

## 46 Execution — Immovable property

RS 22, 2023, D1 Rule 46-1

(1)(a) Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless

- (i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or
- (ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5).

(b) A writ of execution against immovable property shall contain —

- (i) a full description of the nature, magisterial district and physical address of the immovable property to enable it to be traced and identified by the sheriff; and
- (ii) sufficient information to enable the sheriff to give effect to subrule (3) hereof, including the title deed number, the erf number or sectional title unit number, and the exclusive use area to enable the registrar of deeds to identify the immovable property and record the attachment as an interdict against the immovable property.

[Subparagraph (ii) substituted by GN R3397 of 12 May 2023.]

(2) The attachment of the immovable property shall be made by any sheriff of the district in which the property is situated, upon a writ corresponding substantially with Form 20 of the First Schedule.

(3)(a) Notice of the attachment, corresponding substantially with Form 20A of the First Schedule, shall be served by the sheriff upon the owner of the immovable property and upon the registrar of deeds or other officer charged with the registration of such property, and if the property is occupied by some person other than the owner, also upon such occupier.

(b) Any notice referred to in paragraph (a) shall —

- (i) draw attention to the provisions of subrule (8)(a)(iii); and
- (ii) be served according to the provisions of rule 4, except that service upon the registrar of deeds or other officer charged with the registration of immovable property may also be effected by the sheriff by means of a registered letter, duly prepaid and posted, addressed to the officer intended to be served.

(4)(a) When effecting the attachment, the sheriff may enter buildings or structures on the immovable property in order to ascertain the improvements made to the immovable property, as well as the condition of such improvements: Provided that where the sheriff after reasonable attempts is unable to gain access onto the immovable property or into any building or structure on account of the property, building or structure being locked, the sheriff may use a locksmith to gain entry.

(b) After attachment, any sale in execution shall take place in the district in which the attached immovable property is situated and shall be conducted by the sheriff of such district who first attached the property: Provided that the sheriff in the first instance and subject to the provisions of paragraph (d) of subrule (8) may on good cause shown authorise such sale to be conducted elsewhere and by another sheriff.

RS 22, 2023, D1 Rule 46-2

(c) Upon receipt of written instructions from the execution creditor to proceed with such sale, the sheriff shall ascertain and record the bonds or other encumbrances which are registered against the attached immovable property together with the names and addresses of the persons in whose favour such bonds and encumbrances are so registered and shall thereupon notify the execution creditor accordingly.

(5) Subject to rule 46A and any order made by the court, no immovable property which is subject to any claim preferential to that of the execution creditor shall be sold in execution unless —

(a) the execution creditor has caused notice of the intended sale to be served upon —

- (i) preferential creditors;
- (ii) the local authority, if the property is rated; and
- (iii) the body corporate, if the property is a sectional title unit,

calling upon the aforesaid entities to stipulate within 10 days of a date to be stated, a reasonable reserve price or to agree in writing to a sale without reserve, and has provided proof to the sheriff that such entities have so stipulated or agreed, or

(b) the sheriff is satisfied that it is impossible to notify any preferential creditor, in terms of this rule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in paragraph (a) within the time stated in such notice.

(6) The sheriff may by notice served upon any person require such person to deliver up to the sheriff forthwith, all documents in such person's possession or control relating to the debtor's title to the said property.

(7)(a) The sheriff conducting the sale shall appoint a day and place for the sale of the attached immovable property, such day being, except by special leave of a magistrate, not less than 45 days after service of the notice of attachment and shall forthwith inform all other sheriffs appointed in the district of such day and place.

(b)(i) The execution creditor shall, after consultation with the sheriff conducting the sale, prepare a notice of sale containing a short description of the attached immovable property, its improvements, magisterial district and physical address, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the sheriff conducting the sale.

(ii) The execution creditor must furnish the sheriff with as many copies of the notice of sale as the sheriff may require.

(c) The execution creditor shall —

- (i) publish the notice once in a newspaper circulating daily or weekly in the district in which the attached immovable property is situated and in the *Gazette* not less than five days and not more than 15 days before the date of the sale; and

RS 22, 2023, D1 Rule 46-3

(ii) provide the sheriff conducting the sale, by hand, or by facsimile or electronic mail, with one satisfactory photocopy of each of the notices published in the newspaper and the *Gazette*, respectively.

(d) Not less than 10 days prior to the date of the sale, the sheriff conducting the sale shall forward a copy of the notice of sale referred to in paragraph (b) to every execution creditor who had caused the said immovable property to be attached and to every mortgagee thereof whose address is known and shall simultaneously furnish a copy of the notice of sale to all other sheriffs appointed in that district.

(e) Not less than 10 days prior to the date of the sale, the sheriff conducting the sale shall affix —

- (i) one copy of the notice on the notice-board of the magistrate's court of the district in which the attached immovable property is situated, or if the said property is situated in the district where the court out of which the writ was issued is situated, then on the notice-board of such court; and

(ii) one copy at or as near as may be to the place where the said sale is actually to take place.

(8)(a)(i) Not less than 35 days prior to the date of the sale, the execution creditor shall prepare the conditions of sale, corresponding substantially with Form 21 of the First Schedule, upon which the attached property is to be sold and shall submit such conditions to the sheriff conducting the sale, for the purposes of settling them.

(ii) In addition to any other terms, the conditions of sale shall include any conditions ordered by the court.

(iii) Not less than 25 days prior to the date of the sale, any interested party may submit to the sheriff, in writing, further or amended conditions of sale.

(iv) Not less than 20 days prior to the date of the sale, the sheriff shall settle the conditions of sale.

(v) The sale in execution and the conditions of sale shall comply with the provisions of any law relating to auctions, in particular the Consumer Protection Act, 2008 ([Act No. 68 of 2008](#)), and the Regulations promulgated thereunder.

(b)(i) The execution creditor shall thereafter supply the said sheriff with three copies of the conditions of sale, one of which shall lie for inspection by interested parties at the office of the sheriff for 15 days prior to the date of the sale.

(ii) The sheriff conducting the sale shall forthwith furnish a copy of the conditions of sale to all other sheriffs appointed in that district.

(c) Not less than 15 days prior to the date of the sale, the sheriff shall serve one copy of the conditions of sale on the judgment debtor.

(d) Not less than 10 days prior to the date of the sale, any interested party may, subject to rule 46A and any order made by the court under

the provisions thereof, and upon 24 hours' notice to all known affected parties, apply to the magistrate of the district in which the attached immovable property is to be sold for any modification of the conditions of sale and the magistrate may make such order thereon, including an appropriate order as to costs.

RS 22, 2023, D1 Rule 46-4

(9) The execution creditor shall appoint a conveyancer to attend to the transfer of the attached immovable property sold in execution: Provided that the sheriff shall be entitled to appoint a new conveyancer should the conveyancer appointed by the execution creditor not proceed timely or satisfactorily with the transfer.

(10) Immovable property attached in execution shall be sold by the sheriff by public auction.

(11)(a)(i) If the purchaser fails to carry out any obligations due by the purchaser under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the sheriff conducting the sale, after due notice to the purchaser, and the attached immovable property may be put up for sale again.

(ii) The report shall be accompanied by a notice corresponding substantially with Form 21A of the First Schedule.

(iii) If the sale is cancelled, the sheriff shall inform the judgment debtor of the cancellation.

(b) Any loss sustained by reason of the purchaser's default may, on the application of any aggrieved creditor referred to in subparagraphs (i) and (ii) of subrule (14)(c) be recovered from the purchaser under judgment of a judge given on a written report by the sheriff, after notice in writing has been given to the purchaser that the report will be laid before a judge for the aforesaid purpose.

[Paragraph (b) substituted by GN R3397 of 12 May 2023.]

(c) If the purchaser is already in possession of the immovable property, the said sheriff may, on notice to affected persons apply to a judge for an order evicting the purchaser or any person claiming to occupy the property through the purchaser or otherwise occupying the property.

(12) Subject to the provisions of rule 46A and subrule (5) hereof —

(a) the sale shall be conducted upon the conditions stipulated under subrule (8); and

(b) the immovable property shall be sold to the highest bidder.

(13)(a) All moneys in respect of the purchase price of the immovable property sold in execution shall be paid to the sheriff and the sheriff shall retain such moneys in his or her trust account until transfer has been given to the purchaser.

(b) The sheriff conducting the sale shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him or her shall be as valid and effectual as if he or she were the owner of the property.

(c) No amount of the purchase money shall be paid out until the provisions of subrule (14) have been complied with.

(14)(a) After conclusion of the sale, but before preparation by the sheriff of a plan of distribution, the execution creditor or his or her attorney shall provide the sheriff with a certificate of all money paid by the judgment debtor to the execution creditor or his or her attorney after the issue of the writ of execution.

(b)(i) Within 10 days after the date of registration of the transfer, the sheriff shall have prepared a plan of distribution of the proceeds in order of preference and must forward a copy of such plan to the registrar and to all other sheriffs appointed in that district.

RS 22, 2023, D1 Rule 46-5

(ii) Immediately thereafter the said sheriff shall give notice to all parties who have lodged writs and to the execution debtor that the plan of distribution will lie for inspection at his or her office and the office of the registrar for 15 days from a date mentioned, and unless such parties signify in writing their agreement to the plan, such plan will so lie for inspection.

(c) After deduction from the proceeds of the costs and charges of execution, the following shall be the order of preference:

(i) Claims of preferent creditors ranking in priority in their legal order of preference; and thereafter

(ii) Claims of other creditors whose writs have been lodged with the sheriff in the order of preference appearing from [sections 96](#), and [98A to 103](#) (inclusive) of the Insolvency Act, 1936 ([Act No. 24 of 1936](#)).

(d) Any interested person objecting to the plan must —

(i) before the expiry of the period referred to in paragraph (b)(ii), give notice in writing to the sheriff and all other interested persons of the particulars of the objection; and

(ii) within 10 days after the expiry of the period referred to in paragraph (b)(ii), bring such objection before a judge for review upon 10 days notice to the sheriff and the said persons.

(e) The judge on review shall hear and determine the matter in dispute and may amend or confirm the plan of distribution or may make such order including an order as to costs as he or she deems appropriate.

(f) If —

(i) no objection is lodged to such plan; or

(ii) the interested parties signify their concurrence therein; or

(iii) the plan is confirmed or amended on review,

the sheriff shall, on production of a certificate from the conveyancer that transfer has been given to the purchaser, pay out in accordance with the plan of distribution.

(15) Neither a sheriff nor any person on behalf of the sheriff shall at any sale in execution purchase any immovable property offered for sale either for himself or herself or for any other person.

(16) In this rule, the word 'days' shall have the same meaning as 'court days' [sic] as defined in rule 1 of these Rules.

[Rule 46 substituted by GN R1272 of 17 November 2017.]

## Commentary

**Forms.** Writ of attachment—immovable property, 20; Notice of attachment in execution, 20A; Conditions of sale in execution of immovable property, 21; Notice to cancel sale of immovable property in terms of rule 46(11)(a), 21A; Certificate of ownership and encumbrances: sale in execution of immovable property, 'D'.

**General.** Rules 45, 46 and 46A deal with execution in High Court procedure. Whereas rule 45 makes provision for execution in general and against movable property, rule 46 deals with execution against immovable property and rule 46A with execution against residential immovable property.<sup>1</sup>

RS 22, 2023, D1 Rule 46-6

Rule 46 deals with execution against immovable property other than the residential immovable property of a judgment debtor, the underlying principle being that, save where immovable property has been specially declared executable, execution shall not issue against immovable property until movable property has been excussed and it appears that the movable property is insufficient to satisfy the writ.<sup>2</sup> Rule 46A applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. See further, in this regard, rule 46A and the notes thereto below.

In *Dream Supreme Properties 11CC v Nedcor Bank Ltd*<sup>3</sup> it was held that if a judgment creditor who obtained default judgment against a debtor proceeds with an attachment and sale in execution of immovable property in pursuance of the judgment with knowledge of a prior private sale of the property (i e a sale which took place after the judgment was obtained but before the attachment and sale in execution took place), such knowledge does not affect the validity of the attachment and sale in execution. To extend the doctrine of notice to such a situation would open the door to unscrupulous debtors to fabricate personal rights which would be difficult for a creditor to expose for what they are. It would also create, to the detriment of both the creditor and debtor, uncertainty as to the title obtained at the sale in execution and reduce the effectiveness of such sale.

A sale in execution may be set aside where the debtor has settled what it owed to the creditor in full prior to the date of sale, but where the creditor, in error, has failed to instruct the sheriff to cancel the sale.<sup>4</sup> In other words, property which is by agreement of the execution creditor with the judgment debtor to be withdrawn from a sale in execution upon payment of arrears before that date cannot by reason of the principle of 'the fall of the hammer' at public auctions result in the debtor losing his house because of mistake and being limited to a damages claim for breach of contract against the execution creditor.<sup>5</sup>

A sale in execution not yet followed by transfer may be set aside by reason of the rescission of the underlying (default) judgment and order declaring the property specially executable.<sup>6</sup> In such event the owner of the immovable property concerned is entitled to restoration of the property from a bona fide purchaser who purchased the immovable property at the sale in execution.<sup>7</sup>

If transfer has taken place pursuant to a sale in execution by the time that the default judgment is rescinded, and the bona fide purchaser had no knowledge of the judgment debtor's proceedings for the rescission of the judgment, or if transfer has been effected prior to the institution of the rescission proceedings, the judgment debtor is not entitled to recover possession of the immovable property concerned, unless it can be established that the judgment and/or the sale in execution constituted a nullity.<sup>8</sup>

**Subrule (1)(a)(i): 'A return . . . that the said person has insufficient movable property to satisfy the writ.'** The court has a general discretion to declare immovable property executable under the common law and will do so where an execution debtor refuses or fails to point out

RS 22, 2023, D1 Rule 46-7

movable property in a 'tricky manner'. It is submitted that subrule (1) does not remove or impact upon this discretion of the court.<sup>9</sup>

In *Nkola v Argent Steel Group (Pty) Ltd*<sup>10</sup> it was held<sup>11</sup> that the common law and the Uniform Rules of Court allow a judgment creditor to levy execution against the immovable property of a judgment debtor if the latter claims movables to satisfy the judgment debt but fails to point them out and make them available.

**Subrule (1)(a)(ii): 'Immovable property has been declared to be specially executable by the court.'** Rule 46 does not lay down the procedure to be followed to have immovable property of a judgment debtor (i e immovable property other than the residential immovable property or primary residence of the judgment debtor) declared to be specially executable in terms of this subrule. It is submitted that the court should, in the application of this subrule, consider all legally relevant factors,<sup>12</sup> and be satisfied that good cause exists for making the order. The Rules Board for Courts of Law, in framing this subrule, obviously did not mean that the court could without further ado grant an order in terms of the subrule. It is submitted that an application on the short form of notice of motion (i e Form 2), supported by an affidavit setting out all the relevant facts, and served on all interested parties, should be presented to the court. This practice could also be followed if an order declaring specially executable a judgment debtor's immovable property under this subrule is sought in conjunction with a claim for provisional sentence under rule 8 or an application for summary judgment under rule 32. Once the court has considered the claim for provisional sentence or the summary judgment application, as the case may be, it could then proceed to consider the application for a declaratory order and, if satisfied that both orders should be granted, give judgment *pari passu*. If, in the case of a summary judgment application, the relevant facts are dealt with in the particulars of claim, a separate application and affidavit would be unnecessary, and the plaintiff's affidavit contemplated in rule 32(2) would suffice. In an application for summary judgment in which an order declaring immovable property specially executable there is an onus on the debtor to provide the court with information concerning whether the property is his personal residence; whether it is a primary residence; whether there are other means available to discharge the debt; and whether there is a disproportionality between the execution and other possible means to exact payment of the judgment debt. If a debtor's attention is drawn to the provisions of s 26 of the *Constitution* and rule 46(1)(a)(ii) in a summons, and the debtor completely fails to avail himself of the rights that were expressly drawn to his attention, there is no obligation on a court to exercise judicial oversight.<sup>13</sup> See further the notes to rule 17(2) s v 'Orders declaring residential immovable property and primary residences specially executable' above.

In *Standard Bank of South Africa v Nkahlele*<sup>14</sup> the court, in granting default judgment and declaring the immovable property concerned specially executable, ordered that the sheriff was authorized to execute the writ of execution but that the sheriff could not sell the property in execution before leave thereto had first been granted by the court in terms of s 30(a) of

RS 22, 2023, D1 Rule 46-8

the Administration of Estates *Act 66 of 1965*.<sup>15</sup> The court held<sup>16</sup> that the provisions of s 30(a) of the Administration of Estates *Act 66 of 1965* constituted an absolute bar to the sale in execution of property out of a deceased estate until after the deceased estate had been advertised in terms of s 29 thereof, and s 30(b) permitted the court to authorise a sale in execution only after there has been such compliance.

**'Where judgment is granted by the registrar under rule 31(5).'** Section 23 of the Superior Courts *Act 10 of 2013*<sup>17</sup> provides that a judgment by default may be granted and entered in the manner and in the circumstances prescribed in the rules, and that a judgment so entered is deemed to be a judgment of a court of that division. This subrule empowers the registrar, when granting default judgment in terms of rule 31(5), to declare immovable property specially executable on the application of the creditor. Neither this subrule, nor rule 31(5), requires that the registrar should take into account all relevant factors before declaring the immovable property specially executable. However, the registrar's power excludes the power to declare residential immovable property of the judgment debtor and immovable property which is the primary residence of the judgment debtor specially executable. Only a court is competent to grant such an order.<sup>18</sup>

**Subrule (1)(b)(i): 'A full description.'** The provisions of this subrule are peremptory and are conceived in the interest of both judgment creditor and debtor.<sup>19</sup> It is clear from the wording of the subrule that the writ must contain a full description of both the nature and physical address of the immovable property as well as the magisterial district in which it is situated so as to enable the sheriff to trace and identify the property. In terms of subrule (2) the attachment of the immovable property must be made by the sheriff of the (magisterial) district in which the property is situated.

**Subrule (1)(b)(ii): 'Sufficient information . . . to give effect to subrule (3).'** This subrule lays down an additional requirement as to what the writ must contain. Subrule (3), which is referred to in the subrule, requires of the sheriff to serve a notice of the attachment of the immovable property concerned, corresponding substantially with Form 20A, upon the owner of the property and upon the registrar of deeds or other officer charged with the registration of the property, and if the property is occupied by some person other than the owner, also upon such occupier. In terms of this subrule the writ must, therefore, contain sufficient information of the aforesaid persons so as to enable the sheriff to serve the notice of attachment on them. The subrule also requires that the title deed number, the erf number or sectional title unit number, and the exclusive use area to enable the registrar of deeds to identify the immovable property and record the attachment as an interdict against the

immovable property, be set out in the writ. Having regard to Form 20A, the writ must also contain the sum and the amount of costs to be raised against the property.

RS 22, 2023, D1 Rule 46-9

**Subrule (2): 'Any sheriff of the district in which the property is situated.'** In terms of rule 1 the word 'sheriff' includes an acting sheriff and a deputy sheriff. In terms of subrule (2)(b)(i) a writ of execution must contain a full description of, *inter alia*, the magisterial district and the physical address of the immovable property that stands to be attached so as to enable the sheriff to trace and identify it. As to the magisterial districts allocated to sheriffs, see Volume 1 third edition, Part D, Appendix 6.

**'Corresponding substantially with Form 20.'** The verbatim following of Form 20 is not required. A writ need only to 'substantially' comply with the form. The word 'substantially' requires, it is submitted, that the writ must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 20 may be used with such variation as circumstances require. Thus, for example, it may (and, in fact, should) be varied to contain the additional information required by subrule (1)(b)(ii). See, in this regard, the notes to subrule (1)(b)(ii) s v 'Sufficient information . . . to give effect to subrule (3)' above.

**Subrule (3): 'Notice of the attachment . . . shall be served.'** This subrule provides for the mode of attachment of immovable property.

In *Campbell v Botha* [20](#) the Supreme Court of Appeal stated that there can 'never be said to have been an attachment where neither the warrant nor the notice of attachment had been served on or brought to the notice of the owner'.

Attachment under this subrule is not complete until service on all the persons mentioned has been effected. [21](#) In such a case a subsequent sale in execution would be null and void; it would confer no title upon those who purport to purchase the property and the owner would be able to recover his property by means of a *rei vindicatio*. [22](#)

The mode of attachment contemplated in the subrule does not dispossess the possessor of the immovable property. [23](#)

**'Corresponding substantially with Form 20A.'** The verbatim following of Form 20A is not required. A notice of attachment need only to 'substantially' comply with the form. The word 'substantially' requires, it is submitted, that the notice must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 20A may be used with such variation as circumstances require. See also the notes to subrule (1)(b)(ii) s v 'Sufficient information . . . to give effect to subrule (3)' above.

In terms of subrule (3)(b)(i) a notice of attachment must draw attention to the provisions of subrule (8)(a)(iii) of rule 46. Form 20A in itself provides for this.

**Subrule (3)(b)(ii): 'Be served according to the provisions of rule 4.'** See rule 4 and the notes thereto above.

If a debtor has chosen a *domicilium citandi et executandi* and the necessary notices are served upon an agent there who fails to inform the debtor of such service, it is nevertheless good service and the debtor cannot claim to have the attachment set aside. [24](#) A writ of execution and all subsequent steps, including the sale in execution, will be invalid and of no force

RS 22, 2023, D1 Rule 46-10

and effect if service of the writ of execution is to be effected on a *domicilium* address that consists of vacant land, but instead is served on a neighbouring property belonging to the same owner. [25](#)

**Subrule (4)(b): 'Shall take place in the district.'** This subrule contemplates that ordinarily a sale in execution shall take place in the district in which the attached immovable property is situated and be conducted by the sheriff of such district who first attached the property.

**Proviso: 'On good cause shown authorise such sale to be conducted elsewhere.'** Under certain circumstances it may be preferable to conduct the sale in a district other than that in which the property is situated. For example, property situated in district A may be nearer to a town in district B than to any town in district A, and in order to obtain the best price at the least expense it may be considered advisable to have the sale conducted at the town in district B by the sheriff of that district. The proviso caters for situations like these.

**Subrule (4)(c): 'Upon receipt of written instructions from the execution creditor.'** It is not open to a sheriff to terminate an auction without reserve once bidding has commenced on the mere telephonic instruction from the execution creditor. The latter can only stop a sale in execution by *written* instruction as required by this subrule. [26](#)

**Subrule (5): 'No immovable property which is subject to any claim preferent . . . shall be sold in execution unless.'** The subrule finds application only in relation to any claim preferent to that of the execution creditor. [27](#) The subrule protects the rights of the preferent creditor and the rights of the local authority (*i.e.* municipality) or body corporate, as the case may be. The purpose of the subrule is not to protect the judgment debtor's position. [28](#) Though the subrule may be peremptory as regards the preferent creditor, local authority and body corporate, and failure to comply with its provisions may render a sale invalid, this does not entitle a judgment debtor for whose benefit the rule was not made, to rely on such non-compliance. [29](#)

Claims preferent to that of the execution creditor include the following:

- (a) the claim of the holder of a mortgage bond over the immovable property concerned; [30](#)
- (b) the claim of a municipality in respect of amounts due for municipal service fees, etc; [31](#)

RS 22, 2023, D1 Rule 46-11

[This page contains footnotes only in print]

RS 22, 2023, D1 Rule 46-12

- (c) claims rendered preferent by virtue of certain other statutory provisions; [32](#)
- (d) the claims of the holder of a lien over the property. [33](#)

The provisions of the subrule are subject to those of rule 46A and any order of court.

**Subrule (5)(a): 'Caused notice of the intended sale to be served.'** In contradistinction to, for example, subrule (3)(b)(ii), this subrule does not require the notice of the intended sale to be served according to the provisions of rule 4. It is the duty of the execution creditor to take all reasonable steps to bring the notice of the intended sale to the attention of any preferent creditor, local authority and body corporate concerned. See further subrule (5)(b) and the notes thereto below.

**'Within 10 days of.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**'A reasonable reserve price.'** The stipulation of a reserve price under this subrule is sufficient to constitute consent to the sale in execution as may be required by another statutory provision. [34](#)

**Subrule (5)(b):'The sheriff is satisfied that it is impossible to notify any preferent creditor.'** In terms of this subrule the sheriff must be satisfied that it is impossible to notify 'any preferent creditor'. The subrule is not (as is the case under subrule (5)(a)) intended to find application in respect of 'any claim preferent to that of the execution creditor' only. In other words, the sheriff has to be satisfied that it is impossible to notify 'any preferent creditor, in terms of this Rule', which must be regarded as a reference to the provisions of rule 46 as a whole, and not as a reference to subrule (5) only. [35](#) It is clearly the duty of the execution creditor to satisfy the sheriff that it has not been possible to notify a preferent creditor. It is submitted that in order to 'satisfy' the sheriff, the execution creditor will have to show that he has taken reasonable steps to ascertain the whereabouts of the preferent creditor and to notify him in terms of the subrule. [36](#)

RS 22, 2023, D1 Rule 46-13

**Subrule (6): 'To deliver up . . . all documents.'** A mortgagor or other person in possession of the title deeds may be ordered to deliver them to the sheriff. [37](#) If the documents are lost the court may order the sale to proceed and transfer to be passed on duly certificated copies thereof. [38](#)

**Subrule (7)(a): 'Except by special leave of a magistrate.'** This presumably refers to the magistrate of the district in which the immovable property is to be sold.

**'Not less than 45 days after.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**Subrule (7)(b)(i): 'The execution creditor shall . . . prepare a notice of sale.'** It is the sole responsibility of the execution creditor to prepare a notice of sale that complies with the provisions of this subrule and to see to it that the notice contains the time and place for the holding of the sale as conveyed to him by the sheriff conducting the sale. [39](#)

**'After consultation with the sheriff conducting the sale.'** Although this subrule provides for the execution creditor to prepare the notice of sale after consultation with the sheriff conducting the sale, the latter has no obligation to approve the terms of the notice and it is even doubtful whether he would be entitled to alter it. [40](#) The need for consultation between the execution creditor and the sheriff conducting the sale arises out of the provisions of subrule (7)(a), which imposes the duty of appointing a day and place for the sale on that sheriff. [41](#)

**'A short description of the attached immovable property.'** Although the provisions of this subrule are imperative, the courts have, in the application of the provisions of former rule 46(7)(b) (which materially corresponded with the provisions of this subrule), distinguished between farm land, on the one hand, and other land (e g developed properties, undeveloped land outside developed areas, etc) on the other.

**Farm land.** In *Hopkins Boerdery (Edms) Bpk v Colyn* [42](#) the full court held that the title deed description of the property in a notice of sale is adequate and in compliance with the provisions of the former corresponding subrule.

**Other land.** A notice of sale that contains no more than the technical designation of such land, as described in the title deed, does not comply with the provisions of the subrule. [43](#) In such instances the purpose of the description is not merely to identify the property, but to inform the public what is being sold with the object of attracting bidders, so as to obtain as high a price as possible for the property. [44](#) While it is not necessary for the sheriff to

RS 22, 2023, D1 Rule 46-14

adopt the 'eulogistic style' found in auctioneers' advertisements, [45](#) nor to give a description of 'enhancing attributes', [46](#) the description must deal with the main characteristics of the property to be sold which might reasonably be expected to attract the interest of potential buyers. These include an express statement as to whether or not there are any improvements or buildings on the land in question and, where applicable, the town planning zone of the property and any special privileges or exemptions which might have been granted in respect of the property in terms of the relevant town planning scheme. [47](#) The description in each case must obviously depend upon the particular circumstances and the particular character and locality of the property in question. [48](#)

If the notice of sale is inadequate, the sale in execution of the property can be set aside at the instance of an interested party. [49](#) Interested parties include creditors ranking in priority to the judgment creditor, the judgment creditor himself, all other creditors who had lodged writs of execution and the judgment debtor. [50](#) A party who has not a sufficient interest in the observance of the subrule has no *locus standi* to restrain transfer by virtue of the defective advertisement. [51](#)

**Subrule (7)(c)(i): 'The execution creditor shall publish.'** The sheriff conducting the sale has no function in relation to the choice of the newspaper in which the notice is to appear. The sole responsibility for publishing the notice in the newspaper and the *Gazette* rests with the execution creditor. [52](#)

**'In the Gazette.'** The word 'Gazette' is neither defined in the Superior Courts [Act 10 of 2013](#) nor in these rules. In terms of s 2(c) of the Interpretation [Act 33 of 1957](#) the following meaning is assigned to the word, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein:

- (c) in the case of laws, proclamations, regulations, notices or other documents published after the date of commencement of the Constitution and required under any law to be published in the *Gazette* or the *Provincial Gazette* or any other official *Gazette*, means the *Government Gazette of the Republic* or the relevant *Provincial Gazette*, according to whether the administration of the law concerned or, as the case may be, the law conferring the power to make or issue such a proclamation, regulation, notice or other document, vests in, or in a functionary of, the national government or a provincial government.'

It is submitted that in the context of this subrule the word refers to the relevant *Provincial Gazette*. Support for this view is to be found in the facts that (a) the subrule requires publication of the notice only in a newspaper circulating daily or weekly *in the district* in which the attached immovable property is situated; and (b) the subrule prior to its substitution [53](#) specifically required publication in the 'Government Gazette' whereas it now requires publication in the 'Gazette'.

RS 22, 2023, D1 Rule 46-15

**'Not less than 5 days and not more than 15 days before.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

In *Sowden v Absa Bank Ltd* [54](#) it was held that failure to observe the time requirements for publication is a defect which is fatal to the validity of the sale. The better view seems to be that there is nothing in this rule or in any other rule that excludes the court's inherent power or its power in terms of rule 27 to condone non-compliance with the rule. [55](#)

**Subrule (7)(d): 'Not less than 10 days prior to.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as

'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**'The sheriff conducting the sale shall forward a copy of the notice of sale.'** The subrule is cast in peremptory terms and the failure of the sheriff to comply with the subrule renders the sale in execution invalid. [56](#)

**'To every mortgagee . . . whose address is known.'** Notices in terms of this subrule must also be sent to mortgagees whose addresses are readily ascertainable by the sheriff conducting the sale. [57](#)

**Subrule (7)(e): 'Not less than 10 days prior to.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**Subrule (8)(a)(i): 'Not less than 35 days prior to.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

It has been suggested that the sheriff is not entitled to fix a condition against the will of the execution creditor. [58](#) It is submitted that the sheriff conducting the sale should, as far as possible, see to it that the conditions of sale are such as to safeguard the interests of all creditors. An interested party may, subject to rule 46A and any order made by the court under the provisions thereof, apply for a modification of the conditions of sale under subrule (8)(d).

**'The execution creditor shall prepare the conditions of sale.'** The responsibility for preparing the conditions of sale rests upon the execution creditor who must submit them to the sheriff conducting the sale for settlement. The sheriff must settle the conditions of sale not less than 20 days prior to the date of sale. [59](#)

Care should be taken that the municipal rates amount outstanding as contemplated in [s 118\(1\)](#) of the Local Government: Municipal Systems [Act 32 of 2000](#) is stated in the conditions of sale. [60](#)

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RS 22, 2023, D1 Rule 46-16

It has been held that when an auctioneer, in conducting a sale, stipulates that he requires two sureties to the purchaser for due payment of the price, such requirement is not a condition that needs be inserted in the advertisement of the conditions of sale. [61](#)

**'Corresponding substantially with Form 21.'** The verbatim following of Form 21 is not required. The conditions of sale need only to 'substantially' comply with the form. The word 'substantially' requires, it is submitted, that the conditions of sale must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 21 may be used with such variation as circumstances require. Thus, for example, subrule (8)(a)(ii) requires that the conditions of sale shall, in addition to any other terms, include any conditions ordered by the court.

The conditions of sale must comply with the provisions of any law relating to auctions, in particular the Consumer Protection [Act 68 of 2008](#), and the regulations promulgated thereunder. [62](#)

**Subrule (8)(a)(iii): 'Not less than 25 days prior to.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**Subrule (8)(a)(iv): 'Not less than 20 days prior to.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**Subrule (8)(b)(i): 'For 15 days prior to.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**Subrule (8)(c): 'Not less than 15 days prior to.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**Subrule (8)(d): 'Not less than 10 days prior to.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**'Any interested party may . . . apply.'** Interested parties would include preferent creditors, the judgment creditor himself, all other creditors who had lodged warrants of execution and the judgment debtor. [63](#)

The provisions of this subrule are subject to those of rule 46A and any order made by the court under them.

**'Modification of the conditions of sale.'** This subrule does not make it clear whether the magistrate has the power to stay a sale in execution at the instance of an interested party or to order that a sale shall not take place at all. It is submitted that the magistrate's functions are limited to modifying the conditions of sale, and that if it is desired to obtain a stay of the sale or an order that it shall not take place, application would have to be made to the High Court.

**Subrule (9): 'The execution creditor shall appoint a conveyancer.'** Under such appointment no benefit is conferred on the execution creditor, nor does he become a party to the contract between the sheriff and the purchaser. [64](#) The conveyancer has the function of transferring

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RS 22, 2023, D1 Rule 46-17

the property into the name of the purchaser, which is the sheriff's obligation. [65](#) In performing this function the conveyancer acts as the sheriff's agent. [66](#)

**Subrule (10): 'Shall be sold by the sheriff.'** It has been held that when the sheriff carries out the duties imposed upon him in the sale of attached property, he does not sell as a principal but he acts as a statutory agent on behalf of the judgment debtor who is being compelled to sell the particular attached assets. [67](#) This view has, however, not found the approval of a full court of the former Transvaal Provincial Division which held that where a sheriff disposes of property in pursuance of a sale in execution, he does not act as the agent of anybody but as an executive of the law. [68](#)

There is no general duty on the sheriff to establish the VAT status of the owner of the attached property and it is for the prospective bidder himself to establish the VAT implications prior to the auction. [69](#)

**'By public auction.'** [Section 45](#) of the Consumer Protection [Act 68 of 2008](#) read with regulations 20–33 sets out the requirements for an auction of goods as contemplated under that Act. The word 'goods' includes, *inter alia*, 'a legal interest in land or any other immovable property'. For purposes of s 45 the word 'auction' includes a sale in execution pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction. [70](#)

By virtue of [s 3](#) of the Alienation of Land [Act 68 of 1981](#) the provisions of that Act are inapplicable to a contract of sale of land by public auction. The fact that the contract is thereafter recorded and made effective in a signed document does not render it any the less a sale by public auction. [71](#)

Where the purchaser at a sale in execution purchased as a trustee for a company not yet formed, the subsequent signing

by him of the conditions of sale was held to be sufficient compliance with the requirements of s 35 of the (now repealed) Companies Act 61 of 1973. [72](#)

A sale of immovable property of a deceased estate in contravention of [s 30](#) of the Administration of Estates [Act 66 of 1965](#) is null and void, irrespective of whether the attachment of the property took place before or after the death of the deceased. [73](#)

RS 22, 2023, D1 Rule 46-18

Subrule (12) provides that the sale shall be conducted upon the conditions stipulated under subrule (8), and that the immovable property shall be sold to the highest bidder. [74](#) In terms of subrule (12) the provisions thereof are subject to those of subrule (5) and rule 46A.

**Subrule (11)(a)(i): 'The sale may be cancelled by a judge.'** In terms of the definition of 'judge' in rule 1 this means a judge sitting otherwise than in open court, i.e. a judge in chambers.

Under former rule 46(11)(a) (the provisions of which materially corresponded with the provisions of this subrule under consideration) the position was held to be as set out hereunder.

In *Sheriff, Hlabisa and Nongoma v Shobeda* [75](#) it was, *inter alia*, held that (a) if the matter is opposed, the judge should refuse an order under rule 46(11) and leave the parties to pursue conventional remedies by way of the ordinary procedures of court; [76](#) (b) rule 46(11) does not contemplate a formal application by the sheriff; [77](#) and (c) there is nothing in rule 46(11) that empowers a judge, when cancelling a sale based on the report of the sheriff, to make a costs order in favour of the sheriff. [78](#)

In *Sheriff of the High Court, Johannesburg South v Sithole and Three Similar Cases* [79](#) the court, in applying *Sheriff, Hlabisa and Nongoma v Shobeda*, [80](#) *inter alia*, laid down the following:

- (a) Rule 46(11) provides a quick and inexpensive procedure for the prompt resale of the property concerned — without compromising the rights of notice and the *audi alteram partem* rule — thereby guaranteeing that the property may be quickly realized for the benefit of both the creditor and the debtor without increasing the interest on the outstanding debt. [81](#)
- (b) Although a forfeiture of deposit clause is often found in the conditions of sale for a sale in execution of immovable property, rule 46(11) does not sanction automatic forfeiture on breach — on the contrary, it expressly circumscribes the extent of the purchaser's liability on default, and how it is to be determined. Forfeiture provisions are, consequently, invalid. The mechanism employed to give proper effect to the rule should (i) ensure that the provisions of rule 46(11)(b) are properly reflected in the conditions of sale agreement; and (ii) require the sheriff to refund the deposit, unless an aggrieved distribution creditor wishes to apply for judgment to recover the losses from the defaulting purchaser, in which event the sheriff is obliged to submit an account for judicial scrutiny and comply with the judge's pronouncement on the quantification of the losses. The sheriff must refund any remaining balance to the purchaser. The deposit must be distinguished from the sheriff's other funds and placed in a separate trust account until, in the case of a successful transfer pursuant to a judicial sale, it is paid into the deposit account of the relevant magistracy as contemplated in rule 46(14)(a). Until then, placing the funds into a separate trust account gives effect to the sheriff's function as a stakeholder regarding the deposit and complies with the obligations imposed on him under [s 22](#) of the Sheriffs [Act 90 of 1986](#). It will enable the judge, when scrutinizing the written report envisaged under rule 46(11)(b), to follow the paper trail with relative ease. [82](#)

RS 22, 2023, D1 Rule 46-19

- (c) If there is no opposition to the cancellation of the sale in execution of the property and its resale, rule 46(11)(a) provides for a hearing in chambers supported by the sheriff's written report (which is required only if the distribution creditor seeks judgment for the losses sustained). The judge may then decide whether the matter is to be argued in open court. If dispute is unlikely, a hearing in open court would not be advisable. Rule 46(11)(a) does not contemplate an application-type procedure, and, save in the case of opposition by the purchaser, or possibly some exceptional situation which may require it, the practice in the Gauteng local seat of the High Court, Johannesburg, is for the sheriff to prepare and serve a notice authorizing the cancellation and resale supported by an accompanying affidavit. On filing, the registrar refers the matter to a judge in chambers. Where no opposition is anticipated, rule 46(11)(a) does not envisage that the sheriff should engage attorneys. [83](#)

On 18 April 2019 the Judge President of the Gauteng Division of the High Court (Pretoria and Johannesburg) issued a Practice Directive, effective from that date, to the effect that all applications in terms of rule 46(11) shall no longer be dealt with by a judge in chambers but be referred to or set down in the interlocutory court. Requirements for the necessary affidavits as well as a draft order were stipulated in the Practice Directive. [84](#)

The subrule makes it clear that a sale in execution must be cancelled by a judge before the sheriff conducting the sale would be entitled to put the property up for sale again. [85](#)

**Subrule (11)(a)(ii): 'A notice corresponding substantially with Form 21A.'** The verbatim following of Form 21A is not required. The notice need only to 'substantially' comply with the form. The word 'substantially' requires, it is submitted, that the notice must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 21A may be used with such variation as circumstances require.

**Subrule (11)(a)(iii): 'The sheriff shall inform the judgment debtor of the cancellation.'** The provisions of this subrule seem to be too limited. It is submitted that all persons affected by the cancellation of the sale are entitled, as of right, to be informed of the cancellation and, accordingly, that the sheriff should inform all such persons of the cancellation before the immovable property is put up for sale again. In this manner the rights of all affected parties will be adequately protected.

**Subrule (11)(b): 'Any loss sustained . . . may be recovered from the purchaser.'** Questions of recovery of loss can only be dealt with when the court is in possession of a written report from the sheriff. [86](#)

The correct manner of calculating the loss is set out in *The Sheriff v Jaithoon*: [87](#) the purchaser is liable to pay the difference between the net proceeds which would have resulted from the first sale, and the net proceeds actually resulting from the second sale.

**'After notice in writing has been given to the purchaser.'** This provision of the subrule seems to be too limited. It is submitted that all persons affected by the cancellation of the sale should be notified of the aggrieved creditor's application to recover loss from the purchaser as well as the sheriff's written notice contemplated in the subrule. The sheriff should therefore give all such persons notice in writing of an aggrieved creditor's application to recover

RS 22, 2023, D1 Rule 46-20

loss from the purchaser and of the fact that the sheriff will lay his report before a judge for that purpose. In this manner the rights of all affected parties will be adequately protected.

**Subrule (12)(a): 'The sale shall be conducted under the conditions stipulated under subrule (8).'** If the conditions of sale follow the wording of Form 21, read with subrule (8)(a)(i), and provide that the immovable property shall be sold to the highest bidder subject to a reserve price, and further provide that the sale could be cancelled forthwith if the execution creditor's attorney commits a '*bona fide* error in respect of the execution of the court rules', there is no room for cancellation of the sale on that ground or on grounds of *justus error* if the attorney representing the execution creditor at the sale holds instructions stipulating a reserve price but, in ignorance of the terms of the conditions of sale and the provisions of rule 46, on the one hand, and as a result of his misunderstanding that his instructions are in conflict within the conditions of sale, on the other hand, fails to bid and allows the property to be sold at a price much lower than the reserve price.<sup>88</sup>

If the purchaser of immovable property at the sale in execution has paid arrear rates, electricity and water charges owed by the judgment debtor in accordance with the conditions of sale of the property, to enable him to obtain transfer of the property, he has a right to recover the amounts so paid from the judgment debtor.<sup>89</sup>

**Subrule (12)(b): 'The immovable property shall be sold to the highest bidder.'** This provision is imperative. It does not allow the sheriff, in his discretion, to refuse to accept the highest bid if that bid is not market-related.<sup>90</sup>

**Subrule (13)(a): 'The sheriff shall retain such moneys . . . until transfer has been given.'** The sheriff does not hold the proceeds of the sale as agent for the judgment creditor.<sup>91</sup> The provision for payment of the purchase money into the trust account of the sheriff overcomes the difficulty that arose in *Cyster v Du Toit*<sup>92</sup> where payment was wrongly made to the judgment creditor.

**Subrule (13)(b): 'The sheriff conducting the sale shall give transfer.'**<sup>93</sup> Rule 46 makes provision for two distinct transactions with regard to execution levied against immovable property — the one is the sale of the property and the other the transfer thereof.<sup>94</sup> Ownership of immovable property attached pursuant to a writ of execution does not pass upon the sale in execution; it passes upon formal transfer by the sheriff to the purchaser in execution.<sup>95</sup> If immovable property has been attached and sold in execution but the estate of the judgment debtor is sequestrated before the property has been transferred to the purchaser in execution, the property forms part of the judgment debtor's insolvent estate and falls to be dealt with in terms of s 20(1)(a) of the Insolvency Act 24 of 1936.<sup>96</sup>

In giving transfer to the purchaser, the sheriff is not saddled with the legal obligation to give *vacua possessio* of the property to the purchaser.<sup>97</sup> In his capacity as an executive of

RS 22, 2023, D1 Rule 46-21

the law, the sheriff may commit himself to contractual terms, including the obligation to provide *vacua possessio* to the purchaser of land sold in execution.<sup>98</sup>

When the sheriff, as part of the execution process, commits himself to the terms of the conditions of sale, he, by virtue of this statutory authority, does so in his own name and may also enforce it on his own. A sale in execution of immovable property entails two distinct transactions, namely the sale itself and the passing of transfer pursuant thereto. Rule 46 does not specifically empower the sheriff to institute proceedings in order to enforce the contract embodied in the conditions of sale but such power is implicit in the duty to see that transfer is passed and the provisions of this subrule which impose an obligation on him to do anything necessary to effect registration of transfer.<sup>99</sup>

**Subrule (14)(a): 'A certificate of all money paid by the judgment debtor . . . after the issue of the writ of execution.'**

The provisions of this subrule are imperative. Any moneys paid by the judgment debtor to the execution creditor or his attorney will have an impact on the plan of distribution which the sheriff is obliged to prepare under subrule (14)(b)(i). In terms of subrule (13)(c) no amount of the purchase money shall be paid out until the provisions of subrule (14) have been complied with.

**Subrule (14)(b)(i): 'Within 10 days after.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**'A plan of distribution . . . in order of preference.'** The order of preference is set out in subrule (14)(c).

**Subrule (14)(c)(i): 'In their legal order of preference.'** It is beyond the scope of this work to discuss in detail the legal order of preference.<sup>100</sup>

**Subrule (14)(d)(i): 'Any interested person . . . all other interested persons.'** Interested persons would include preferent creditors, the judgment creditor himself, all other creditors who had lodged writs of execution and the judgment debtor.<sup>101</sup>

**'Notice . . . of the particulars of the objection.'** Substantial compliance with the provisions of the subrule is sufficient.<sup>102</sup>

**Subrule (14)(d)(ii): 'Within 10 days after . . . upon 10 days notice.'** In terms of subrule (16) the word 'days' in rule 46 has the same meaning as 'court days' [sic] as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

**'Before a judge.'** In terms of the definition of 'judge' in rule 1 this means a judge sitting otherwise than in open court, i.e. a judge in chambers.

**Subrule (16): 'Shall have the same meaning as.'** This subrule, first inserted by GN R1746 of 25 October 1996, resolves the difference of opinion between *First Consolidated Leasing Corporation Ltd v Theron*,<sup>103</sup> in which it was held that 'days' in the former rule meant calendar days, and *Röntgen v Reichenberg*<sup>104</sup> in which it was held that 'days' in the rule meant court days as defined in rule 1. See further the notes to rule 1 s v 'Court day' above.

<sup>1</sup> Rule 46, as substituted, and rule 46A came into operation on 22 December 2017 (GN R1272 in GG 41257 of 17 November 2017).

<sup>2</sup> See *Barclays Nasionale Bank Bpk v Badenhorst* 1973 (1) SA 333 (N) at 338E-H, a case decided under former rule 45(1), the wording of which corresponded substantially with that of rule 46(1)(a).

<sup>3</sup> 2007 (4) SA 380 (SCA) at 390J-391D.

<sup>4</sup> *Absa Bank Ltd v Morrison* 2013 (5) SA 199 (GJ) at 200D-E, 201B-E and 204F-H.

<sup>5</sup> *Absa Bank Ltd v Morrison* 2013 (5) SA 199 (GJ) at 204G-H.

<sup>6</sup> *Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 (GSJ) at 602B-H and the authorities there referred to.

<sup>7</sup> *Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 (GSJ) at 602G-H.

<sup>8</sup> *Knox NO v Motokeng* 2013 (4) SA 46 (GSJ) at 50D-F, 55F-56A and 60B-H. See also *Thomani v Seboka NO* 2017 (1) SA 51 (GP) at 64G-65C; *Absa Bank Ltd v Mare* 2021 (2) SA 151 (GJ) (a decision of the full court).

<sup>9</sup> Cf *Silva v Transcape Transport Consultants* 1999 (4) SA 556 (W) at 562D-I, a case decided under former rule 45(1), the wording of which corresponded substantially with that of rule 46(1)(a).

[10 2019 \(2\) SA 216 \(SCA\).](#)

[11 At 218B–220A.](#)

[12 Cf FirstRand Bank Ltd v Folscher and Another, and Similar Matters 2011 \(4\) SA 314 \(GNP\)](#) at 330C–D; [Standard Bank of South Africa Ltd v Bekker and Four Similar Cases 2011 \(6\) SA 111 \(WCC\)](#) at 129C. See also the *obiter dictum* in [Nedbank Ltd v Bestbier \(Scholtz Intervening\)](#) (unreported, WCC case no 12654/18 dated 17 September 2020) at paragraphs [47]–[48].

[13 NPGS Protection & Security Services CC v FirstRand Bank Ltd 2020 \(1\) SA 494 \(SCA\)](#) at paragraphs [63]–[67].

[14 2021 \(5\) SA 642 \(WCC\).](#)

[15](#) At paragraph [14]. [Section 30](#) of the Administration of Estates [Act 66 of 1965](#) provides that no person charged with the execution of any writ or other process shall (i) before the expiry of the period advertised within which creditors must lodge their claims; or (ii) thereafter, unless the Master, if the value of the property does not exceed R5 000, or in the case of any other property, the High Court, otherwise directs, sell any property in the estate of any deceased person which has been attached whether before or after his death under such writ or process. If the person charged with the execution of the writ could not have known of the death of the deceased, these provisions do not apply.

[16 At paragraphs \[8\] and \[9\].](#)

[17 As to which, see Volume 1 third edition, Part D.](#)

[18 See the notes to the proviso to rule 31\(5\)\(b\) s v 'Provided that if the application is for an order declaring residential property specially executable' above as well as the notes to rule 46A below.](#)

[19 See Messenger of the Magistrate's Court, Durban v Pillay 1952 \(3\) SA 678 \(A\)](#) and [Pillay v Messenger of the Magistrate's Court, Durban 1951 \(1\) SA 259 \(N\)](#); [Cummins v Bartlett NO 1991 \(4\) SA 135 \(E\)](#) at 140.

[20 2009 \(1\) SA 238 \(SCA\)](#) at 245A.

[21 Joosub v JI Case SA \(Pty\) Ltd 1992 \(2\) SA 665 \(N\)](#) at 673B; and see [Klyte v Messenger of Court, Aberdeen 1928 EDL 408](#); [Kaleni v Transkei Development Corporation 1997 \(4\) SA 789 \(Tks\)](#) at 792D–H.

[22 Joosub v JI Case SA \(Pty\) Ltd 1992 \(2\) SA 665 \(N\)](#) at 679C; [Sowden v Absa Bank Ltd 1996 \(3\) SA 814 \(W\)](#) at 821H; and see [Van der Walt v Kolektor \(Edms\) Bpk 1989 \(4\) SA 690 \(T\)](#) at 697C; [Kaleni v Transkei Development Corporation 1997 \(4\) SA 789 \(Tks\)](#) at 792D–H.

[23 Builder's Depot CC v Testa 2011 \(4\) SA 486 \(GSJ\)](#) at 489F–490A.

[24 Gerber v Stolze 1950 \(3\) SA 68 \(T\)](#), confirmed on appeal in [Gerber v Stolze 1951 \(2\) SA 166 \(T\)](#).

[25 Naidoo v FirstRand Finance Co Ltd 2012 \(6\) SA 122 \(WCC\)](#) at 127A–D.

[26 Absa Bank Ltd v Universal Pulse Trading Figures 45 \(Pty\) Ltd 2011 \(5\) SA 80 \(WCC\)](#) at 82B–D, 83H, 85B–C, 85H and 86C–D.

[27 Astfin Gauteng \(Pty\) Limited trading as Assetfin v Standard Bank of South Africa Ltd](#) (unreported, GP case no 14656/2021 dated 14 December 2022) at paragraph [22.7].

[28 Impendle Properties CC v Comrie 1993 \(3\) SA 706 \(N\)](#) at 710B–C.

[29 Impendle Properties CC v Comrie 1993 \(3\) SA 706 \(N\)](#) at 710F.

[30 A mortgage bond registered after the immovable property has been attached creates no preference and may be cancelled \(Thorne NO v Registrar of Deeds 1964 \(3\) SA 20 \(N\)\).](#)

[31 Section 118\(3\) of the Local Government: Municipal Systems Act 32 of 2000](#). Section 118(3) is an independent self-contained provision which is not subject to the two-year time limit contemplated in s 118(1) of the said Act ([BOE Bank Ltd v City of Tshwane Metropolitan Municipality 2005 \(4\) SA 336 \(SCA\)](#); and see [City of Johannesburg v Kaplan NO 2006 \(5\) SA 10 \(SCA\)](#) at 13G–H; [Real People Housing \(Pty\) Ltd v City of Cape Town 2010 \(1\) SA 411 \(C\)](#) at 421C–423E and 423F–426D; [Vosal Investments \(Pty\) Ltd v City of Johannesburg 2010 \(1\) SA 595 \(GSJ\)](#) at 601A–E and 602I–603B).

In [Jordaan v Tshwane City and Four Similar Cases 2017 \(2\) SA 295 \(GP\)](#) Fourie J found that s 118(3) of the Municipal Systems Act permitted arbitrary deprivation of property contrary to [s 25\(1\)](#) of the Constitution of the Republic of South Africa, 1996, which could result in a loss of ownership for new or subsequent owners of the property concerned once a municipality perfected its security by obtaining a court order, sold the said property in execution and applied the proceeds to pay off the historical debt (at 300D–301A, 303E–F, 304C–305E, 307B–E, 308E–J and 309D–G). The deprivation and limitation were also found not to be reasonable and justifiable in an open democratic society as contemplated in [s 36](#) of the [Constitution](#) (at 310I–311A). Consequently, the following order, amongst others, was made (at 325G–H):

'(1) The provisions of [s 118\(3\)](#) of the Local Government: Municipal Systems [Act 32 of 2000](#) are declared to be constitutionally invalid to the extent only that the security provision "a charge upon the property" survives transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to municipal debts incurred prior to such transfer.'

(2) This order must be brought to the attention of the registrar of this court to enable him/her to comply with the provisions of [rule 16\(1\)](#) of the Rules of the Constitutional Court.'

In [Jordaan v Tshwane Metropolitan Municipality 2017 \(6\) SA 287 \(CC\)](#) the Constitutional Court declined to confirm the order of constitutional invalidity made in the [Jordaan case \(supra\)](#). It was held (at 317A–B) that s 118(3) could properly and reasonably be interpreted, without constitutional objection, to mean that the 'charge upon the property' it provides for does not survive transfer of the property to a new owner (at 304D–305B, 306D–307C, 307G–308C, 311F–312C and 312D–317A).

The operation of s 118(1) and (3) of the Municipal Systems Act can be summarized as follows (see [City of Johannesburg v Kaplan NO 2006 \(5\) SA 10 \(SCA\)](#) at 18C–H; [YST Properties CC v Ethekwini Municipality 2010 \(2\) SA 98 \(D\)](#) at 106C–J):

When a municipal debtor is not subject to a sequestration or liquidation order —

1. No property may be transferred unless a clearance certificate is produced to the registrar of deeds that certifies full payment of all municipal debts as described in s 118(1) which have become due during a period of two years before the date of application for the certificate.

2. Any amount due for municipal debts (i.e. not limited by the aforesaid period of two years) that have not prescribed is secured by the property and, if not paid and an appropriate order of court is obtained, the property may be sold in execution and the proceeds applied in payment of the debts. In such event, the proceeds will be applied to payment of the municipal debts in full. Only after satisfaction of such debts will the remainder, if any, be available for payment of the debt secured by a mortgage bond over the property.

Once a debtor has been sequestered or liquidated, the position is, to the extent that the municipal debts are 'taxes' within the meaning of [s 89\(5\)](#) of the Insolvency [Act 24 of 1936](#) (but not otherwise) the following —

1. No property may be transferred unless the clearance certificate certifies full payment of municipal debts that have become due during a period of two years before the date of application for the certificate.

2. The preference accorded by s 118(3) in favour of the municipality over that of a holder of a mortgage bond is limited to claims which fell due during the period laid down in s 89(1), i.e. two years prior to the date of sequestration or liquidation up to the date of transfer.

3. Interest charged on the secured claim of the municipality is secured as if it were part of the claim.

After sequestration or liquidation, those municipal debts that are not 'taxes' within the meaning of s 89(5) continue to attract the benefits of s 118(3) without being affected by [s 89](#) of the Insolvency [Act 24 of 1936](#).

In [City of Cape Town v Real People Housing \(Pty\) Ltd 2010 \(5\) SA 196 \(SCA\)](#) the Supreme Court of Appeal, in upholding [Real People Housing \(Pty\) Ltd v City of Cape Town 2010 \(1\) SA 411 \(C\)](#), held (at 201A–E) that a municipality has an obligation under s 118(1) to issue a clearance certificate for a property when all municipal debts as described in s 118(1) that became due in connection with that property during the two years preceding the date of application for the certificate have been fully paid.

See also [Nelson Mandela Bay Municipality v Amber Mountain Investments 3 \(Pty\) Ltd 2017 \(4\) SA 272 \(SCA\)](#) at 281F–283B.

In [City of Tshwane Metropolitan Municipality v Mathabathe 2013 \(4\) SA 319 \(SCA\)](#) the Supreme Court of Appeal held (at 324D) that the principal elements of s 118 are (a) a veto or embargo provision within a time limit (s 118(1)); and (b) a security provision without a time limit (s 118(3)). Under s 118(1) a municipality, therefore, has the capacity to block the transfer of ownership of immovable property until debts due and owing to it have been paid in certain circumstances (at 324C–D). Section 118(3), on the contrary, is on its own wording an independent, self-contained security provision without a time limit (at 324D–F). The security provided by s 118(3) amounts to a lien having the effect of a tacit statutory hypothec and no limit is placed on its duration outside of insolvency. Its effect is to create in favour of a municipality a security for the payment of the prescribed municipal debts so that the municipality enjoys preference over a registered mortgage bond on the proceeds of the property. The security given to a municipality by s 118(3) is a charge upon the property (at 324D–I). Consequently, a municipality cannot under s 118(3) block the transfer of ownership of immovable property by demanding that the debts falling within the ambit of that subsection also be paid as a prerequisite to the issue of a clearance certificate contemplated by s 118(1) (at 324I–325D).

See also [Tshwane City v Uniqon Woning \(Pty\) Ltd 2016 \(2\) SA 247 \(SCA\)](#) (a case concerning the payment of rates by a township owner in respect of erven in the township which had not yet been sold) and [Tshwane City v Mitchell 2016 \(3\) SA 231 \(SCA\)](#) (in which it was held that the security provided for in s 118(3) is a charge against the property concerned which survives the transfer of the property pursuant to a sale in execution); and see [Tshepo Mashile 'Municipalities have a hypothec over debts for rates' 2016 \(June\) De Rebus](#) 30–2. Care should be taken that the municipal rates amount outstanding as contemplated in [s 118\(1\)](#) of the Local Government: Municipal Systems [Act 32 of 2000](#) is stated in the conditions of sale ([Sheriff, Johannesburg North v Yellow Dot Property Investments 2016 \(5\) SA 107 \(G\)](#) at 112I–113A).

32 See, for example, [s 22](#) of the Alienation of Land [Act 68 of 1981](#) and [s 33](#) of the Land and Agricultural Development Bank [Act 15 of 2002](#). In the case of agricultural land regard should also be had to the provisions of s 38 of the Agricultural Credit Act 28 of 1966 (which Act,

although repealed by the Agricultural Debt Management [Act 45 of 2001](#), is still considered to be valid for purposes of s 7 of the latter Act. The Agricultural Debt Management Act was, in turn, repealed by the Agricultural Debt Management Repeal [Act 15 of 2008](#), which provides in s 2(1) thereof that, despite such repeal, the provisions of, *inter alia*, s 7 of the Agricultural Debt Management Act remain in force until all agreements referred to in that Act have been terminated and the debt associated with those agreements has been recovered or otherwise extinguished), which create preferences in respect of crops standing on the land. See *Landboukredietraad v Vrystaat Lewendehawe Koöperasie Bpk* [1990 \(1\) SA 106 \(A\)](#); *Weichelt v Van Rensburg NO* [1990 \(1\) SA 545 \(T\)](#). See also [s 4](#) of the Co-operatives [Act 14 of 2005](#).

[33](#) *United Building Society v Smookler's Trustees* 1906 TS 623; *Levy v Tyler* 1933 CPD 377; and see *Schoeman NO v Aberdeen Trading Co (Pty) Ltd* [1955 \(1\) SA 100 \(C\)](#).

[34](#) *Jessa v H S Ebrahim (Pty) Ltd* [1975 \(3\) SA 162 \(D\)](#) in which the mortgagee's stipulation of a reserve price under the former corresponding subrule was held to be sufficient consent to the sale in execution for the purposes of s 77(1) of the (now repealed) Housing Act 4 of 1966.

[35](#) *Astfin Gauteng (Pty) Limited trading as Assetfin v Standard Bank of South Africa Ltd* (unreported, GP case no 14656/2021 dated 14 December 2022) at paragraph [22.7].

[36](#) See, by way of analogy, *Wessels v Brink NO* [1950 \(4\) SA 352 \(T\)](#).

[37](#) *Ex parte The Master* 1907 TS 128. If the documents are lost the court may order the sale to proceed and transfer to be passed on duly certified copies thereof (*Lanham v Simpson* 1907 TH 145).

[38](#) *Lanham v Simpson* 1907 TH 145.

[39](#) *Cummins v Bartlett NO* [1991 \(4\) SA 135 \(E\)](#) at 141J-142A.

[40](#) *Cummins v Bartlett NO* [1991 \(4\) SA 135 \(E\)](#) at 142B.

[41](#) *Cummins v Bartlett NO* [1991 \(4\) SA 135 \(E\)](#) at 142B; and see *Kaleni v Transkei Development Corporation* [1997 \(4\) SA 789 \(Tks\)](#) at 791B.

[42](#) [2006] 1 All SA 497 (C) at 506a-510g.

[43](#) *Messenger of the Magistrate's Court, Durban v Pillay* [1952 \(3\) SA 678 \(A\)](#); *Pillay v Messenger of the Magistrate's Court, Durban* [1951 \(1\) SA 259 \(N\)](#) at 264A-E; *Rossiter v Rand Natal Trust Co Ltd* [1984 \(1\) SA 385 \(N\)](#) at 387H-388A; *Cummins v Bartlett NO* [1991 \(4\) SA 135 \(E\)](#) at 140J-141A; *Kaleni v Transkei Development Corporation* [1997 \(4\) SA 789 \(Tks\)](#) at 719B-C.

[44](#) *Nepaul v Messenger, Magistrate's Court, Port Alfred* [1962 \(1\) SA 553 \(D\)](#); *Chasfre Investments (Pty) Ltd v Majavie* [1971 \(1\) SA 219 \(C\)](#); *Rossiter v Rand Natal Trust Co Ltd* [1984 \(1\) SA 385 \(N\)](#) at 388-9; *Cummins v Bartlett NO* [1991 \(4\) SA 135 \(E\)](#) at 141B-C; *Kaleni v Transkei Development Corporation* [1997 \(4\) SA 789 \(Tks\)](#) at 791E; *Maritz t/a Maritz & Kie Rekenmeester v Walters* [2002 \(1\) SA 689 \(C\)](#) at 702F-H.

[45](#) *Pillay v Messenger of the Magistrate's Court, Durban* [1951 \(1\) SA 259 \(N\)](#) at 264; *Rossiter v Rand Natal Trust Co Ltd* [1984 \(1\) SA 385 \(N\)](#) at 388.

[46](#) *First Consolidated Leasing Corporation v Theron* [1974 \(4\) SA 244 \(T\)](#) at 246E-F.

[47](#) *Rossiter v Rand Natal Trust Co Ltd* [1984 \(1\) SA 385 \(N\)](#) at 389A-H; *Cummins v Bartlett NO* [1991 \(4\) SA 135 \(E\)](#) at 141C-D; but see *Röntgen v Reichenberg* [1984 \(2\) SA 181 \(W\)](#) in which the requirements of the description seem to be set somewhat lower.

[48](#) *Rossiter v Rand Natal Trust Co Ltd* [1984 \(1\) SA 385 \(N\)](#) at 389D; *Maritz t/a Maritz & Kie Rekenmeester v Walters* [2002 \(1\) SA 689 \(C\)](#) at 702H-I.

[49](#) *Messenger of the Magistrate's Court, Durban v Pillay* [1952 \(3\) SA 678 \(A\)](#).

[50](#) *Chasfre Investments (Pty) Ltd v Majavie* [1971 \(1\) SA 219 \(C\)](#) at 222.

[51](#) Cf *Cummins v Bartlett NO* [1991 \(4\) SA 135 \(E\)](#) at 142C-D.

[52](#) Cf *Cummins v Bartlett NO* [1991 \(4\) SA 135 \(E\)](#) at 142C-D.

[53](#) Rule 46 was substituted by GN R1272 of 17 November 2017 (published in GG 41257 of 17 November 2017) with effect from 22 December 2017.

[54](#) [1996 \(3\) SA 814 \(W\)](#) at 819F.

[55](#) *Marais v Aldridge* [1976 \(1\) SA 746 \(T\)](#) at 752C; *Hoban v ABSA Bank Ltd* 1997 CLR 403 (W) at 411-12; *AH Noorbhai Investments (Pty) Ltd v New Republic Bank Ltd* [1998 \(2\) SA 575 \(W\)](#) at 578A-580C. These cases were decided prior to the substitution of paragraph (c) of the subrule by GN R785 of 5 June 1998 and GN R1024 of 7 August 1998, but the principle seems to remain unaffected.

[56](#) *Astfin Gauteng (Pty) Limited trading as Assetfin v Standard Bank of South Africa Ltd* (unreported, GP case no 14656/2021 dated 14 December 2022) at paragraphs [17]-[18] and [22.6].

[57](#) *Le Roux v Nedbank Bpk* [1980 \(4\) SA 386 \(O\)](#).

[58](#) See the *obiter* statement in *Thirlwell v Johannesburg Building Society* [1962 \(4\) SA 581 \(D\)](#) at 583C. The execution creditor may include provisions to its benefit in the conditions of sale (*Mpakathi v Kghotso Developments CC* [2005 \(3\) SA 343 \(SCA\)](#) at 349A-B).

[59](#) Rule 46(8)(a)(iv).

[60](#) *Sheriff, Johannesburg North v Yellow Dot Property Investments* [2016 \(5\) SA 107 \(GJ\)](#) at 112I-113A.

[61](#) *Pabst v The Sheriff* [1952 \(3\) SA 252 \(T\)](#) at 257-8; and see *Smith v Gessla (Pty) Ltd* [1972 \(1\) SA 543 \(D\)](#).

[62](#) Rule 46(8)(a)(v).

[63](#) See *Chasfre Investments (Pty) Ltd v Majavie* [1971 \(1\) SA 219 \(C\)](#) at 222G.

[64](#) See *Mpakathi v Kghotso Developments CC* [2003 \(3\) SA 429 \(W\)](#) at 434G, confirmed on appeal in *Mpakathi v Kghotso Developments CC* [2005 \(3\) SA 343 \(SCA\)](#) at 346D and 347C.

[65](#) *Mpakathi v Kghotso Developments CC* [2003 \(3\) SA 429 \(W\)](#) at 434H, confirmed on appeal in *Mpakathi v Kghotso Developments CC* [2005 \(3\) SA 343 \(SCA\)](#) at 347A.

[66](#) *Mpakathi v Kghotso Developments CC* [2003 \(3\) SA 429 \(W\)](#) at 434H, confirmed on appeal in *Mpakathi v Kghotso Developments CC* [2005 \(3\) SA 343 \(SCA\)](#) at 347A.

[67](#) *South African Permanent Building Society v Levy* [1959 \(1\) SA 228 \(T\)](#) at 230B; *Sedibe v United Building Society Ltd* [1991 \(4\) SA 65 \(W\)](#) at 69G.

[68](#) *Sedibe v United Building Society Ltd* [1993 \(3\) SA 671 \(T\)](#) at 675I and 676B-D; *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie NO v Syfrets Bank Ltd* [1997 \(1\) SA 764 \(D\)](#) at 773E-F and 778B. See also *Mpakathi v Kghotso Developments CC* [2003 \(3\) SA 429 \(W\)](#) at 434D-E; *Ivorale Properties (Pty) Ltd v Sheriff, Cape Town* [2005 \(6\) SA 96 \(C\)](#) at 118E-H; *Hiralal v Naicker* [2009 \(1\) SA 636 \(D\)](#) at 641C; *Sani v FirstRand Bank Ltd* [2012 \(4\) SA 370 \(WCC\)](#) at 381D-E; *Absa Bank Ltd v Morrison* [2013 \(5\) SA 199 \(GSJ\)](#) at 2011. The judgment creditor is not a party to the contract between the sheriff and the purchaser and does not become a party thereto by accepting a stipulation in his favour. If he accepts such a stipulation, a separate contract comes into existence between him and the purchaser or between him and the sheriff, as the case may be. In either case the obligation to deliver the property and to enforce payment of the purchase price remains on the sheriff (*Mpakathi v Kghotso Developments CC* [2003 \(3\) SA 429 \(W\)](#) at 434C-435B; see also *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central; Schoerie NO v Syfrets Bank Ltd* [1997 \(1\) SA 764 \(D\)](#) at 773J-774B; *Hiralal v Naicker* [2009 \(1\) SA 636 \(D\)](#) at 641D-E).

[69](#) *Sheriff, Piketberg v Lourens* [2016 \(6\) SA 110 \(WCC\)](#) at 117C.

[70](#) *Section 45(1) of the Consumer Protection Act 68 of 2008*.

[71](#) *Pledge Investments (Pty) Ltd v Kramer NO: In re Estate Selesnik* [1975 \(3\) SA 696 \(A\)](#).

[72](#) See *Pledge Investments (Pty) Ltd v Kramer NO: In re Estate Selesnik* [1975 \(3\) SA 696 \(A\)](#), overruling *Nicolau v Navarone Investments (Pty) Ltd* [1971 \(3\) SA 883 \(W\)](#).

[73](#) *De Faria v Sheriff, High Court, Witbank* [2005 \(3\) SA 372 \(T\)](#) at 380D-G; and see *Standard Bank of South Africa v Nkahalele* [2021 \(5\) SA 642 \(WCC\)](#) at paragraphs [8]-[9].

[74](#) See also *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central* [1997 \(1\) SA 764 \(D\)](#) at 770I-771D.

[75](#) [2009 \(6\) SA 272 \(KZP\)](#).

[76](#) At 276D-E. See also *Sheriff, Piketberg v Lourens* [2016 \(6\) SA 110 \(WCC\)](#).

[77](#) At 275G-276E.

[78](#) At 276F-H.

[79](#) [2013 \(3\) SA 168 \(GSJ\)](#).

[80](#) [2009 \(6\) SA 272 \(KZP\)](#).

[81](#) *Sheriff of the High Court, Johannesburg v Sithole and Three Similar Cases* [2013 \(3\) SA 168 \(GSJ\)](#) at 171A-B; and see *Business Partners Limited v Smith N.O.* (unreported, FB case no 1039/2017 dated 3 December 2021) at paragraph [2] (a case in which a full-blown application was heard in open court).

[82](#) *Sheriff of the High Court, Johannesburg v Sithole and Three Similar Cases* [2013 \(3\) SA 168 \(GSJ\)](#) at 171F-172E, 174F-H and 174I-175B.

[83](#) *Sheriff of the High Court, Johannesburg v Sithole and Three Similar Cases* [2013 \(3\) SA 168 \(GSJ\)](#) at 172F-G, 176F-G, 177B-C, 178A-B

and 178G–H.

84 The Practice Directive is reproduced in [Volume 3](#), Parts H2 and H4.

85 The subrule renders the decisions in *The Sheriff v Gillingham* 1907 TS 190 and *The Sheriff v Mashaba* [1948 \(4\) SA 870 \(T\)](#) no longer applicable.

86 *Sheriff, Hlabisa and Nongoma v Shobeda* [2009 \(6\) SA 272 \(KZP\)](#) at 276I–277B.

87 [1955 \(3\) SA 416 \(N\)](#) at 417G.

88 *McCreath v Wolmarans NO* [2009 \(5\) SA 451 \(ECG\)](#).

89 *Msomi v Biyela* [2011 \(2\) SA 311 \(KZD\)](#) at 319A.

90 *McCreath v Wolmarans NO* [2009 \(5\) SA 451 \(ECG\)](#) at 459G–460A.

91 Cf *Paizes v Phitides* 1940 WLD 189.

92 1932 CPD 345.

93 This paragraph, which appeared in the first edition of this work, was referred to with approval in *FirstRand Bank Ltd v Nkata* [2015 \(4\) SA 417 \(SCA\)](#) at 431B–C and 431H, reversed on appeal (but not on this point) in *Nkata v FirstRand Bank Ltd* [2016 \(4\) SA 257 \(CC\)](#).

94 *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central* [1997 \(1\) SA 764 \(D\)](#) at 777G–778D.

95 *Simpson v Klein NO* [1987 \(1\) SA 405 \(W\)](#).

96 *Simpson v Klein NO* [1987 \(1\) SA 405 \(W\)](#); *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central* [1997 \(1\) SA 764 \(D\)](#).

97 *Goedhals v Deputy Sheriff of Albany* 1913 CPD 108.

98 *Sedibe v United Building Society Ltd* [1991 \(4\) SA 65 \(W\)](#) at 69J; *Sedibe v United Building Society Ltd* [1993 \(3\) SA 671 \(T\)](#) at 676C; *Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central* [1997 \(1\) SA 764 \(D\)](#) at 774J–775A; *Campbell v Botha* [2009 \(1\) SA 238 \(SCA\)](#) at 242F–244H.

99 *Ivorai Properties (Pty) Ltd v Sheriff, Cape Town* [2005 \(6\) SA 96 \(C\)](#) at 118E–I.

100 See *Mars Insolvency* 478 et seq.

101 See *Chasfre Investments (Pty) Ltd v Majavie* [1971 \(1\) SA 219 \(C\)](#) at 222G.

102 *Klagbruns Inc v Adjunk-Balju, Bronkhorstspruit* [1979 \(2\) SA 169 \(T\)](#) at 170H–171A.

103 [1974 \(4\) SA 244 \(T\)](#).

104 [1984 \(2\) SA 181 \(W\)](#).