reasonably be expected to reach at an auction. Therefore, factors like the debtor's repayment history (such as whether he or she was a serial defaulter) can hardly be relevant to the value of the property. [138]

Rule 46A(8)(e) read with rule 46A(5)(f) implies that the creditor is obliged to provide the information necessary for the court to exercise its discretion regarding the reserve price. Such information must be included in the creditor's affidavit and evidenced by the supporting documents accompanying the creditor's application. Nevertheless, although the information necessary to decide on the reserve price should generally be supplied by the creditor, it is also incumbent on the debtor to provide information and arguments in this respect. [139] An opportunity for the debtor to supply information and arguments regarding the reserve price is anticipated in rule 46A(6), which allows the debtor to file an opposing affidavit containing his or her submissions, [140] as well as rule 46(9)(a), which refers to the court's duty, "upon submissions made by a respondent" (the debtor), to consider whether to set a reserve price. However, if the debtor refrains from providing information to the court, the court must determine the matter without the benefit of the debtor's input and, therefore, solely based on the information provided by the creditor. [141]

3.4 How to set a reserve price

Except for listing the factors that should be considered, rule 46A does not stipulate a methodology or formula for determining an appropriate reserve price. Since each of the factors relate to proven or estimated monetary amounts, the idea is probably that these amounts should be used to calculate an appropriate reserve price. Regarding the manner in which the reserve price should be set, the court in *Mokebe* declined to provide a closed list of factors to be taken into account and explained that the amount of the reserve price would depend on the facts of each case. [142] Since the court's power to set a reserve price is relatively new in South Africa, there is little guidance and, thus, there is bound to be some uncertainties as the practice of determining ideal reserve prices develops over time.

It seems that determining a reserve price can be approached in at least two ways: (1) by trying to cover all the debts and costs, or (2) by trying to set a price that the property might realistically be expected to achieve at the auction. The starting point, in my view, should be to add up all amounts owing

with reference to the property: moneys owed to first and further mortgage creditors; moneys owned to the local authority; moneys owed to a body corporate; and other costs pertaining to the execution process. The sum total of these amounts should ideally be the minimum price to be set so that the debtor can, if possible, walk away free from any debts related to the property – provided of course that the sum of these debts does not exceed the market value.

Therefore, if the valuation of the property is high enough that, in all likelihood, the judgment debt as well as the amounts owed to the local authority and body corporate will be covered by the proceeds of the sale, the court should consider setting the reserve price at an amount equal to the total debt owed with reference to the property. [143] Furthermore, if the estimated market value is significantly higher than the total debts, it should be considered whether it might be feasible to set a reserve price that is higher than the total debt and thus closer to the market value. If a price higher than the total debt is achieved, the debtor would walk away with the surplus (even a small one) to help him or her start over again.

The more difficult situations are when the total debt is greater than (or very close to) the market value of the property. Of course, setting a reserve price that is higher than the market value would not make sense and, therefore, in instances where the debt is higher than the market value, one would not be able to use the total debt as the starting point for calculating the reserve price. It should be emphasised that it is not the core aim of the court's power to set a reserve price to ensure that the debtor is left with no remaining debt after the property has been sold, because the latter situation is often unavoidable. The court "can ensure that the sale is at a just and equitable price by taking the factors of each specific matter into account" but it "cannot ensure that a debtor is not left with a debt after a sale in execution". [144]

If it appears that the total debt is higher than the realistically expected sale price, one might not be able to avoid the situation where the debtor is left with a remaining debt after the sale. In such cases, therefore, the goal cannot be to set a reserve price that will cover the full debt or that protects the debtor's capital investment, but instead the aim should be to ensure that the reserve price is high enough to keep the remaining debt as low as possible. In such instances, the market value itself – not the total debt – would have to be the starting point for calculating the reserve price. [145] However, it is common knowledge that the highest bids achieved at auction sales almost always are less than the market value of the property. [146] This reality is so well-known that expert valuers are apparently able to account for it in the valuations they supply to banks. Indeed, most banks already make use of external valuers to determine the ideal sale price of the property, whose analyses take factors

into account which would depress the value of the property. [147] Accordingly, not only can expert valuers estimate a normal market value, but it appears that they have methodologies with which they can also provide the bank with a so-called "forced sale value". [148] There is probably no firm rule, but it seems that the forced sale value of a property is roughly 30% lower than the estimated market value. [149]

In other words, in light of the ideal to cover all amounts owed relating to the property, the court should consider setting the reserve price at no less than roughly 30% below the estimated market value. However, this is only to serve as a rough guideline and ultimately the appropriate reserve price would depend on all the facts of the particular case. Ideally, both parties should assist the court by making arguments regarding their preferred reserve price.

3.5 If the reserve price is not achieved

If the reserve price is not achieved, the sheriff is obliged to submit a report to the court within five court days after the auction. The report must contain:

- the date, time and place of the auction;
- the names, identity numbers and contact details of all persons who participated in the auction;
- the amount of the highest bid or offer that was made; and
- any other relevant factor that might assist the court in deciding on the way forward. [150]

If the reserve price is not achieved at the auction, the court must reconsider all the relevant factors and then, within its powers stipulated in rule 46A, grant an order on how the sale in execution should proceed. [151] After the court considers the information provided by the sheriff as well as any other relevant factor, it may order that the property should be sold to the person who made the highest offer or bid. [152] The latter appears to refer to the highest bid made at the auction itself, but the court can possibly also allow a sale to someone who made

a higher offer after the auction had been conducted. To avoid problems, the sheriff should be notified of any such post-auction offers so that he or she can include such information in the report given to the court. [153]

The High Court Rules are not entirely clear on whether awarding the property to the person who made the highest offer is the only order that the court can make regarding how the sale in execution should proceed, or whether its order can entail other steps as well. For instance, may the court order that a new auction must be arranged? This option might be appropriate if, for example, certain problems have been identified regarding the original auction, such as low attendance, ineffective advertising, or a reserve price that was set too high.

Because the sheriff should provide the court with any factor that might be relevant to assist the court in deciding on the way forward, I would suggest that information regarding the following should, if available, also be provided in the sheriff's report to the court: information regarding the advertising of the auction; the feasibility of arranging another auction with better attendance; the willingness of the creditor to take over ownership of the property in exchange for extinguishing all outstanding debts; and any other consideration that might indicate how a sale can be achieved at or higher than the reserve price.

The High Court Rules currently do not permit for property attached in execution to be sold in a manner other than by public auction. [154] In other words, the sheriff is not authorised to sell the property by advertising it on the private market. Nevertheless, it is recommended that the Rules Board should consider amending the rules to allow a court to authorise an alternative method of sale under certain circumstances. Furthermore, it is probably time to explore more earnestly the prospect of conducting online auctions while also improving the advertising of auctions. A broader review of the entire practice and law of auctions might even be called for at this stage.

4. Conclusion

Although not flawless, rule 46A represents a significant step forward in the law and practice of the sale in execution of residential immovable property. [155] It provides a relatively high degree of certainty regarding what creditors must do (including the information that should be supplied) if they wish to execute against residential property, while it also indicates what debtors should do to protect themselves. Furthermore, the rule sets relatively clear

guidelines for courts regarding the different orders that can be made when adjudicating these matters. The rule also restates the substantive law that the entire process is aimed at: An execution order should be granted only if there are no reasonable alternative ways to service the debt and, thus, if execution against the debtor's home is the last resort. Simply put, if the creditor can show, on a balance of probabilities, that execution is the last resort and that no reasonable alternatives exist, the court will be justified in granting the creditor's application because the outcome (a forced sale of the home) would then not unjustifiably violate the debtor's constitutional housing rights.

However, the granting of an execution order is not the end of the matter, since the rule now grants more pertinent protection for the debtor regarding how the sale is conducted as well. To this end, the main innovation in rule 46A is the court's power to set a reserve price at which the property should be put up for auction, which should go a long way towards ensuring that the property is sold for a fair and reasonable price – thereby leaving the debtor in as good a position as possible after the sale.

* Thank you to Corlia van Heerden as well as the anonymous reviewers for their exceptionally valuable comments on this article. All errors are my own.

1 S 6 of the Rules Board for Courts of Law Act 107 of 1985.

2 See GN R1272 in *GG* 41257 of 17-11-2017.

3 The equivalent provision is Magistrates' Courts Rule 43A.

4 See eg R Brits *Real Security Law* (2016) 63-100 (and other sources cited there).

5 Gauteng Local Division: Johannesburg "Practice Manual of the Gauteng Local Division of the High Court of South Africa" (16-10-2018) *Johannesburg Bar* (accessed 25-11-2019).

6 The Western Cape High Court Practice Direction 33A, which was issued in annexure A to the judgment in *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC), is almost identical to ch 10.17 of the Gauteng Practice Manual and therefore reference is made here only to the latter.

7 S 26(3) of the Constitution of the Republic of South Africa, 1996 ("Constitution"). See also *Changing Tides 17 (Pty) Ltd NO v Meikle* 2020 (5) SA 146 (KZP) para 10.

8 S 26(1) of the Constitution. See also *Allinah v Rescue Rod (Pty) Ltd* 2019 JOL 40836 (GJ) para 44.

9 S 36(1) of the Constitution.

10 Rule 46A entails procedural rules only; the rule neither creates nor adds to existing substantive law: see *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC) paras 25-28, 57.

11 A higher sale price undoubtedly will serve the interests of the creditor as well.

12 Rule 46A(1). Since rule 46A does not have retrospective effect (*Soobramany v Changing Tides 17 (Pty) Ltd* 2019 JDR 0962 (KZD) para 13), it does not apply to matters where the execution order was granted before rule 46A came into effect (*Williams v Standard Bank of South Africa Ltd* 2019 JDR 1496 (WCC) para 38), but it applies to applications that were pending on that day (*NPGS Protection and Security Services CC v FirstRand Bank Limited* 2019 3 All SA 391 (SCA) para 50).

13 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 28. See eg *JM v KM* 2018 JDR 1215 (KZD) paras 36-37 (money judgment for an unsecured debt in terms of a settlement agreement).

14 See *Nedbank Limited v Khoza* (31321/2018) 2019 ZAGPJHC 171 (17 May 2019) paras 50-56 *SAFLII* (accessed 25-11-2019).

15 Rule 46A(2)(a)(i) of the High Court Rules.

16 See eg *Certus Property Solutions CC v Ravuku* (36814/2108) 2019 ZAGPJHC 360 (30 August 2019) paras 13-14 *SAFLII* (accessed 25 November 2019), where the debtor owned another immovable property and would thus not be left homeless by the sale in execution. The court applied rule 46A but the fact that the debtor would not be left homeless was a factor in favour of granting the execution order. See also *Body Corporate of Oakmont v Awah* (2490/2018) 2019 ZAGPJHC 362 (20 September 2019) *SAFLII* (accessed 25-11-2019) where the debtor owned several other properties.

17 See eg *Body Corporate of Oakmont v Awah* (2490/2018) 2019 ZAGPJHC 362 (20 September 2019) *SAFLII* (accessed 25-11-2019) where the court found that rule 46A was not applicable because the judgment debtor did not live in the property, and the fact that a tenant lived there was not taken into account. See also *Firstrand Bank Limited v Mgedesi* 2019 JDR 2252 (MN); *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 70; *Nedbank Limited v Bestbier (Scholtz Intervening)* (12654/18) 2020 ZAWCHC 107 (17 September 2020) paras 32-38 *SAFLII* (accessed 21-09-2020). Conversely, see *Absa Bank Limited v Schuurman* 2019 JDR 0353 (GP), where the court postponed the application because the tenant was not joined.

18 See eg *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust* (7901/2017) 2019 ZAGPPHC 336 (9 July 2019) *SAFLII* (accessed 25-11-2019) (rule 46A applies where property is owned by a trust but occupied by a beneficiary). Conversely, see *Investec Bank Limited v Fraser NO* 2020 (6) SA 211 (GJ) paras 25-73; *Land Agricultural Development Bank of South Africa v Du Plessis NO* 2020 JOL 48168 (FB) para 48. See also *Nedbank Limited v Bestbier (Scholtz Intervening)* (12654/18) 2020 ZAWCHC 107 (17 September 2020) paras 18-31 *SAFLII* (accessed 21-09-2020); *Assetline South Africa (Pty) Ltd v Manhattan Delux Properties (Pty) Ltd* (30996/19) 2020 ZAGPJHC 97 (10 May 2020) *SAFLII* (accessed 20-09-2020).

19 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 23.

20 Paras 17-33; *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC) paras 35-48. See also part 2 6 3 below. L Steyn "Execution Against a Mortgaged Home – A Transformed, Yet Evolving Landscape: *FirstRand Bank Ltd v Mdletye* (KZD) and *FirstRand Bank t/a First National Bank v Zwane* (GJ)" (2018) 135 *SALJ* 446 460 has argued that rule 46A should be amended to refer to "debtor" instead of "judgment debtor".

21 *Absa Bank Limited v Benade* (11271/2012) 2019 ZAWCHC 131 (4 October 2019) para 46 *SAFLII* (accessed 25-11-2019). See also *Changing Tides 17 (Pty) Ltd NO v Meikle* 2020 (5) SA 146 (KZP) para 12.

22 Rule 46A(2)(a)(i) of the High Court Rules.

23 Rule 46A(2)(a)(ii). See eg *Plastomark (Pty) Limited v Small* 2018 JOL 40580 (ECG) paras 19-23; *Investec Bank Limited v Nghalaluma* 2020 JDR 1455 (GP) paras 24-31. See also Steyn (2018) *SALJ* 458.

24 *Absa Bank Ltd v Njolomba* 2018 (5) SA 548 (GJ) para 3.

25 See eg *Absa Bank Ltd v Njolomba* 2018 (5) SA 548 (GJ) paras 29, 40; *Changing Tides 17 (Pty) Ltd NO v Frasenburg* 2020 4 All SA 87 (WCC) paras 12, 32, 52. See also Steyn (2018) 135 *SALJ* 459. However, in *Nkola v Argent Steel Group (Pty) Limited t/a Phoenix Steel* 2019 (2) SA 216 (SCA) the Supreme Court of Appeal did not have sympathy for a debtor who claimed that he had enough movable assets to cover the judgment debt but failed to point these out to the sheriff and indeed appeared to suggest that it was the creditor's duty to find these movables to attach and sell them towards execution of the judgment (paras 2, 8, 18). The implication is that, if a debtor claims to have alternative assets that can be sold, the debtor has the duty to realise these assets him- or herself and

then pay the judgment; if he or she fails to point out movables to the sheriff, the creditor has no duty to search for such assets (paras 10-11, 18). See also *Absa Bank Limited v Makola* (4708/2018) 2019 ZAMPMHC 16 (3 December 2019) paras 41-42 *SAFLII* (accessed 20-09-2020), where the court was not willing to speculate regarding the availability of movables if the debtor failed to provide the court with any information in this respect.

26 See eg ch 10.17 para 3[2] of the Gauteng Local Division: Johannesburg "Practice Manual of the Gauteng Local Division of the High Court of South Africa" *Johannesburg Bar*.

27 S 129(3) of the National Credit Act 34 of 2005 ("National Credit Act").

28 See eg *Changing Tides 17 (Pty) Ltd NO v Mabiletsa* 2019 1 All SA 619 (GJ) para 41

29 S 85 of the National Credit Act. This option would require the debtor to allege his or her over-indebtedness and supply the court with the necessary information to exercise its discretion in this respect.

30 2019 JDR 1496 (WCC) para 18, citing *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 59; *Gundwana v Steko Development* 2011 (3) SA 608 (CC) para 54. See further *Changing Tides 17 (Pty) Limited v Muriritirwa* (5290/2019) 2020 ZAGPPHC 132 (7 April 2020) paras 20-21 *SAFLII* (accessed 20-09-2020).

31 Rule 46A(2)(a)(ii) read with Rule 46A(8)(d) of the High Court Rules. See *Williams v Standard Bank of South Africa Ltd* 2019 JDR 1496 (WCC) para 15; *Plastomark (Pty) Limited v Small* 2018 JOL 40580 (ECG) paras 19-20.

32 *Williams v Standard Bank of South Africa Ltd* 2019 JDR 1496 (WCC) para 19. See also *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 15 *SAFLII* (accessed 25-11-2019); *Standard Bank of South Africa Limited v Mwamba* (4611/2016) 2019 ZAGPPHC 1013 (12 December 2019) para 19 *SAFLII* (accessed 18-04-2020).

33 The creditor, as applicant, bears the onus to convince the court that the sale should be authorised (*Williams v Standard Bank of South Africa Ltd* 2019 JDR 1496 (WCC) para 14), ie "that there exists no less drastic measure to recover the debt" (*Nedbank Limited v Nkosi* (18884/2014) 2017 ZAGPPHC 900 (06 December 2017) para 11 *SAFLII* (accessed 25-11-2019))

34 GN R981 in *GG* 33689 of 19-11-2010.

35 2005 (2) SA 140 (CC).

36 2011 (3) SA 608 (CC).

37 2018 (6) SA 492 (GJ) para 47.

38 In general, see also *Nedbank Limited v Bestbier (Scholtz Intervening)* (12654/18) 2020 ZAWCHC 107 (17 September 2020) paras 39-48 *SAFLII* (accessed 21-09-2020).

39 Rule 46A(2)(c) of the High Court Rules.

40 Rule 46(1)(a). Of course, a court or registrar will usually not know whether rule 46A applies to a particular case unless the relevant facts (indicating whether or not the property is the home of the judgment debtor) have been provided under oath. Therefore, the safest course of action would be for the creditor to bring a rule 46A application in all instances, even if only to supply information enabling the court to find that the property is *not* the debtor's primary residence. Alternatively, an affidavit regarding the non-residential nature of the property could be supplied to the registrar when the creditor applies for a writ of execution in terms of rule 46(1). However, in the latter case, the registrar will likely refer the matter to open court if he or she suspects that the property is the debtor's home: see rule 46A(2)(c). Furthermore, if the creditor applies for a judgment in terms of rule 31, which application can be heard in chambers, the application for an execution order in terms of rule 46A cannot also be heard in chambers but must be heard in open court: see *Changing Tides 17 (Pty) Ltd NO v Meikle* 2020 (5) SA 146 (KZP) paras 8-17. See also ch 10.17 para 2 of the Gauteng Local Division: Johannesburg "Practice Manual of the Gauteng Local Division of the High Court of South Africa" *Johannesburg Bar*.

41 This article takes for granted that the creditor has complied with the debt enforcement requirements set out in ss 129-130 of the National Credit Act.

42 Rule 46A(3)(a) of the High Court Rules.

43 Rule 46A(3)(b).

44 Rule 46A(3)(b) read with rule 46(5)(a). The court may order that the notice should also be served on any other party it considers necessary.

45 Rule 46A(4)(a).

46 Rule 46A(4)(a)(i).

47 Rule 46A(4)(a)(ii).

48 Rule 46A(4)(b) read with rule 46A(4)(a)(ii).

49 Rule 46A(4)(a)(iii).

50 Rule 46A(4)(a)(iv).

51 Rule 46A(3)(c).

52 Rule 46A(5) and (9)(b). See parts 2 5 3 and 3 3 below.

53 See *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 7 *SAFLII* (accessed 25-11-2019); and also ch 10.17 para 8 Gauteng Local Division: Johannesburg "Practice Manual of the Gauteng Local Division of the High Court of South Africa" *Johannesburg Bar*.

54 See eg *Changing Tides 17 (Pty) Ltd NO v Mabiletsa* 2019 1 All SA 619 (GJ) para 41.

55 Ch 10.17 para 6 of Gauteng Local Division: Johannesburg "Practice Manual of the Gauteng Local Division of the High Court of South Africa" *Johannesburg Bar*, as endorsed by *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 7 *SAFLII* (accessed 25-11-2019).

56 Rule 46A(3)(d) of the High Court Rules.

57 See ch 10.17 para 1 of the Gauteng Local Division: Johannesburg "Practice Manual of the Gauteng Local Division of the High Court of South Africa" *Johannesburg Bar*.

58 Compare *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) paras 9.3, 20 *SAFLII* (accessed 25-11-2019).

59 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 52.

60 2019 1 All SA 839 (WCC) paras 31-33.

61 See also rule 4(2) of the High Court Rules.

62 Rule 46A(5). The court may also call for any other document that it may consider necessary.

63 Rule 46A(5)(a)-(b).

64 Rule 46A(5)(c).

65 Rule 46A(5)(d)-(e).

66 See part 2 6 1 below.

67 See eg *Ndzoko v Kalakala* (30241/2016) 2018 ZAGPJHC 578 (12 October 2018) para 31 *SAFLII* (accessed 25-11-2019); *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 18 *SAFLII* (accessed 25-11-2019).

68 Rule 46A(5)(f) of the High Court Rules. See eg *Ndzoko v Kalakala* (30241/2016) 2018 ZAGPJHC 578 (12 October 2018) para 26 *SAFLII* (accessed 25-11-2019).

69 See part 3 3 below.

70 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) paras 55-56

71 Rule 46A(6)(a)(i)-(iii) of the High Court Rules

72 Rule 46A(6)(b)(i)-(ii). It is probably advisable that the notice of application should draw the debtor's attention to what would be required of him or her should he or she wish to oppose the application. See eg the information given in the notice of application in *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 2 *SAFLII* (accessed 25-11-2019)

73 Rule 46A(6)(c) of the High Court Rules.

74 See eg *NPGS Protection and Security Services CC v FirstRand Bank Limited* 2019 3 All SA 391 (SCA) para 55; *Absa Bank Limited v Makola* (4708/2018) 2019 ZAMPMHC 16 (3 December 2019) paras 34-37, 40 *SAFLII* (accessed 20-09-2020).

75 Rule 46A(6)(d) of the High Court Rules.

76 Rule 46A(6)(d)(i).

77 Rule 46A(6)(d)(ii).

78 Rule 46A(6)(d)(iii).

79 Note that rule 32 was amended with effect from 1 July 2019 (see GN R842 in *GG* 42497 of 31-05-2019). The most significant change is that the plaintiff can now apply for summary judgment only after the defendant has delivered a plea (rule 32(1)).

80 However, strict compliance with rule 46A might not always be realistic in summary judgment applications considering that the parties are usually pressed for time. Moreover, in summary judgment proceedings, there remains a strong emphasis on the respondent's duty to present a *bona fide* defence. For instance, in *NPGS Protection and Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) para 55, the court held that, as long as the creditor complied with the requirements of rule 46A, the onus is on the debtor to supply the court with information regarding matters like whether the property is the debtor's primary residence, whether there are other means to pay the debt and whether there is disproportionality present. Compare also eg *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) paras 13-16 *SAFLII* (accessed 25-11-2019); *Changing Tides 17 (Pty) Limited NO v Rademeyer* 2019 ZAGPPHC 165 (31 May 2019) paras 18-20 *SAFLII* (accessed 20-04-2021); *Absa Bank Limited v Makola* (4708/2018) 2019 ZAMPMHC 16 (3 December 2019) paras 5-7 *SAFLII* (accessed 20-09-2020); *Absa Bank Limited v Kunene* 2020 JDR 0226 (GJ).

81 Rule 46A(8) of the High Court Rules

82 Rule 46A(8)(b)(i)-(ii).

83 Rule 46A(8)(c)(i)-(ii).

84 Rule 46A(8)(d). See eg *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 21 *SAFLII* (accessed 25-11-2019); *Certus Property Solutions CC v Ravuku* (36814/2108) 2019 ZAGPJHC 360 (30 August 2019) para 15.8 *SAFLII* (accessed 25-11-2019); *Mahomed v Standard Bank of South Africa Ltd* 2019 JOL 45111 (GP) paras 31, 33; *Absa Bank Limited v Kunene* 2020 JDR 0226 (GJ) para 7; *Changing Tides 17 (Pty) Limited v Muriritirwa* (5290/2019) 2020 ZAGPPHC 132 (7 April 2020) para 21 *SAFLII* (accessed 20-09-2020).

85 See part 2 3 above.

86 Rule 46A(8)(a) of the High Court Rules.

87 Rule 46A(8)(e) and see part 3 below.

88 Rule 46A(8)(f).

89 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) paras 17-33; *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC) paras 35-48. Conversely, see the earlier judgment in *Absa Bank Ltd v Njolomba* 2018 2 All SA 328 (GJ) where the court found that rules 46 and 46A did not prevent a court from postponing the application for the execution order while granting the money judgment. There were also conflicting opinions on this matter pre-rule 46A: see especially *FirstRand Bank Ltd t/a First National Bank v Zwane* 2016 (6) SA 400 (GJ); *Firstrand Bank Ltd v Mdletye* 2016 (5) SA 550 (KZD). See also Steyn (2018) *SALJ* 446.

90 See also eg *First Rand Bank Limited v Barnwell* 2019 JOL 42429 (GJ); *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) *SAFLII* (accessed 25-11-2019); *Changing Tides 17 (Pty) Limited NO v Rademeyer* 2019 ZAGPPHC 165 (31 May 2019) *SAFLII* (accessed 20-04-202); *Changing Tides 17 (Pty) Ltd NO v Mabiletsa* 2019 1 All SA 619 (GJ). This approach is also reflected in ch 10.17 para 2[1] of the Gauteng Local Division: Johannesburg "Practice Manual of the Gauteng Local Division of the High Court of South Africa" *Johannesburg Bar*.

91 Rule 46(1)(a)(i) of the High Court Rules.

92 See eg ch 10.17 para 3 of the Gauteng Local Division: Johannesburg "Practice Manual of the Gauteng Local Division of the High Court of South Africa" *Johannesburg Bar*

93 See *Absa Bank Ltd v Njolomba* 2018 (5) SA 548 (GJ) paras 4, 10 regarding the importance of reinstatement in terms of the National Credit Act in the context of rule 46A and the protection of homes. See also *Standard Bank of South Africa Limited v Mwamba* (4611/2016) 2019 ZAGPPHC 1013 (12 December 2019) paras 23, 31-33 *SAFLII* (accessed 18-04-2020).

94 Rule 46A(8)(g) of the High Court Rules. If the application is denied, the creditor may later bring a new application in terms of rule 46A, for instance when new facts come to light: see the *obiter* remark in *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 19 *SAFLII* (accessed 25-11-2019).

95 See eg *Blignaut v Bam* 2019 JDR 1519 (FB) para 11, where the application for an execution order was regarded as premature and thus dismissed because, in view of the size of the judgment debt, the court was not convinced that the debt could not be paid in another way. See also *Investec Bank Ltd v Abada* (43166/2019) 2020 ZAGPPHC 128 (23 April 2020) paras 15, 17 *SAFLII* (accessed 07-05-2020), where the court noted that it would not easily entertain an application for an execution order if the arrear amount is meagre, ie less than six months' worth of instalments.

96 Rule 46A(8)(h) of the High Court Rules.

97 See eg *Soobramany v Changing Tides 17 (Pty) Ltd* 2019 JDR 0962 (KZD) paras 28-29.

98 Rule 46A(8)(i) of the High Court Rules.

99 See also rule 45A, which authorises the court to suspend the execution of any order for such period as it may deem fit.

100 A credit agreement (including a mortgage agreement) subject to the National Credit Act can be reinstated by getting the arrears up to date and paying certain costs (s 129(3)) up until the property is sold in execution and the proceeds are paid to the creditor: see *Nkata v FirstRand Bank Limited* 2016 (4) SA 257 (CC) para 131.

101 See eg *Ndzoko v Kalakala* (30241/2016) 2018 ZAGPJHC 578 (12 October 2018) para 37 *SAFLII* (accessed 25-11-2019); *Changing Tides 17 (Pty) Limited v Muriritirwa* (5290/2019) 2020 ZAGPPHC 132 (7 April 2020) para 24 *SAFLII* (accessed 20-09-2020); *Investec Bank Limited v Nghalaluma* 2020 JDR 1455 (GP) para 34. However, see *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC) para 39, where the court was not in favour of postponing the implementation of the execution order, due to the time-specific nature of a rule 46A application.

102 See eg *Changing Tides 17 (Pty) Ltd NO v Mabiletsa* 2019 1 All SA 619 (GJ) paras 11, 41, 46.

103 See eg *Ndzoko v Kalakala* (30241/2016) 2018 ZAGPJHC 578 (12 October 2018) para 14 *SAFLII* (accessed 25-11-2019).

104 See eg *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 21 *SAFLII* (accessed 25-11-2019).

105 Ss 80-84 of the National Credit Act.

106 S 85 read with ss 86-88.

107 See eg *Nxazonke v Absa Bank Ltd* (18100/2012) 2012 ZAWCHC 184 (4 October 2012) *SAFLII* (accessed 25-11-2019); *Nkwane v Nkwane* 2019 JOL 43796 (GP). Compare also the comments in *Absa Bank Limited v Ntsane* 2007 (3) SA 554 (T) para 84; *Nedbank Ltd v Fraser* 2011 (4) SA 363 (GSJ) para 22.

108 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) paras 53.

109 Para 66.

110 Ss 25 and 26 respectively.

111 See eg *Bartezky v Standard Bank of South Africa Limited* (13668/2016) 2017 ZAWCHC 9 (16 February 2017) *SAFLII* (accessed 25-11-2019); *Nkwane v Nkwane* 2019 JOL 43796 (GP)

112 See eg R Brits "Sale in Execution of Property at Unreasonably Low Price Indicates Abuse of Process: *Nxazonke v Absa Bank Ltd* 2012 ZAWCHC 184 (4 October 2012)" (2013) 76 *THRHR* 451 457, where the argument is made that, if a home is sold at an unconscionably low price, the eviction of the occupiers could be arbitrary as contemplated in s 26(3) of the Constitution. Compare also *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 57.

113 *Nkwane v Nkwane* 2019 JOL 43796 (GP) para 36.

114 See also *Nedbank Limited v Bohloko* 2019 JDR 1700 (FB) para 9.

115 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) paras 59, 66; *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC) para 63.

116 Instead, if such difficulties were to occur, the creditor would be able to approach the court for a variation of the reserve price stipulated in the execution order in order to make it more likely to find a buyer: see *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 54.

117 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 59. See also *SB Guarantee Company (RF) (Pty) Ltd v Key* (71519/2019) 2020 ZAGPPHC 469 (20 August 2020) para 22 *SAFLII* (accessed 20-09-2020).

118 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 65; *Ndzoko v Kalakala* (30241/2016) 2018 ZAGPJHC 578 (12 October 2018) para 28 *SAFLII* (accessed 25-11-2019); *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC) para 62.

119 Rule 46A(9)(b) of the High Court Rules.

120 Rule 46A(9)(b)(i).

121 In *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 54 the court reasoned that, because most banks already make use of external valuers to determine the ideal sale price of the property, which analysis takes factors into account which would depress the value of the property, it would not involve an increase in costs for the creditor to provide such information to a court by way of affidavit (see also paras 55-56). See further eg *Changing Tides 17 (Pty) Limited NO v Rademeyer* 2019 ZAGPPHC 165 (31 May 2019) para 36 *SAFLII* (accessed 20-04-2021); *Ndzoko v Kalakala* (30241/2016) 2018 ZAGPJHC 578 (12 October 2018) para 36 *SAFLII* (accessed 25-11-2019). See also part 3 4 below.

122 Rule 46A(5)(b) of the High Court Rules. See part 2 5 3 above.

123 See eg *Ndzoko v Kalakala* (30241/2016) 2018 ZAGPJHC 578 (12 October 2018) para 28 *SAFLII* (accessed 25-11-2019).

124 Para 36.

125 Rule 46A(9)(b)(ii) of the High Court Rules.

126 See eg *Willow Waters Homeowners Association (Pty) Ltd v Koka NO* 2015 1 All SA 562 (SCA).

127 Rule 46A(9)(b)(iii) of the High Court Rules.

128 Previously rule 46(5) referred only to preferent creditors and the local authority; now it includes a body corporate as well.

129 Rule 46A(9)(b)(iv) of the High Court Rules. See *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 59 (capital growth as a factor).

130 Rule 46A(9)(b)(v).

131 Rule 46A(9)(b)(vi).

132 *Absa Bank Ltd v Sweet* 1993 (1) SA 318 (C) 324.

133 Rule 46A(9)(b)(vii) of the High Court Rules.

134 Rule 46A(9)(b)(viii).

135 Rule 46A(9)(b)(ix).

136 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 56.

137 Para 59.

138 Para 64.

139 *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 22 *SAFLII* (accessed 25-11-2019); *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 59. See also *Absa Bank Limited v Makola* (4708/2018) 2019 ZAMPMHC 16 (3 December 2019) para 36 *SAFLII* (accessed 20-09-2020).

140 See part 2 5 4 above.

141 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 59.

142 Para 62.

143 See eg *Absa Bank Limited v Sawyer* (2018/17056) 2018 ZAGPJHC 662 (14 December 2018) para 22 *SAFLII* (accessed 25-11-2019).

144 *Absa Bank Limited v Mokebe* 2018 (6) SA 492 (GJ) para 56. See also para 59.

145 See eg *Absa Bank Limited v Kunene* 2020 JDR 0226 (GJ) para 7

146 See eg *Standard Bank of South Africa Limited v Hendricks* 2019 1 All SA 839 (WCC) para 63.

147 Para 54.

148 See eg *Changing Tides 17 (Pty) Limited NO v Rademeyer* ZAGPPHC 165 (31 May 2019) para 36 *SAFLII* (accessed 20-04-2021), where the court took into account the estimated market value, forced sale value and expenses that would be incurred to prepare and sell the property. See also eg *Absa Bank Limited v Makola* (4708/2018) 2019 ZAMPMHC 16 (3 December 2019) paras 46-47 *SAFLII* (accessed 20-09-2020), where the court set the reserve price at an amount less than the estimated market value but higher than the estimated forced sale value. A similar approach was followed in *Changing Tides 17 (Pty) Limited v Muriritirwa* (5290/2019) 2020 ZAGPPHC 132 (7 April 2020) paras 22-23 *SAFLII* (accessed 20-09-2020). In *Investec Bank Limited v Nghalaluma* 2020 JDR 1455 (GP) para 33, the court set the reserve price at an amount more or less equal to the forced sale value.

149 See eg *Ndzoko v Kalakala* (30241/2016) 2018 ZAGPJHC 578 (12 October 2018) para 36 *SAFLII* (accessed 25-11-2019), where the reserve price was determined by subtracting 30% from the average between the municipal value and the market value. See also *Standard Bank of South Africa Limited v Sneech* 2018 ZAGPJHC 623 (10 August 2018) para 25.12 *SAFLII* (accessed 21-04-2021), where the reserve price was set by subtracting the amount owed to the local authority from the average between the market value and the municipal value.

150 Rule 46A(9)(d)(i)-(iv) of the High Court Rules.

151 Rule 46A(9)(c).

152 Rule 46A(9)(e). It is not entirely clear where this highest bid would come from. In an auction with reserve, there usually will not be any offers lower than the reserve price, since the bidding would start at the reserve price. However, rule 46A(9)(e) possibly implies that the sheriff may record offers made at amounts lower than the reserve price but without awarding the sale to the highest bidder, with the view to subsequently inform the court of such highest bid so to enable the court to award the sale to the person who made the highest offer (albeit below the reserve price) at the auction.

153 *Hancock v Nedbank Limited* 2019 JDR 2268 (FB) para 9.

154 Rule 46(10) of the High Court Rules.

155 For a more sceptical perspective on rule 46A, see C Singh "To Foreclose or not to Foreclose: Revealing the 'Cracks' within the Residential Foreclosure Process in South Africa" (2019) 31 *SA Merc LJ* 145 151-155.