46A Execution against residential immovable property

(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2)*(a)* A court considering an application under this rule must —

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.

(3) Every notice of application to declare residential immovable property executable shall be —

(a) substantially in accordance with Form 2A of Schedule 1;

(b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)*(a)*: Provided that the court may order service on any other party it considers necessary;

(c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and

(d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.

(4)*(a)* The applicant shall in the notice of application —

(i) state the date on which the application is to be heard;

(ii) inform every respondent cited therein that if the respondent intends to oppose the application or make submissions to the court, the respondent shall do so on affidavit within 10 days of service of the application and appear in court on the date on which the application is to be heard;

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

(iii) appoint a physical address within 25 kilometres of the office of the registrar and an electronic mail address, where available, at either of which addresses the applicant will accept service of all documents in these proceedings; and

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

(iv) state the applicant's postal or facsimile addresses where available.

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

(b) The application shall not be set down for hearing on a date less than five days after expiry of the period referred to in paragraph *(a)*(ii).

(5) Every application shall be supported by the following documents, where applicable, evidencing:

(a) the market value of the immovable property;

(b) the local authority valuation of the immovable property;

(c) the amounts owing on mortgage bonds registered over the immovable property;

(d) the amount owing to the local authority as rates and other dues;

(e) the amounts owing to a body corporate as levies; and

(f) any other factor which may be necessary to enable the court to give effect to subrule (8):

Provided that the court may call for any other document which it considers necessary.

(6)*(a)* A respondent, upon service of an application referred to in subrule (3), may —

(i) oppose the application; or

(ii) oppose the application and make submissions which are relevant to the making of an appropriate order by the court; or

(iii) without opposing the application, make submissions which are relevant to the making of an appropriate order by the court.

(b) A respondent referred to in paragraph *(a)*(i) and (ii) shall —

(i) admit or deny the allegations made by the applicant in the applicant's founding affidavit; and

(ii) set out the reasons for opposing the application and the grounds on which the application is opposed.

(c) Every opposition or submission referred to in paragraphs *(a)* and *(b)* shall be set out in an affidavit.

(d) A respondent opposing an application or making submissions shall, within 10 days of service of the application —

(i) deliver the affidavit referred to in paragraph *(c)*;

(ii) appoint a physical address within 25 kilometres of the office of the registrar and an electronic mail address, where available, at either of which addresses such respondent will accept service of all documents: and

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

(iii) state the respondent's postal or facsimile addresses where available.

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

(7) The registrar shall place the matter on the roll for hearing by the court on the date stated in the Notice of Application.

(8) A court considering an application under this rule may —

(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;

(b) order the furnishing by —

(i) a municipality of rates due to it by the judgment debtor; or

(ii) a body corporate of levies due to it by the judgment debtor;

(c) on good cause shown, condone —

(i) failure to provide any document referred to in subrule (5); or

(ii) delivery of an affidavit outside the period prescribed in subrule (6)*(d)*;

(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;

(e) set a reserve price;

(f) postpone the application on such terms as it may consider appropriate;

(g) refuse the application if it has no merit;

(h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or

(i) make any other appropriate order.

(9)*(a)* In an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set.

(b) In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court shall take into account—

(i) the market value of the immovable property;

(ii) the amounts owing as rates or levies;

(iii) the amounts owing on registered mortgage bonds;

(iv) any equity which may be realised between the reserve price and the market value of the property;

(v) reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)*(a)* to *(e)*, whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);

(vi) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;

(vii) the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;

(viii) any prejudice which any party may suffer if the reserve price is not achieved; and

(ix) any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.

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

(d) Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within 5 days of the date of the auction, which report shall contain—

(i) the date, time and place at which the auction sale was conducted;

(ii) the names, identity numbers and contact details of the persons who participated in the auction;

(iii) the highest bid or offer made; and

(iv) Any [*sic*] other relevant factor which may assist the court in performing its function in paragraph *(c)*.

(e) The court may, after considering the factors in paragraph *(d)* and any other relevant factor, order that the property be sold to the person who made the highest offer or bid.

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

Commentary

Form. Notice of application to declare immovable property executable in terms of rule 46A, 2A.

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. Rules 45, 46 and 46A should, where necessary, be read together with:

(a) rule 45A, which provides for the suspension of execution;

(b) the following sections of the Superior Courts Act 10 of 2013 which are reproduced in Volume 1 third edition, Part D:

(i) s 42 — scope and execution of process;

(ii) s 43 — execution of process by sheriff;

(iii) s 44 — electronic transmission of summonses, writs and other process;

(iv) s 45 — property not liable to be seized in execution;

(v) s 46 — offences relating to execution.

Rule 46, as substituted, and this rule, came into operation on 22 December 2017. [1] In the notes that follows the position under former rule 46(1)*(a)* and the present position under rule 46A are discussed. It is to be noted that rule 46A does not apply retrospectively. [2]

The position under former rule 46(1)*(a)*

Rule 46(1)*(a)*, as substituted by GN R981 of 19 November 2010 with effect from 24 December 2010, read as follows:

'No writ of execution against the immovable property of any judgment debtor shall issue until —

(i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or

(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.'

In *Gundwana v Steko Development* [3] the Constitutional Court declared that it is unconstitutional for the registrar to declare immovable property specially executable under rule 46(1)*(a)*(ii) when ordering default judgment in terms of rule 31(5) *to the extent that this permits*

the sale in execution of the home of a person. The effect of this decision, read with the proviso to rule 46(1)*(a)*(ii), is that *only a court* is competent to declare a judgment debtor's *primary* residence (i e the debtor's usual or ordinary residence) specially executable. The court will decide whether or not to order such execution having regard to all relevant circumstances.

With effect from 16 August 2013 the registrar must, in terms of the proviso to rule 31(5)*(b)*, refer every application for an order declaring residential property specially executable to the court. [4] The effect of the proviso is that the registrar has to refer all applications declaring *residential property* specially executable to the court (i e an open court), alternatively that such applications should be enrolled for hearing in court directly. In other words, the registrar is not entitled to declare any residential immovable property, whether it be the primary residence of the debtor or any other residential property of the debtor, specially executable under rule 46(1)*(a)*(ii) when ordering default judgment in terms of rule 31(5)*(b)*. The effect of the proviso therefore is that *only a court* is competent to declare any or all of a judgment debtor's residential immovable property specially executable under the provisions of rule 46(1)*(a)*(ii).

If such residential property consists of the judgment debtor's primary residence, the court has, in terms of the proviso to rule 46(1)*(a)*(ii), to consider all relevant circumstances before ordering execution against such property. Rule 46 does not contain a similar provision in the event of the residential property not consisting of the judgment debtor's primary residence. In such event the court, in considering whether or not to declare the residential property of the judgment debtor specially executable, should consider all relevant circumstances.

Under rule 46(1)*(a)*(ii) a court, in declaring residential property of a judgment debtor not consisting of the judgment debtor's primary residence as contemplated in the proviso to that subrule, specially executable, is not restricted to the residential property of a natural person only, as is the case under the proviso to that subrule. [5] Residential property registered in the name of a trust or a legal person therefore falls within the ambit of the words 'residential property' in the proviso to rule 31(5)*(b)* read with the words 'immovable property' in rule 46(1)*(a)*(ii), and could be declared specially executable by the court.

Proviso: 'Provided that, where the property sought to be attached is the primary residence of the judgment debtor.' The phrase 'the home of a person' means the 'primary residence' of the judgment debtor as contempled in the proviso to this subrule, i e the debtor's usual or ordinary place of residence. [6] Additional dwellings such as a holiday home do not fall within its

ambit. [7] The words 'judgment debtor' in the proviso refer to natural persons only. [8] The words exclude legal persons and trusts. [9] In deciding whether or not to declare the primary residence of a judgment debtor who is a natural person specially executable the court must consider all relevant circumstances as contemplated in the subrule. This means 'legally relevant circumstances'. [10]

In *Jaftha v Schoeman; Van Rooyen v Stoltz* [11] the Constitutional Court gave the following examples of such circumstances:

(a) whether the rules of court have been complied with;

(b) whether there are other reasonable ways in which the judgment debt can be paid;

(c) whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt;

(d) the circumstances in which the judgment debt was incurred;

(e) attempts made by the judgment debtor to pay off the debt;

(f) the financial position of the parties;

(g) the amount of the judgment debt;

(h) whether the judgment debtor is employed or has a source of income to pay off the debt;

(i) any other factors relevant to the particular case.

In *Gundwana v Steko Development* [12] the Constitutional Court added the following to the circumstances referred to above: It is only when there is a disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.

In the *Gundwana* case [13] the Constitutional Court did not, however, discard the rules of practice made by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson* [14] and by the full court in *Nedbank Ltd v Mortinson*. [15] These rules of practice must be applied *mutatis mutandis* by a court when considering whether or not to declare the primary residence of a judgment debtor specially executable under subrule (1)*(a)*(ii). In the *Mortinson* case the full court laid down the following rules of practice: [16]

> '33.1 In all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:
>
> 33.1.1 The amount of the arrears outstanding as at the date of the application for default judgment.
>
> 33.1.2 Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.
>
> 33.1.3 Whether, to the knowledge of the creditor, the immovable property is occupied or not.
>
> 33.1.4 Whether the immovable property is utilised for residential purposes or commercial purposes.
>
> 33.1.5 Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.
>
> 33.2 All applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable where the amount claimed falls within the jurisdiction of the Magistrate's Court, shall be referred by the Registrar for consideration by the court in terms of rule 31(5)*(b)*(vi).
>
> 34 A further rule of practice is laid down that a warrant of execution which is presented to the Registrar for issue, pursuant to an order made by the Registrar declaring immovable property executable, shall contain a note advising the debtor of the provisions of rule 31(5)*(d)*.'

In *FirstRand Bank Ltd v Mdletye* [17] Gorven J held [18] that the potential of a credit agreement not being capable of reinstatement and the judgment debtor's home being sold in execution under circumstances where the arrears could be paid and the agreement reinstated within a relatively short period, is another relevant factor to be taken into account by the court in deciding whether or not to declare the immovable property concerned executable. On reinstatement in general, and the correct interpretation of ss 129(3)*(a)* and 129(4)*(b)* of the National Credit Act 34 of 2005, see *Nkata v FirstRand Bank Ltd.* [19]

The position in Gauteng. In *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* [20] the full court of the North Gauteng High Court, Pretoria, observed the following:

> '40. It is obviously impossible to provide a list of circumstances that might be regarded as extraordinary which would persuade a court to decline a writ of execution. They would usually consist of factors that would render enforcement of the judgment debt an abuse of the process, which a court is obliged to prevent, see *Hudson v Hudson* 1927 AD 259, *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F: "*an abuse of the process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective . . .*" Instances of this nature would fall into the category enumerated by Mokgoro J in *Jaftha, supra* and encountered in *Absa Bank Ltd v Ntsane & another* 2007 (3) SA 554 (T). As is apparent from these examples, the creditor's conduct need not be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although *bona fide*, may be iniquitous because the debtor will lose his home while alternative modes of satisfying the creditor's demands might exist that would not cause any significant prejudice to the creditor.
>
> 41. Mindful of the impossibility to anticipate every potential circumstance, some of the following factors that may need to be taken into consideration by the court when deciding whether a writ should issue or not, are:
>
> - Whether the mortgaged property is the debtor's primary residence;
> - The circumstances under which the debt was incurred;
> - The arrears outstanding under the bond when the latter was called up;
> - The arrears on the date default judgment is sought;
> - The total amount owing in respect of which execution is sought;
> - The debtor's payment history;
> - The relative financial strength of the creditor and the debtor;
> - Whether any possibilities exist that the debtor's liabilities to the creditor may be liquidated within a reasonable period without having to execute against the debtor's residence;

> - The proportionality of prejudice the creditor might suffer if execution were to be refused compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
> - Whether any notice in terms of section 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;

- The debtor's reaction to such notice, if any;
- The period of time that elapsed between delivery of such notice and the institution of action;
- Whether the property sought to have declared executable was acquired by means of, or with the aid of, a State subsidy;
- Whether the property is occupied or not;
- Whether the property is in fact occupied by the debtor;
- Whether the immovable property was acquired with monies advanced by the creditor or not;
- Whether the debtor will lose access to housing as a result of execution being levied against his home;
- Whether there is any indication that the creditor has instituted action with an ulterior motive or not;
- The position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.

It is obvious that not each and every one of the above considerations will of necessity have to be taken into account in every matter. The enquiry must always be fact bound to identify the criteria that are relevant for the particular case.'

The effect and operation of rule 46(1)*(a)*(ii) was dealt with as follows by the full court in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*: [21]

'50. The amended Rule applies only to individual judgment debtors, not to corporate entities or trusts.

51. Its application is restricted to writs of execution sought against the judgment debtor's usual home, his or her ordinary place of residence (the "primary residence"). Additional dwellings such as holiday homes do not fall within its ambit.

52. When action is instituted to enforce a debt secured by a special hypothec over the debtor's primary residence or usual or ordinary residence, the debtor is entitled to be informed in the summons of his or her rights in terms of s 26 of the Constitution.

53. A practice directive is issued that, if the issue of summons is preceded by a notice in terms of s 129 of the National Credit Act 34 of 2005, such notice is to include a notification to the debtor that, should action be instituted and judgment be obtained against him or her, execution against the debtor's primary residence will ordinarily follow and will usually lead to the debtor's eviction from such home.

54. If the debtor does not enter appearance to defend after the service of summons and the creditor applies for judgment by default either to the court or the Registrar, the creditor must file an affidavit in which he sets out all the applicable circumstances enumerated in para 19 above. [22]

55. A creditor applying to court for the granting of a writ for execution after obtaining judgment by default must file an affidavit setting out all the applicable circumstances

enumerated in para 41 [23] above of which the creditor is aware or is able to reasonably establish from the information at its disposal.

56. A creditor instituting action may include a prayer for a writ of execution in the summons, provided that the relevant circumstances identified above are recorded therein. This information is to be verified by affidavit when application is made for judgment by default, which must be made to the High Court if the granting of a writ is sought at the same time.'

The effect of the practice laid down by the full court in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* [24] is that the relevant circumstances contemplated in rule 46(1)*(a)*(ii) can be presented to court in the form of an affidavit if the judgment debtor is in default. [25] This practice should also be followed if an order declaring specially executable a judgment debtor's primary residence under rule 46(1)*(a)*(ii) is sought in conjunction with provisional sentence under rule 8 or summary judgment under rule 32. [26] As regards summary judgment it is advisable that a *separate* affidavit in support of the *declaratory order* be filed in order not to contravene the provisions of rule 32(2). Once the court has considered the summary judgment application it can then proceed to consider the declaratory order on the basis of the facts set out in the separate affidavit and, if satisfied that both orders should be granted, give judgment *pari passu*. If the circumstances are dealt with in the particulars of claim, a separate affidavit is not called for, and the plaintiff's affidavit contemplated in rule 32(2) will suffice and, in terms of the provisions of that subrule, be the only affidavit allowable. In a trial, obviously, evidence should be presented for purposes of an order under rule 46(1)*(a)*(ii).

In *Duma v Absa Bank Ltd* [27] the court noted [28] that those subject to orders for the recovery of outstanding bond payments on their residential property, and declaring bonded residential property specially executable, were often lay people without legal assistance and who might be unaware of their rights. Such rights included, in the light of s 129(3) of the National Credit Act 34 of 2005, the right to reinstate the original credit agreement by paying all outstanding arrears before the bonded property was sold in execution. The court concluded that a court would be paying lip service to the Constitution of the Republic of South Africa, 1996, should it not, in its orders declaring bonded residential property specially executable, inform the debtor that, should the arrears be paid before the sale in execution, the original agreement would be reinstated.

The position in the Western Cape. In *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* [29] the full court of the Western Cape High Court, Cape Town, had to determine the following questions:

'1. What are the "relevant circumstances" to which a court should have regard before ordering execution against mortgaged property specially hypothecated to satisfy the debt secured by such mortgage?

2. By whom must such circumstances be placed [? pleaded] before the court?

3. Does the new rule 46(1) have the effect of setting up any substantive requirement on the part of the plaintiff in order to obtain the relief sought, namely the enforcement of contractual rights and obligations?'

The full court summarized its findings as follows: [30]

'To sum up with reference to the three questions set out in para [5]:

(1) A definitive answer cannot be given to the first question. Relevant circumstances qualify as such only if they are legally relevant. Evidence to show an infringement of constitutional rights or an abuse of process is obviously relevant, as is evidence offered to support any contention by the mortgagee that an alleged or demonstrated infringement is justifiable.

(2) Allegations that execution against the hypothecated property would infringe the defendant/judgment debtor's constitutional rights or that the application for a writ of execution to issue is an abuse should, in principle, be pleaded by the defendant/judgment debtor, and any rebutting allegations by the plaintiff/judgment creditor.

(3) Rule 46(1)*(a)*, in its current form, does not give rise to any new substantive obligation on mortgagees seeking orders for execution against the hypothecated property. The proviso to the subrule gives procedural effect to the constitutional requirement that execution against immovable property that is a judgment debtor's home may potentially entail an infringement of s 26 rights and must therefore occur only under judicial oversight. Apart from the compliance required with PN33 of this court in applicable cases, [31] the procedural obligations which a mortgagee claiming an order that a writ of execution issue against the hypothecated property must satisfy are limited in the ordinary case to compliance with the

Saunderson practice note. [32] In addition, any applicant for an order for execution against immovable property should comply, as far as it is practicable in the circumstances of the case, with the guidelines set out in paras [27]–[29] of this judgment.'

The effect and operation of rule 46(1)*(a)*(ii) was dealt with as follows by the full court in *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases*: [33]

'[27] It is desirable that the court should be able to know from the summons whether or not the application for an order authorising execution against immovable property concerns property that is the defendant / judgment debtor's primary residence. An appropriate allegation should therefore henceforth be included in the summons in matters in which a declaration of special executability is sought ancillary to judgment on the money claim. In matters in which the plaintiff is unable to make such an allegation positively because of a lack of knowledge of the relevant facts that much should be stated in the summons. In cases in which the summons does not contain an allegation that the affected property is not the primary residence of the defendant the court will scrutinise the matter assuming that the property may be the defendant's primary residence unless it is clear from other indications in the papers that this is not so. We agree with the contention advanced both by counsel for the plaintiff and by the amicus that it is in general undesirable that these issues be dealt with by the introduction of affidavits

in the manner required by the practice note issued in the North Gauteng High Court in terms of para 54 of the judgment in *Folscher*. [34] (The position is of course different in matters in which an application for leave to execute is made discretely subsequent to a judgment granted earlier sounding in money; as will occur ordinarily when excussion has first been attempted against the judgment debtor's movable property — an unlikely scenario in cases involving hypothecated property, in which orders authorising special execution against the property are ordinarily sought contemporaneously with judgment for payment of the secured debt.)

[28] Matters in which the plaintiff is able to make the allegation that the property is not the primary residence of the defendant can still be disposed of by the registrar. Mortgagee plaintiffs in such cases are encouraged to avail themselves of that procedure because of the burden placed on the court's limited judicial resources by the number of default applications with attendant prayers for orders of special executability that do require judicial oversight in terms of the proviso to rule 46(1)*(a)*. The registrar of this court has been advised that in all applications for the issue of writs of execution not directed to the court because the property sought to be attached is alleged not to be the defendant or judgment debtor's primary residence, an affidavit should be required from the plaintiff or judgment creditor, deposed to by a person appearing to have the relevant knowledge, confirming that the property is not the primary residence of the judgment debtor. The requirement by the registrar of such an affidavit in the circumstances arises out of the exigencies of the proviso to rule 46(1)*(a)* and is consistent with the registrar's duty in terms of rule 31(5)(vi) to consider whether an application under the subrule should rather be set down for hearing in open court.

[29] We also consider that it would assist the court in the discharge of its duty to examine applications for execution against immovable property that might be the defendant's home cautiously, astute to the fact that the exercise entails more than just seeking to be satisfied that a cause of action has been made out, if, in a case in which execution is sought against hypothecated property, the mortgagee plaintiff would, in cases in which the secured debt was repayable in periodic instalments, include in the summons allegations setting out the amount of such instalments and the amount in which payment in terms of such instalments was in arrears at the time of foreclosure or the issue of summons. In matters in which the amount in arrears was relatively low at the time of foreclosure the plaintiff would be advised to set out in its summons allegations which might support the resort to direct realization of the security as reasonable and appropriate in the circumstances. While we do not wish to be understood to suggest that such allegations should be mandatory, they would, we venture, assist in allaying concerns that could otherwise arise in such cases as to whether the prayer for an order of special executability might be an abuse of process. If such concerns are not allayed in advance they may occasion delay if it becomes necessary to address requests by judges for further information when the matter comes before the court. In considering any allegations made in this respect the court will have due regard in the ordinary course to all the features of the case including the principle of *pacta sunt servanda* and the considerations acknowledged by the Constitutional Court in *Jaftha* in para 58, [35] which we have discussed at length above.'

In *Nedbank Ltd v Jessa* [36] Blignault J stated the following: [37]

'[14] The second issue to be dealt with in this judgment is the practice on the part of plaintiffs to submit information regarding relevant circumstances to the court by way of an affidavit which is frequently not served on the defendant.

[15] In my view this practice should not be followed. It is in direct conflict with the right to a fair hearing which is embodied in section 34 of the Constitution. This provision reads as follows:

> "***34. Access to courts***. — *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before the court or, where appropriate, another independent and impartial tribunal or forum.*"

[16] In *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC) (2003 (1) SACR 561; 2003 (5) BCLR 476) para 36 Ackermann J described the *audi alteram partem* rule as one of the main pillars of the s 34 fair-hearing right.

[17] If it is intended to place additional facts regarding relevant circumstances before the court, these should be alleged in plaintiff's summons and served on the defendant. This is the procedure envisaged in para 29 of the *Bekker* judgment.'

In *Standard Bank of South Africa Ltd v Dawood* [38] the full court of the Western Cape High Court, Cape Town, had to determine the following questions in an attempt to clarify or resolve certain points of uncertainty concerning the correct practice to be followed in that court in applications for default judgment where ancillary orders that immovable property hypothecated be declared executable:

'The questions addressed to us regarding the present matters may be formulated as follows:

(a) Whether a simple or a combined summons ought to be used in actions based on mortgage loans in respect of residential property where it is sought, inter alia, to have such property declared executable.

(b) Whether the notice to defendants required by the SCA in *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) (the *Saunderson* notice) ought to be amplified so as to include a reference to s 26(3) of the Constitution.

(c) Whether or not a plaintiff, in applications for default judgment involving a prayer for execution against residential property, should be required to set out "relevant circumstances" contemplated in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) and the proviso to Uniform Rule 46(1)(*a*) (as amended) by way of an affidavit.'

The full court held as follows. As to —

(a) The first question: [39]

'To sum up as far as this aspect is concerned, for the reasons stated above, we decline to approve the practice suggested in *Marshall* [40] that a combined summons be used in preference to a simple summons in matters involving the NCA and execution orders contemplated in rule 46(1). We hold, nonetheless, that use of a combined summons will not be regarded as impermissible or irregular in these matters, provided that the costs recoverable by a plaintiff on taxation may well be limited to the costs of a simple summons.'

(b) The second question, that the contents of the *Saunderson* notice should be amplified to include an appropriate

notification to the defendant that 'he [or she] is entitled to place information regarding relevant circumstances within the meaning of s 26(3) of the Constitution and rule 46(1), before the court hearing the matter'. [41]

(c) The third question, that the relevant circumstances should be included in the summons but if 'a court dealing with an application to declare immovable property executable requires further information relating to any relevant circumstances that have not been specifically mentioned in the summons, it will be necessary and unavoidable to place such further information before the court by way of an affidavit by the creditor'. [42]

The full court further directed, as a rule of practice in the Western Cape High Court, Cape Town, [43] in all matters issued subsequent to the date of its judgment (i e 9 May 2012), that the summons should contain a notice as suggested in this work in the notes to rule 17(2)(*b*) s v 'Summons . . . in accordance with Form 9' above.

The effect of the practice laid down in the Western Cape High Court, Cape Town, by the full court in *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases,* [44] by Blignault J in *Nedbank Ltd v Jessa* [45] and by the full court in *Standard Bank of South Africa Ltd v Dawood* [46] differs radically from that laid down by the full court of the North Gauteng High Court, Pretoria, in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*. [47] As pointed out in the *Bekker* case, [48] the 'vastly divergent views' appear to have arisen in the main from inconsistent conclusions as to the influence and effect of recent judgments in other courts, i e *Standard Bank of South Africa Ltd v Saunderson*, [49] *Gundwana v Steko Development,* [50] *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* [51] and *Nedbank Ltd v Fraser and Another and Four Other Cases*. [52] To this list can be added *Jaftha v Schoeman; Van Rooyen v Stoltz*, [53] *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd*, [54] *Mkhize v Umvoti Municipality* [55] and *Mkhize v Umvoti Municipality*, [56] albeit that they pertain to s 66(1)*(a)* of the Magistrates' Courts Act 32 of 1944.

An order of execution against a judgment debtor's home that is mortgaged to a bank, is usually sought and granted at the time of the grant of default judgment for payment of the monies outstanding to the bank. In *Absa Bank Ltd v Petersen* [57] it was held [58] that the proper approach in such instance is to give effect to the mortgage bond unless something makes it inappropriate to do so, having regard to all the relevant circumstances of the case. If execution

is refused, the court ought to state its reasons for doing so. In *FirstRand Bank Ltd t/a First National Bank v Zwane and Two Other Cases* [59] it was held [60] that a court faced with an application by a mortgage lender for (i) default judgment for the accelerated full balance of the mortgage loan; and (ii) an order declaring the mortgaged property executable would, if the mortgaged property were the debtor's primary residence, have a discretion to postpone both applications to afford the debtor the opportunity to pay the arrears.

The position under rule 46A

Rule 46A provides for judicial oversight, the aim of which is to protect the constitutional right to adequate housing provided for in s 26 of the Constitution. [61]

In terms of rule 46A(1), rule 46A applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. [62] It is submitted that it is clear from the wording of subrule (1) that rule 46A, which came into operation on 22 December 2017, also applies to pending proceedings in which execution creditors are seeking to execute against the residential immovable property of a judgment debtor. [63] The rule makes a clear distinction between immovable residential property which is the primary residence of the judgment debtor, on the one hand, and other residential property of the judgment debtor, on the other hand. In both instances the registrar shall not issue a writ of execution against the immovable property concerned unless a court (i e the High Court as referred to in s 6 of the Superior Courts Act 10 of 2013), [64] on application, has ordered execution against such property. A court considering such application must:

(a) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; [65]

(b) if it is established that the property is the primary residence of the judgment debtor:

(i) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence; [66]

(ii) not authorize execution against the primary residence of the judgment debtor unless, having considered all relevant factors, it considers that execution against such property is warranted. [67] It is submitted that the words 'all relevant factors' mean all 'legally relevant' factors. [68]

(c) if it is established that the property is the residential immovable property of the judgment debtor, but not the judgment debtor's primary residence, further deal with the application on the basis of a consideration of all legally relevant circumstances and whether execution against such *residential* property is warranted. [69]

Subrule (5) requires every application under the rule to be supported by the following documents, if applicable:

(a) the market value of the immovable property;

(b) the local authority valuation of the immovable property;

(c) the amounts owing on mortgage bonds registered over the immovable property;

(d) the amount owing to the local authority as rates and other dues;

(e) the amounts owing to a body corporate as levies; and

(f) any other factor which may be necessary to enable the court to give effect to subrule (8).

The court may call for any other document which it considers necessary. [70]

The contents of the applicable documents referred to above will constitute 'relevant factors' as contemplated in rule 46A.

The following relevant factors can also be gleaned from rule 46A (subject to the distinction between the primary residence and other residential immovable property of the judgment debtor):

(a) alternative means by the judgment debtor of satisfying the judgment debt, other than execution against such debtor's primary residence (subrule (2)*(a)*(ii));

(b) the persons occupying the primary residence of the judgment debtor and the circumstances of such occupation (subrule (9)*(b)*(vi));

(c) the effect of the inclusion of appropriate conditions in the conditions of a possible sale in execution of the judgment debtor's primary residence (subrule (8)*(a)*);

(d) any other factor which in the opinion of the court is necessary for the protection of the interest of both the execution

creditor and the judgment debtor (subrule (9)*(b)*(ix)).

It is submitted that, depending on the facts of the case, the relevant circumstances enumerated in the cases referred to under the heading 'The position under former rule 46(1)*(a)*' above may also need to be considered by a court in the exercise of its discretion under rule 46A(2)*(b)* to the extent that they are not already included in the relevant factors under the rule. Obviously, the list of relevant factors is not exhaustive and it is simply impossible to anticipate every potential relevant factor. In the end every case has to be dealt with in the light of its own facts. [71]

In *Van den Bos NO v Mohloki* [72] the magistrate's court granted orders by default for payment of arrear levies against owners of sectional title units. The sheriff rendered *nulla bona* returns on warrants of execution issued out of the magistrate's court. The High Court was then approached for declarations of special executability in respect of the debtors' residential sectional title units in terms of rule 46A. The issue this raised was whether the High Court had jurisdiction to grant such declarations on the back of judgments given in the magistrate's court where execution had been initiated in that court. The High Court held, with reference to the decision of the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Mpongo*, [73] that it had jurisdiction to make the declarations. [74] The High Court, however, found that there was no basis on which it could make the declarations because:

(a) under its inherent jurisdiction there was no *lacuna* to address (special executability was available in the magistrate's court under rule 43A); [75]

(b) the requirements for relief by way of process-in-aid were unfulfilled; [76]

(c) the creditor was bound to the forum he had chosen. [77]

In *Van Den Bos NO v Mogoane* [78] the facts were essentially identical to the facts in *Van den Bos NO v Mohloki* referred to above. In an affidavit by the applicant's attorney in support of the relief claimed in the High Court, it was pointed out that the applicant ran 'into a brick wall in the enforcement of the judgment' in the magistrate's court. [79] The High Court granted process-in-aid and enforced the order of the magistrate's court by declaring the residential sectional title unit of the debtors specially executable. [80]

The rules of practice which were carefully crafted by various divisions of the High Court under the former dispensation will now, to the extent necessary, have to make way for the uniform procedure laid down by rule 46A.

Subrule (1): 'This rule applies whenever.' The revised *Practice Manual* of the Gauteng Local Division (i e local seat) of the High Court, Johannesburg, [81] contains a directive [82] that is to be read with rule 46A. The directive precludes the granting of default judgment for a money claim where it is necessary to postpone the claim for a declaration of executability. In *Absa Bank Ltd v Mokebe and Related Cases* [83] the full court of the Gauteng local seat of the High Court, Johannesburg, held [84] that it is both desirable and necessary for a money claim and a claim for a declaration of executability under a mortgage bond to be heard simultaneously as envisaged in the *Practice Manual*. It was held [85] that there is 'a duty on banks to bring their entire case including the money judgment, based on a mortgage bond, in one proceeding simultaneously' and that, should the matter require postponement for whatever reason, 'the entire matter falls to be postponed and piecemeal adjudication is not possible'.

The full court judgment was given pursuant to a direction in terms of s 14(1)*(a)* of the Superior Courts Act 10 of 2013 followed by a Practice Directive issued by the Judge President of the Gauteng Division of the High Court on 2 May 2018, which made provision for a full court to be constituted to deal with the aforesaid and related issues. [86] The background to the issuing of the Practice Directive and the legal issues raised in terms thereof for determination by the full court are framed as follows in the Practice Directive: [87]

> '1. This is a Directive issued in terms of Section 14(1)(a) of the Superior Courts Act, Act 10 of 2013, read with Section 173 of The Constitution of the Republic of South Africa. The purpose of the Directive is to make provision for the constitution of a full Court, to sit at first instance to hear and determine the matters referred to a Full Court, including the issues identified hereunder. The further purpose of the Directive is, inter alia, to set timelines for the filing and service of further process regarding the issues outlined hereunder.
>
> Background
>
> 2. On Friday, 13 April 2018, four unopposed applications relating to foreclosures of bonds over primary residences where the provisions of The National Credit Act 34 of 2005 ("NCA") were applicable, were referred for hearing by the Full Court pursuant to s.14(1)(b) of the Superior Courts Act. The reason why this was done appears from the written judgment of that date in the first four matters identified in the heading of this directive.
>
> 3. It has been the practice in the Local Division, having regard to s.26(3) of the Constitution, that when a mortgagee applies for a default money judgment for the accelerated full outstanding balance of the bond and an order declaring the residence executable, to postpone the application for some months to enable the debtor to bring up the arrears. If upon the postponed date the arrears will have been brought up, the agreement would be reinstated (s.129(3) of NCA) and the debtor will not lose her home.
>
> 4. However, some mortgagees began applying, when the court postponed the application to declare the residence executable, for an immediate money default judgment for the accelerated full outstanding balance. Judges have also reported that some mortgagees would then, based on that default money judgment, take out a writ against movables and execute by attachment of movables and their subsequent sale in execution. The proceeds of the sale in execution would then be credited to the mortgagor's bond account with the mortgagee.

> 5. It was in this regard that divergent practices have developed, some of which were reported in judgments, and others simply applied without written judgments being handed down. This has led to the disharmony more fully raised in the Mokebe-judgment that has referred this issue to the full court. See FirstRand Bank Ltd v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another [2014] ZAGPJHC 117 (4 June 2014); Absa Bank Ltd v Lekuku, [2014] ZAGPJHC 244 (14 October 2014) (full court); FirstRand Bank Limited t/a First National Bank v Zwane; FirstRand Bank Limited t/a First National Bank v Hyslop and Another, Nedbank Limited v Nkuna and Another (18581/2016, 19362/2016, 30634/2015) [2016] ZAGPJHC 203; 2016 (6) SA 400 (GJ) (29 July 2016); Absa Bank Ltd v Njolomba, RC and Another, Case no. 20321/2017 (5 March 2018).
>
> The Legal Issues raised:
>
> 6. The following issues have been raised in judgments, and there may be others, concerning the legal propriety and desirability of granting a money judgment for the accelerated full outstanding balance under the bond, and yet then postponing the application to declare the property secured by the bond specially executable:
>
> (a) Does a court have a discretion, when postponing an application for executability to afford the mortgagor an opportunity to " . . . remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue . . ." under the NCA, and the mortgagee asks for an immediate money judgment for the accelerated full outstanding balance under the bond, to decline that request and postpone it too so that it too is ultimately dealt with at the same time and in the same enquiry when the executability application is dealt with?

(b) If the court does have such a discretion, meaning that the court may in its discretion decline immediately to grant a default money judgment for the accelerated full outstanding balance, should the Practice Manual request uniformity of treatment, meaning uniformity of manner of exercise of discretion, by the judges in this Division?

(c) If so, what should that uniformity of treatment be? In particular, is the current suggested manner of dealing with the issue, as stated in the latest version of the Practice Manual, being the postponement of the application for the money judgment as well, objectionable/desirable?

(d) Does such an immediate money judgment for the accelerated full balance qualify as "*any other court order enforcing that agreement*" for purposes of s.129 (3) and (4) of the NCA? If it does so qualify, does it have the consequence of prohibiting the credit provider from re-instating or reviving the credit agreement — despite the arrears having been paid up — once the mortgagee bank, on the strength of such a judgment for the accelerated full balance, will have attached and sold in execution movable property of the mortgagor?

(e) Even if such a judgment could be given on the basis that it would be capable of subsequently being set aside or declared null and void if the mortgagor does ". . . *remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue* . . .", is it desirable that the court makes such an order, given —

(i) its potential for attachment and execution of movables in the meantime? and

(ii) that it may be undesirable to make an order which is not final in that it may potentially be set aside/declared null and void later?

7. The Full Court will also be required to consider under what circumstances should a court set a reserve price and how this is to be determined in terms of the new uniform rule 46A, effective since 22 December 2017.'

As regards the legal issues raised in paragraphs 6 and 7 of the Practice Directive, the full court held: [88]

'Question 6*(a)*

[31] As a result of our finding that the claim for payment and the claim for execution must be heard simultaneously, it stands to reason that in the event of the claim for execution not being finalised and being postponed, the monetary claim should be dealt with in the same way. There was no argument against the court's power to exercise its discretion to postpone the granting of an order declaring property executable or to defer its operation where the property is a debtor's primary residence because the order implicates a constitutional right — the constitutional s 26 right to adequate housing. Section 172(1)*(b)* of the Constitution empowers courts with a broad discretion when deciding a constitutional matter within its power to grant just and equitable relief.

Question 6*(b)*

[32] Insofar as this judgment binds single judges of our division, we are of the view that a uniform approach is established herewith and that the Practice Manual of both divisions should be amended to remove the reasons therein stated why the money judgment must be heard together with the claim for executability. The reason furnished in the Practice Manual is not in accordance with the judgment in *Nkata*. Most, if not all, parties who appeared before us recognised the need for a degree of uniformity, which takes into account the facts and circumstances of each case and the remarks of Coetzee J in 1984 remain as relevant today as they were then.

Question 6*(c)*

[33] The postponement of the money judgment is both desirable and necessary and is to be heard together with the question of executability, should any part of the matter be postponed.

Question 6*(d)*

[34] This issue has partially been resolved by the critical finding in this matter. However, the question whether a money judgment for the accelerated full balance qualified as "any other court order enforcing that agreement" for purposes of s 129(3) and (4) of the NCA is implicit in the directive issued by the Judge President and requires consideration.

. . .

[43] Cadit quaestio. What prevents the reinstatement in terms of s 129(4)*(b)* is only the sale in execution of the immovable property and the realisation of the proceeds of such sale. Prior to the realisation of the proceeds of the sale, the mere attachment is no hindrance to the reinstatement of the agreement. The fact that the mortgaged property has been attached pursuant to a default judgment and an order declaring the mortgaged property specially executable, is of no moment. It is only when the mortgaged property has been sold and the proceeds of the sale have been realised that there can be no reinstatement. This is self-evident as there is nothing to reinstate. The agreement is at an end. It is no more. Accordingly, the granting of the money judgment and the executionary order is not a bar to reinstatement of the agreement. It is only when the mortgaged property is sold and its proceeds realised that reinstatement is impermissable. In the words of *Nkata*, the reinstatement 'would be of no use to either party'.

[44] However, s 129(3) has been substituted by s 32*(a)* of the National Credit Amendment Act 19 of 2014, which came into effect on 13 March 2015. The amended ss (3) now speaks of a consumer remedying the default under the agreement instead of a consumer reinstating the agreement.

[45] It seems to us that the legislature, in effecting the amendment, intended to remedy the impression created that a credit agreement that has not been cancelled, could be reinstated. Prior to cancellation of the agreement, the agreement is extant. There is therefore nothing to reinstate. That being the case it makes sense to speak of remedying the default rather than reinstating the extant agreement. The prohibition of reinstatement of the agreement in ss (4) must be read in conjunction with the Constitutional Court judgment in *Nkata* where it was stated that the provisions of s 129(4)*(b)* must be narrowly interpreted. This accords with the submission of counsel for Absa who, in argument, submitted that a narrow interpretation would accord with the clear purpose of the NCA. This argument was adopted by all the banks, as well as Legal Aid. A wider interpretation, so the submission went, would not be businesslike. It would defeat the purpose of the NCA which is to grant relief to the consumers who have fallen on hard times but are able to save their primary homes. We adopt and agree with the interpretation given to the section by Rogers J, which interpretation was endorsed by the Constitutional Court. The interpretation which was argued by the banks accords with the provisions of the Constitution and the purpose of the Act: that is, that the reference in s 129(4)*(b)* of the NCA, narrowly interpreted, is a reference to execution against the security given under the bond. A wider interpretation — that it refers to any other court order — would lead to obvious anomalies. The result is that execution against movables would not be execution of any other court order as contemplated by s 129(4)*(b)* of the NCA. A narrow interpretation would promote the values of fairness, good faith, reasonableness and equality. This is indeed a compelling reason why the meaning of "execution" in s 129(4)*(b)* should be given the narrow meaning contended for by the parties, thus removing the barrier to remedy the default.

[46] In conclusion, with regard to question 6*(d)*, it is necessary to have regard to the provisions of s 39(2) of the Constitution which enjoins courts when interpreting any legislation, such as the NCA, and in particular the provisions of s 129(3) and (4) of the NCA, to promote the spirit, purport and objects of the Bill of Rights. Foreclosure of immovable property which is the primary residence of a consumer has a major impact on the right contained in s 26(1) of the Constitution: the right to have access to adequate housing. Section 129(3) and (4) of NCA must therefore be interpreted to promote this right. A default judgment and declaration of the immovable property as specially executable, and the sale of immovable property in satisfaction of such default judgment should not be a bar to revival of the agreement. What militates against the revival of the agreement is, inter alia the sale and receipt of the proceeds of such sale. Before then, a consumer may revive or reinstate the agreement. In order to ensure that the homeowner understands his or her right, we are of the view that the following statement must be incorporated in a document initiating the proceedings where a mortgaged property may be declared executable, such statement to be made in a reasonably prominent manner:

"The defendants' (or respondent's) attention is drawn to s 129(3) of the National Credit Act 34 of 2005 that he/she may pay to the credit grantor all amounts that are overdue together with the credit provider's permitted default charges and reasonable agreed or taxed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement."

. . .

[48] A final word needs to be said about s 129(4). Thus far we have discussed the right to reinstate an agreement with reference to the wording of s 129(3) and (4) in its unamended form. Subsections (3) and (4) now read as follows:

"(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administrative charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

(4) A credit provider may not re-instate or revive a credit agreement after —

(a) the sale of any property pursuant to —

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123."

The amendment of ss (3) seems to recognise the difficulty with the terminology: How does a consumer reinstate something that has not been cancelled? Therefore the term "remedy" may be more appropriate.

[49] The amendment of ss (4) to replace a consumer with a credit provider is more perplexing. What follows may not be the last word on this issue but, for purposes of this judgment, we accept that the right to reinstate or revive the agreement remains with the consumer. We adopt the reasoning of R Brits in an article in 2015 *De Jure*:

"The second option is to assume that the amendments made to section 129(4) should not be taken literally and, for all practical purposes, might have to be ignored. A strong indication of this possibility is the fact that the first draft amendment bill proposed no amendments to this subsection, and therefore the final version is probably the result of last-minute drafting confusion. Since the legislature also provided no explanation for the amendment, one must assume that it was never the intention to bring about the kind of substantive change that the literal wording of the modified subsection appears to indicate.

It is regrettable that the legislature leaves one with little choice but to disregard the actual wording of the NCA on this point, because the alternative would simply be too nonsensical. The bizarre reality is that one is compelled to interpret section 129(4) as if it has not been amended at all. Therefore, one must simply read section 129(4) as still providing for the limitations upon *the consumer's* right of reinstatement (or to remedy a default), regardless of the fact that the subsection now literally refers to the limitations on the *credit provider's* ostensible ability to reinstate or revive the agreement. What the legislature probably intended to do with the amendments to section 129(4) was to emphasise that the credit provider must *allow* reinstatement if the consumer remedies his default prior to any of the events listed in the subsection. After these events, the credit provider may (or must?) refuse to accept late payment. Not allowing reinstatement after property has been sold generally makes sense, because the alternative would create too much uncertainty for purchasers of property at sales in execution." [Emphasis in original.]

Question 6*(e)*

[50] The attachment of movables after judgment and before the realisation of the sale in execution of the mortgaged property is of no consequence due to the interpretation of s 129(4)*(b)* of the NCA.

Reserve price

. . .

[53] The determination of a reserve price is an issue which is provided for in the Uniform Rules of Court. The sale of a property, and in particular of a primary residence, for nominal amounts of money occurs to the detriment of the defaulting homeowner. Such a person, whether the poorest of the poor or otherwise, 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.

. . .

[57] The courts' power and duty to impose a reserve price is founded, inter alia, in s 26(3) of the Constitution. The process of granting judgment against the homeowner is the first step that may lead to his or her eviction from the property. Thus a court is to consider all the relevant factors when declaring a property specially executable at the behest of a bondholder. It is thus incumbent upon the bank or bondholder to place "all relevant circumstances" before the court when it seeks an order for execution. This, in our view, includes a proper valuation of the property (under oath), the outstanding arrears, municipal accounts and like information. This is not to thwart the mortgagee's right to execution, to which it may be entitled, but to secure a just and equitable outcome. It is not a prohibition to realise a bank's security as is suggested in the affidavit filed by Investec. The oversight duty is a far cry from such perceived prohibition. This is based on s 1 of the Constitution which places an obligation on all to promote the value of human dignity, the achievement of equality and the advancement of human rights and freedoms which would include the application of s 26 of the Constitution by a court, having regard to all the relevant circumstances, before sanctioning the process that may lead to the ultimate eviction from a home. . . .

[59] . . . It is therefore necessary for a court to determine whether a reserve price should be set based on all the factors placed before it by both the creditor and the debtor when granting an order declaring the property to be specially executable. If a debtor fails to place facts before the court despite the opportunity to do so, the court is bound to determine the matter without the benefit of the debtor's input. We cannot stress enough that this matter concerns and applies only to those properties which are primary homes of debtors who are individual consumers and natural persons. Rule 46A(8)*(e)*, in operation since December 2017, now empowers the court to set a reserve price for the property at the sale in execution. It would, in our view, be expedient and appropriate to generally order a reserve price in all matters, depending on the facts of each case. . . .

[61] The directive by the Judge President in terms of which this matter is heard requires of this court to consider under "what circumstances should a court set a reserve price and how this is to be determined in terms of . . . Rule 46A".

[62] We are of the view that setting a reserve price would depend on the facts of each case. Some facts may indicate that the debt is so hopelessly in excess of the value of the property that the reserve price would be irrelevant compared to the value of the property but yet, if the debt is not satisfied by the proceeds of the sale of the property, a debtor still remains liable for any balance after realisation of the property. In all the circumstances, a reserve price should be set in all matters where facts indicate it. It will not be possible to set out a numerus clausus of factors to be considered in each case as the reserve price

will depend on the facts of each individual matter. As was the case in *Jaftha*, it would be unwise to set out all the relevant factors for each matter. Mokgoro J said:

"[56] It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided."

[63] *Lekuku* expressed, albeit for a different purpose, the factors that are taken into account as follows:

"[34] An important difficulty raised by the Bank was the issue of low arrears and the varying approaches by different

judges as to what the benchmark is for arrears being too low to justify foreclosure. The difficulty with the differing approaches by the Bench results in the banks not knowing in advance whether foreclosure will be granted. A court will always have a discretion based on the facts before it as to what amount is proportional to the final effect and consequence of foreclosure. In carrying out this assessment, the court in each and every case carries out a unique enquiry in exercising its judicial oversight. To lay down a standard approach will be contrary to the constitutional imperative of judicial oversight in foreclosure matters."

And:

"[36] It would be inappropriate to define when arrears are low for the purpose of Practice Directive 10.17.1.6 as this would unduly restrict a discretion which a judge must exercise in the particular circumstances of each case. This Full Bench cannot give guidance in this regard as the very purpose of the judicial oversight requires an enquiry and a strategic engagement with the parties. The amicus curiae submitted that the overriding question is whether execution is proportionate, having regard to all the relevant circumstances. The amicus curiae submitted that there is no definitive number or easy calculation. If there were, claims for execution against residential property would be liquidated claims. The underlying basis of the *Jaftha* and *Gundwana* decisions is that they are not."

. . .

[65] It will be incumbent upon an applicant for execution to set out such facts relevant to a particular case with due regard to the provisions of rule 46A so that a court can exercise its discretion properly. After all, a court is obliged to consider whether to set a reserve price. It can only do so if all the facts are fully disclosed. A reserve price will balance the misalignment between the banks and the debtors where execution orders are granted. It ensures that the debtor is not worse off due to unrealistically low prices being obtained and accepted at sales in execution. This oversight regarding the imbalance between the parties can only effectively be exercised if the matters are brought properly to court, setting out all relevant factors so that a court can decide whether to set a reserve price in a particular matter.

[66] We are aware that rule 46A(8) provides that a court "may" set a reserve price. In order to comply with the constitutional requirement of just and equitability, it would be an exception rather than a rule where a reserve price is not set by a court. In our view question 7 should be answered as follows:

"Save in exceptional circumstances a reserve price should be set by a court, in all matters where execution is granted against immovable property which is the primary residence of a debtor, where the facts disclosed justify such an order." '

In *Standard Bank of South Africa Ltd v Hendricks and Related Cases* [89] a full court of the Western Cape Division of the High Court, Cape Town, discussed and approved the decision in *Absa Bank Ltd v Mokebe and Related Cases*. [90] The full court, in summary, held as follows:

(a) Where a creditor seeks a money judgment for the accelerated full outstanding balance on a loan, as well as an order of special execution against the debtor's primary residence mortgaged to secure such a loan, such orders should be sought simultaneously in the same proceedings (as opposed to being brought piecemeal in separate proceedings). This is so, given the nature of the claims, the cost advantages of dealing with both orders at the same time, and the necessity to limit the piecemeal adjudication of such matters (at 634G–H).

(b) A court, where it considers it to be in the interests of justice, may postpone the money judgment together with the order for special execution (at 637A–E).

(c) The practice of banks proceeding to court to seek both the money judgment and order for special execution, for 'trifling amounts', after the debtor had been in arrears for only a limited time, and without any appropriate steps having been taken to resolve the matter, could not be allowed to continue. Their approach did not strike an appropriate balance between the interests of consumers and credit providers as mandated by the National Credit Act 34 of 2005 (at 637E–638F).

(d) An application for an order declaring a primary residence specially executable must be personally served on the debtor by the sheriff, alternatively in a manner as authorized by the court. This was so even where a *domicilium citandi* clause was provided in the loan agreement (at 631E–632E).

(e) Where a court grants an order for execution against the primary residence of a debtor, saving exceptional circumstances it is obliged to set a reserve price (at 641C–D).

Pursuant to the decision of the full court a new Practice Direction which is applicable to all applications for foreclosure was inserted as 33A in the Consolidated Practice Notes of the Western Cape High Court, Cape Town. [91]

In *Changing Tides 17 (Pty) Ltd v Miekle* [92] the applicant, after service of a summons in an action on a mortgage bond over a residential property, and having obtained a confession to judgment by the defendants in terms of rule 31(1), applied for judgment in terms of rule 31(1) together with an application to declare the immovable property executable in terms of rule 46A. It was held [93] that it is undesirable, impractical and contrary to the interests of justice to combine a judgment by confession with an application to declare an immovable residential property executable in compliance with the requirements of rule 46A. This is so because service of the application for judgment by confession would not inform the defendants, as lay persons, how they should go about placing before the judge in chambers any facts or representations regarding the fate of the residential property. In this instance the judge proceeded to grant, in chambers, the money judgment by confession but postponed the declaration of the immovable property as executable *sine die* pending an application in open court in compliance with the legal requirements for such relief.

The provisions of rule 46A should also be followed if an order declaring specially executable a judgment debtor's residential immovable property or primary residence is sought in conjunction with provisional sentence under rule 8 or summary judgment under rule 32. [94]

In terms of subrule (3)*(a)* and *(c)* the procedure under rule 46A is by means of a notice of motion that must substantially be in accordance with Form 2A and be supported by an affidavit setting out the reasons why the execution creditor (i e the applicant) seeks to execute against the residential immovable property of the judgment debtor and the grounds on which the application is based.

'Residential immovable property.' Rule 46A does not apply when an execution creditor seeks to execute against immovable property of a judgment debtor that does not perform the function of a form of dwelling or shelter for humans (e g commercial immovable property) or that is occupied by juristic persons or legal entities other than humans (e g trusts) for use other than a dwelling. [95] In the event of an execution creditor seeking to execute against such immovable property, rule 46 applies. [96] In such a case the registrar may, under rule 31(5)*(b)*, grant an order declaring the non-residential immovable property of the judgment debtor specially executable. See further the notes to rule 31(5)*(b)* above.

It would seem that if immovable residential property is merely nominally registered in the name of a legal person or trust, but used as a dwelling by the shareholder(s) or the trustees/trust beneficiaries (depending on the nature of the trust deed), as the case may be, the property falls within the ambit of rule 46A in the event that the legal person or the trustees in their

official capacity are the judgment debtors and the judgment creditor wants to execute against the property. [97] Otherwise the provisions and purpose of the rule could easily be circumvented

by judgment creditors. It would seem that a housing interest under the Housing Development Schemes for Retired Persons Act 65 of 1988 also falls within the ambit of rule 46A. By virtue of the provisions of the proviso to rule 35(5)*(b)* and subrule (2)*(c)* of rule 46A the registrar would not have the power in such cases to either grant an order declaring the residential immovable property/housing interest specially executable or to issue a writ of execution against it.

It must be noted that the current protective measures for the vulnerable judgment debtor relate to execution against his primary residence, which must be immovable property. There is no provision relating to a primary residence which is movable property such as, for example, a caravan.

Subrule (2)*(a)*: 'An application under this rule.' Subrule (3) requires, *inter alia*, that every notice of application to declare residential immovable property executable must be substantially in accordance with Form 2A. See further the notes to subrule (3)*(a)* s v 'Substantially in accordance with Form 2A' below.

Subrule (2)*(a)*(i): 'Primary residence.' These words refer to a judgment debtor's usual home, in other words, such debtor's ordinary place of residence. Additional dwellings such as holiday homes are excluded from the ambit of the words, but do fall within the ambit of the words 'residential immovable property' in rule 46A. [98]

Subrule (2)*(a)*(ii): 'Alternative means . . . of satisfying the judgment debt.' It is submitted that such alternative means is a relevant factor to be considered by a court under subrule (2)*(b)* in determining whether execution against the primary residence of the judgment debtor is warranted. In *Absa Bank Ltd v Njolomba and Other Cases* [99] Fisher J stated: [100]

> '[3] There have, of late, been salutary moves in the statutes, case law, rules, and practice directives to introduce a measure of flexibility into the execution process where it is sought to execute against the home of a debtor. These laws and rules emanate from an accepted need to promote the objects of our Bill of Rights and especially the requirement that all relevant circumstances be considered before depriving a person of his or her home. They include the requirement that immovable property not be executed against without judicial oversight being brought to bear thereon and the recent introduction of rule 46A into the Uniform Rules which requires that the court "*consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.*" The cases have required stringent adherence to notice and service requirements and the furnishing of details in relation to the steps taken to manage the indebtedness

> of the debtor. Recent amendments to rule 46 [*sic*] of the Uniform Rules require the consideration by the court of alternative means of satisfying the judgment debt. These changes impose an even more rigorous investigative function on a court faced with an application for a declaration of executability and require still more information to be forthcoming in relation to the debtor's circumstances and the value of the property. This assists in setting appropriate reserve prices and other sale conditions in the event of execution against the property becoming necessary. However, the process has, as its main endeavour, to maintain the mortgage loan and the [*sic*] rehabilitate the debtor if at all possible.
>
> [4] Pivotal to the court's function in preserving the credit agreement and thus the debtor's home, is section 129(3) of the NCA, which affords to the debtor rights that he did not have before the advent of the NCA. It provides that notwithstanding that a debtor has fallen into arrears he "*may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.*" Thus, even after judgment, the debtor is entitled to remedy any default by paying the arrear amounts together with default charges and reasonable costs of enforcing the credit agreement. Indeed, in relation to immovable property this right endures until the proceeds from the sale have been realised. A debtor experiencing financial difficulties is thus given greater leeway in relation to the maintenance of the agreement.'

Subrule (2)*(b)*: 'All relevant factors.' See the notes s v 'The position under rule 46A' above.

Subrule (2)*(c)*: 'The registrar shall not.' See the notes to subrule (1) s v 'Residential immovable property' above.

Subrule (3)*(a)*: 'Substantially in accordance with Form 2A.' The verbatim following of Form 2A is not required. A notice of attachment need only '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 2A may be used with such variation as circumstances require.

Subrule (3)*(b)*: 'Any . . . party who may be affected.' It is submitted that this includes, for example, the occupiers of the residential property or primary residence of the judgment debtor, as the case may be, and the judgment debtor's dependents. [101]

'The entities referred to in rule 46(5)*(a)*.' These entities are:

(i) preferent creditors;

(ii) the local authority, if the property is rated; and

(iii) the body corporate, if the property is a sectional title unit.

Subrule (3)*(c)*: 'Supported by affidavit.' The provisions of this subrule are imperative, [102] but fact bound. In terms of the subrule the affidavit that is required in support of the application must set out the reasons why the execution creditor (i e the applicant) seeks to execute against the residential immovable property of the judgment debtor and the grounds on which the application is based.

It is submitted that 'grounds' as the word is used in this subrule relates to the facts on which the application is based. [103] Thus, in order to meet the requirements laid down in the subrule, there must be a sufficiently full disclosure of the relevant material facts on which the application is based. See further the notes to rule 6 s v 'Supported by an affidavit' and 'The facts upon which the applicant relies for relief' above. See also rule 62 below.

'Served by the sheriff on the judgment debtor personally.' This subrule requires personal service by the sheriff only on the judgment debtor except if the court orders service in any other matter. The subrule is silent as regards service on any other party who may be affected by the sale in execution and to whom the notice of application is directed. It is submitted that the application should be served on each such party according to the provisions of rule 4.

Subrule (4)*(a)*(ii): 'Within 10 days of.' This means court days, as to which see the definition of 'court day' in rule 1.

Subrule (4)*(a)*(iii): 'An electronic mail address, where available.' Where an electronic mail address is not available the only other address allowed by the subrule for acceptance of notices by and service of documents on the applicant is the one

appointed by the applicant within 25 kilometers of the office of the registrar. Subrule (4)*(a)*(iv), however, requires the applicant to state its postal or facsimile addresses, where available. The purpose of those addresses is unclear as subrules (4)*(a)*(iii) and (iv) are inexplicably excluded from the provisions of rule 4A above, and that rule therefore does not apply to these subrules.

Subrule (4)*(b)*: 'Less than five days after.' This means court days, as to which see the definition of 'court day' in rule 1.

Subrule (5): 'Shall be supported by the following documents.' The provisions of this subrule are imperative, [104] but fact bound. [105] Thus, for example, if the residential immovable property or primary residence of the judgment debtor against which the execution creditor seeks execution is not a sectional title unit, paragraph *(a)* of the subrule will not be applicable.

The subrule requires that the application be supported by documents. It is submitted that the best evidence in this regard should be presented to the court and that secondary evidence as to the applicable documents would be inadmissable, [106] except if a proper case has been

made out (i e good cause shown) for the allowance of secondary evidence. [107]

Subrule (5)*(a)*: 'The market value of the immovable property.' In *SB Guarantee Company (Pty) Ltd v De Sousa and Similar Matters* [108] it was held [109] that:

(a) applications under rule 46A must include an independent and reliable valuation of the property provided under oath by a qualified expert valuer;

(b) if an expert report is a collaboration between two people, only one of whom has the necessary expertise, qualification or credentials, this should be expressly brought to the court's attention;

(c) all parties involved in providing an expert valuation must set out clearly, on affidavit, the source of their knowledge of the facts related to their involvement in the valuation and the basis on which they claim expertise;

(d) the valuations should, in the absence of other evidence which may satisfy a court as to expertise of the person who has determined that value, be those of an accredited professional valuer registered in terms of the Property Valuers Profession Act 47 of 2000;

(e) the requirement that a deponent sign a declaration in the physical presence of a commissioner of oaths is not met where the signature is appended to the affidavit electronically and not in the presence of the commissioner (regulation 3(1) governing the administering of affirmation, published under Justices of the Peace and Commissioners of Oaths Act 16 of 1963). [110]

Subrule (5)*(c)*: 'The amounts owing on mortgage bonds registered over the immovable property.' If reliance can be placed on a provision allowing for proof by means of a certificate of indebtedness (which is normally the case under mortgage bonds), the application could be supported by such a certificate. [111]

Subrule (5)*(f)*: 'Any other factor . . . to give effect to subrule (8).' Documents under this subrule would include documents that support:

(a) good cause for the granting of condonation as contemplated in subrule (8)*(c)*;

(b) the absence of satisfactory means other than execution against the primary residence of the judgment debtor to satisfy the judgment debt (subrule (8)*(d)*);

(c) the inclusion of further appropriate conditions of sale as contemplated in subrule (8)*(a)*;

(d) the setting of a reserve price (subrule (8)*(e)*);

(e) the postponement of the application on appropriate terms (subrule (8)*(f)*);

(f) the making of an appropriate costs order (subrule (8)*(h)*);

(g) the making of any other appropriate order (subrule (8)*(i)*).

Subrule (6)*(a)*: 'A respondent may.' The exercise of a respondent's election under this subrule must be done by means of an affidavit as contemplated in subrule (6)*(c)*. A respondent who elects to oppose the application or to oppose the application and make submissions relevant to an appropriate order must in such respondent's answering affidavit:

(a) admit or deny the allegations in the founding affidavit (subrule (6)*(c)*(i)); and

(b) set out the reasons for opposing the application and the grounds on which the application is opposed (subrule (6)*(c)*(ii)). [112]

See further the notes to subrule (3)*(c)* s v 'Supported by affidavit' above.

Subrule (6)*(d)*: 'Within 10 days.' This means court days, as to which see the definition of 'court day' in rule 1.

Subrule (6)*(d)*(ii): 'An electronic mail address, where available.' Where an electronic mail address is not available the only other address allowed by the subrule for acceptance of notices by and service of documents on the respondent is the one appointed by the respondent within 25 kilometers of the office of the registrar. Subrule (6)*(d)*(iii), however, requires the respondent to state the respondent's postal or facsimile addresses, where available. The purpose of those addresses is unclear as subrules (6)*(d)*(ii) and (iii) are inexpicably excluded from the provisions of rule 4A above, and that rule therefore does not apply to these subrules.

Subrule (9)*(a)*: 'The court must consider whether a reserve price is to be set.' See the notes to rule 46A s v 'The position under rule 46A' above where the decision of the full court of the Gauteng local seat of the High Court, Johannesburg, in *Absa Bank Ltd v Mokebe and Related Cases* [113] (in particular, paragraphs [53], [57], [59], [61], [62], [63], [65] and [66] of the judgment) and the decision of the full court of the Western Cape Division of the High Court in *Standard Bank of South Africa v Hendricks and Related Cases* [114] are referred to.

In *Nedbank Ltd v Mzizi and Two Similar Cases* [115] it was held [116] that in applications in terms of rule 46A an internal bank valuation was not sufficient in and of itself to establish a reserve value unless it contained or was accompanied by evidence of independent verification as to value. Thus, either independent valuations had to be be obtained or further information as to value had to be used, in addition to the bank's valuation, to satisfy the court as to the appropriate reserve value. In all instances, the valuation had to be proven by an affidavit of a person who had actually conducted the valuation and who was properly qualified in that respect. The court stated:

> '[3] Rule 46A is a relatively recent amendment to the Rules. It seeks to ameliorate the devastating effects of a debtor's inability to meet the payments of a mortgage loan and the inevitability of execution against his or her home. One of its aims is to protect debtors by ensuring that homes are not sold in execution for prices which are not market related, as was a prevalent iniquity in

the recent past. The rule enjoins the court to take into

account the market value of the property in making the determination as to what a fair reserve price would be. For this purpose, the applicants routinely rely on sworn valuations by property valuers. This is, after all, the traditional way of satisfying courts as to market value of property.

. . .

[16] The constitutional imperatives which are protected by the enactment of R46A generally and in connection with the determination of the reserve price are so fundamental, that, to my mind, any potential conflict inherent in the information provided must be given due weight in the determination of the reserve price. If a price set is less than true market value the debtor is liable to lose the investment made in the property and still be left indebted to the bank for more than is fair. For most homeowners the investment in the mortgaged property is the largest and most important of their lives. Rule 46A creates a discretionary weighing up process which must be judicially exercised. In my view this process calls for reliance on evidence which is independent of the financial institution itself. The municipal valuation of the property is insufficient as it often bears no relationship to the true value.'

In *Blackberry Limited v De Bod* [117] it was held that the following considerations are relevant and to be taken into account by the court for purposes of determining whether a reserve price is to be set: [118]

(a) The market value of the immovable property.

(b) The amounts owing as rates or levies in respect of the immovable property.

(c) The amounts owing on registered mortgage bonds.

(d) Any equity which may be realized between the reserve price and the market value of the property.

(e) Reduction of the judgment debtor's indebtedness on the judgment debt amount, and whether or not equity may be found in the immovable property as referred to in subparagraph (iv) of subrule (9)*(b)*.

(f) Whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation.

(g) The likelihood of the reserve price not being realized and the likelihood of the immovable property not being sold.

(h) Any prejudice which any party may suffer if the reserve price is not achieved.

(i) Any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.

In *Absa Bank Ltd v Gontsana* [119] Absa advanced a loan to an impecunious family in one of South Africa's poorest townships. When the Gontsanas failed to repay that loan, Absa took judgment. Having obtained judgment and the right to execute, it then left the judgment to lie fallow for 10 years, all the while accepting payments and no doubt contributing to the impression that it was no longer interested in executing against the Gontsanas' property. After the decade had elapsed, it approached the High Court in terms of this subrule on an unopposed basis, contending that the court need only decide what Absa considered to be the technical matter of whether a reserve price should be set. Despite being given the opportunity to do so by the court, Absa did not adequately explain what happened in the 10 years during which it declined to execute, why it applied the Gontsanas' payments to their loan account, and not in reduction of the judgment debt, and why it then decided to reverse its

course and execute against their home after all. The court, with reference to *Gundwana v Steko Development CC*, [120] held that the proportionality of the relief Absa claimed had to be evaluated on the facts as they stood before the court and not the facts as they were almost 10 years ago. [121] Generally speaking, execution against a debtor's home was neither lawful nor proportionate if it amounted to an abuse of process. In this regard the court, applying the test for an abuse of process laid down in *Beinash v Wixley*, [122] viz that an abuse of process 'takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective', held that it could think of few clearer instances of an abuse of process than Absa's conduct in the case. [123] Execution was therefore not authorized and the application was dismissed. In addition, the initial order declaring the immovable property specially executable was suspended and the following order was made: [124]

'[25.3] The applicant is directed, by no later than 1 March 2023, to cause personal service on the respondents, via sheriff, of a copy of this judgment, together with a notice —

[25.3.1] setting out what remains unpaid of the judgment granted in paras 1, 2 and 3 of Mali AJ's order; and

[25.3.2] inviting the respondents to make a proposal within one month of the date of service of the notice to pay off that amount over a reasonable period; and

[25.3.3] giving the name and contact details of an appropriately empowered official of the applicant who can receive and respond to that proposal.

[25.4] The applicant may apply to this court, on notice served personally on the respondents, not earlier than 17 July 2023, to lift the suspension of para 4 of the order of Mali AJ.

[25.5] In that application the applicant must —

[25.5.1] address the content of this judgment;

[25.5.2] demonstrate its compliance with this order; and

[25.5.3] disclose such proposals as have been received from the respondents to reduce the judgment debt, together with the applicant's response to those proposals.

[25.6] There is no order as to costs. The applicant may not recover the costs of this application, or any further action it is required to take in terms of this order, from the respondents.'

Subrule (9)*(c), (d)* and *(e)*. Paragraphs *(c)*, *(d)* and *(e)* of subrule (9) are not clearly worded. [125] There are conflicting judgments in regard to the procedure to be followed in the reconsideration exercise. [126]

In *Changing Tides 17 (Pty) Ltd NO v Khubeka* [127] it was held that:

(a) the reconsideration of a reserve price in terms of rule 46A(9)*(c)* should be sought by way of application, supported by affidavit, [128] in open court and not by approach to a judge in chambers; [129]

(b) such an application should at least — [130]

(i) seek specific relief in the notice of motion;

(ii) satisfy the court that the auction was properly advertised, at least, in accordance with the Uniform Rules of Court;

(iii) assert that there are, to the best of the deponent's belief, no reasons other than the reserve price being too high which could rationally be said to be a reason for the failure to achieve a bid at the reserve price;

(iv) be brought as interlocutory to the main application so that the court is afforded access to all documents in the main application and all other interlocutory matters;

(v) be brought as soon as possible after the sheriff's report is issued;

(vi) explain any failure to hold the sale within six months of the handing down of the foreclosure order;

(vii) place before the court any additional reliable evidence of the true value which could assist in the reconsideration process such as, for example, information relating to other recent property sales in the area;

(c) the report of the sheriff submitted in terms of rule 46A(9)*(d)* comprises both a return of service and an aid to the court and is always the best evidence; [131] the absence of such a report would have to be fully explained; [132]

(d) the fact that the reserve price was not achieved is a jurisdictional fact which is evidenced by the sheriff's report and without such evidence, the provisions of subrule (9)*(c)* are not triggered; [133]

(e) if the applicant specifically seeks that the court allow the property to be sold at the highest bid that was received at the sale, the absence of the sheriff's report is fatal to the application; [134]

(f) an application for reconsideration of the reserve price must be served on the judgment debtor and cannot be brought ex parte; [135]

(g) the constitutional imperatives inherent in a reconsideration application, and the fact that the foreclosure application itself requires personal service, is sufficient to justify the requirement by a court that a reconsideration application also be personally served. [136]

The procedure adopted in the *Changing Tides* case was not followed in *Standard Bank of South Africa Ltd v Tchibamba.* [137] In the *Standard Bank* case it was held that:

(a) The application procedure in the *Changing Tides* case was not supported by the wording of rule 46A(9)*(c)*, which, in the given circumstances, directs the sheriff to submit a report to the court and requires the court receiving such report *ipso facto* to undertake the necessary reconsideration, irrespective whether anyone applies for it or not. [138]

(b) Parties have been making applications for the reconsideration of reserve prices simply because rule 46A(9) does not provide the procedural framework for getting the sheriff's report before a judge and enabling the judge to obtain the necessary information to undertake a reconsideration with reference to the several factors enumerated in rule 46A(9)*(b)*. The rule does not put anyone on terms to institute interlocutory proceedings for the prescribed reconsideration. [139]

(c) Leaving aside certain types of application properly brought *ex parte*, the notion of an application posits an adversarial proceeding. The conception that an application process in the conventional sense is engaged, is misconceived. The judicial reconsideration posited in rule 46A(9)*(c)* is plainly inquisitorial in character and, unlike in ordinary adversarial proceedings, the court must be able to call upon the sheriff or the protagonists in the principal rule 46A application to supply it with any information that it needs to do the task (see rule 46A(9)*(b)*(ix) and *(d)*(iv)). It is the rules of inquiry that are missing. [140]

(d) The sheriff has as real an interest in obtaining further directions from the court as the judgment creditor does. The sheriff invariably becomes a party to an executory contract of sale with the successful bidder at the auction sale in execution. The contract is subject to the court's confirmation. The court can hardly '*order that the property be sold to the person who made the highest offer or bid*' if that offer or bid did not have binding effect. [141]

(e) It is also plain from the requirements of rule 46A(9) that the court can properly undertake the reconsideration prescribed in terms of paragraph *(c)* thereof only with updated information and the opportunity for input from the protagonists in the original rule 46A application. The rule is deficient in that it does not provide for how those parties are to be given notice of the reconsideration or in what manner and by when they should exercise their right to adduce evidence or address argument. [142]

(f) The rule, properly construed, contemplates the reconsideration exercise prescribed in terms of subrule (9)*(c)* to be an extension of the application provided for in subrule (3). The scheme of subrule (9)*(c)* is that the original application continues on the basis of supplemented papers, commencing with the sheriff's report. There is no new application to be instituted. If there were, one would expect the rule to provide for it. It does not. The exercise that is involved is nothing more than a consideration by the court whether to amend the order that it has already given in the application in terms of rule 46A(3) so that it can be effectively executed. The reconsideration does not occur in a new matter. Subrule (9) plainly implies that a court that fixes a reserve price in its order is not *functus* until the contemplated sale has been concluded at or above the determined reserve price. [143]

(g) The unfortunate *lacunae* in subrule (9) require of the court itself to deal with the consequences. The express provisions of the subrule necessarily imply that the registrar should place the sheriff's report before a judge and make the necessary arrangements to render the prescribed reconsideration ripe for hearing in open court after a reasonable opportunity has been afforded to the interested parties (viz the judgment creditor and debtor, and the successful bidder at less than the reserve price, if there is one) to adduce such additional evidence as they might be advised to. [144]

(h) The aforegoing would not entail an altogether novel process. In the Cape Provincial Division, for example, the registrar sets down case management matters for consideration by case manager judges on defined dates upon notice to the litigants that they must file pre-trial minutes by a stipulated date before the case management meeting is to take place. It would require only minor adjustments to that well-established system to make an equivalent system in respect of subrule 46A(9) workable. [145]

(i) In the system envisaged, the registrar would determine in consultation with the Judge President —

(i) to which judge the sheriff's report should be referred;

(ii) the date upon which the reconsideration in terms of subrule (9)*(c)* would be heard in open court;

(iii) the date(s) by which the interested parties would be required to file supplementary affidavits and heads of argument, and issue a notice to the interested parties timeously informing them of the aforegoing.

All of these measures would be undertaken mindful of the relative urgency which the rule maker, for good reason, contemplated that the prescribed reconsideration should take place, but also remembering that a reasonable time would in many such matters be needed for updated property valuation reports to be obtained. An interval of not more than 3–4 months should ordinarily be necessary between the date of the filing of the sheriff's report and the reconsideration of the reserve price in open court. [146]

(j) In a case where a judge had determined, when fixing a reserve price, that the matter would be retained by that judge, the registrar would place the sheriff's report before that judge and inform the parties of the relevant timetable for the reconsideration hearing to take place before that judge rather than a judge allocated by the Judge President. [147]

(k) Practice Direction 33A of the Western Cape Division of the High Court [148] must, obviously, be construed consonantly with the rule. The reference to 'applications' in paragraph 1 of the Practice Direction accordingly falls to be interpreted to mean the reconsiderations prescribed in subrule (9) and not to imply fresh proceedings on notice of motion. The statement in paragraph 1 of the Practice Direction that the judge determining the 'initial price' may 'retain the matter' is consistent with the construction of subrule (9). Retention can only refer to an extant matter. The verb 'retain' means 'to keep in possession'; one cannot 'retain' an application that has yet to be made. Paragraph 1 of the Practice Direction therefore recognizes the implication in subrule (9) that the judge who initially fixes the reserve price is not *functus* until the contemplated sale in execution has been concluded at or above the determined reserve price. [149]

(l) The reconsideration must take place in open court, rather than only 'ideally' so. The reconsideration is an extension of the proceedings commenced in terms of rule 46A(3), which proceedings are ordinary motion proceedings, and thus subject to the general requirements of s 32 of the Superior Courts Act 10 of 2013. [150]

In *Changing Tides 17 (Pty) Ltd v Schuurman* [151] the High Court heard an opposed application in open court where the reserve price was not achieved at an auction. In the exercise of its discretion under rule 46A(9)*(c)* as to how execution was to proceed, the court ordered that a

fresh sale in execution had to take place without a reserve price. [152] In *Standard Bank of South Africa Ltd v Tchibamba* [153] the High Court, in the exercise of its discretion under rule 46A(9)*(c)* of the Uniform Rules of Court, made an order allowing a reasonable opportunity to the judgment debtors to give transfer of the property in terms of a private sale agreement, failing which the judgment creditors were authorized to readvertise the sale in execution without a reserve price to be conducted at the site of the property. It was to be a condition of any such sale in execution that if the highest bid obtained at the readvertised sale did not exceed that obtained at the previous auction, the sale to the purchaser at that auction would be deemed to have been confirmed. [154]

In *Nedbank Ltd v Mabaso* [155] it was held that the scope of rule 46A(9)*(c)*, in affording the High Court a wide discretion to order how execution is to proceed, was indeed sufficiently broad to allow the court to revisit the previously granted orders of special executability, should it emerge from information brought to its attention in the reconsideration proceedings that the circumstances of the matter had changed to such an extent that such an order was no longer warranted, for example, because there were other satisfactory means of satisfying the judgment debt. Such an approach was held to be consistent with the purpose of the rule, which was to achieve an appropriate balance between the legitimate commercial rights of judgment creditors to payment, and the equally legitimate rights of indigent debtors to housing under s 26 of the Constitution. This underlying purpose remained a central consideration to the very last possible moment. In other words, if a rule 46A(9) application presented a court with an opportunity to address an inappropriate imbalance that had emerged between the competing rights of the parties, that opportunity had to be seized. [156]

1 GN R1272 of 17 November 2017 in *GG* 41257 of 17 November 2017.

2 *Williams v Standard Bank of South Africa* (unreported, GP case no 18088/2015 dated 3 May 2019) at paragraphs 20–38; *Classic Crown Properties 55 CC v Standard Bank of South Africa Limited* (unreported, GP case no A314/2021 dated 5 October 2023 — a decision of the full court) at paragraphs [20]–[24].

3 2011 (3) SA 608 (CC) at 65F–G. The Constitutional Court placed no limit on the retrospectivity of its order of constitutional invalidity (at 627D–F). Individual persons affected by the order therefore need to approach the courts to have sales and transfers set aside if granted by default by the registrar under rule 31(5) (at 627E–F). In doing so, debtors will have to explain the reason for not bringing a rescission application earlier and will have to set out a defence to the claim for judgment against them (at 628A–E). Once these hurdles have been cleared, and it is determined by the court that special execution should not have been allowed, the question of the effect of invalid execution sales and subsequent transfers will have to be addressed (at 628E–F). As regards the prospective effect of its order of constitutional invalidity the Constitutional Court pointed out (at 620F–G) that it has been ameliorated by the coming into operation of the amendment to rule 46(1) on 24 December 2010 under GN R981 of 19 November 2010.

4 See the proviso to rule 31(5)*(b)* which was inserted by GN R471 of 12 July 2013 (*GG* 36638 of 12 July 2013).

5 See *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 329H–I and 326B.

6 *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 329C–G and 336A–B.

7 *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 329F–G and 336B.

8 *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 329G–H and 336B.

9 *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 329H–I and 336B.

10 *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 Another and Four Similar Cases* 2011 (6) SA 111 (WCC) at 129C.

11 2005 (2) SA 140 (CC) at 161I–163B.

12 2011 (3) SA 608 (CC) at 626F–G.

13 At 625H–626B.

14 2006 (2) SA 264 (SCA) at 277C–F.

15 2005 (6) SA 462 (W).

16 At 473D–H. See also *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ) at 149C–D; *Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 (GSJ) at 604A–I.

17 2016 (5) SA 550 (KZD).

18 At 554E–555B, 555E and 555H–556B.

19 2016 (4) SA 257 (CC).

20 2011 (4) SA 314 (GNP) at 332C–333D. In *Absa Bank Ltd v Ntsane* 2007 (3) SA 554 (T), referred to in paragraph 40 of the *Gundwana* case, the court laid down the following principle (at 567A–568A): whenever a bondholder calls up a bond, or seeks an order declaring the bonded property specially executable, while the amount in arrears at the date of application for (default) judgment is so small that it should readily be capable of settlement by means of execution against movable assets, taking all circumstances into account, the declaration of immovable property as executable would constitute an abuse of process of the court and an infringement of the debtor's fundamental right to access to adequate housing in terms of s 26 of the Constitution of the Republic of South Africa, 1996. Consequently, the court held (at 568A–B) that judgment to declare the immovable property specially executable should be refused unless and until the plaintiff has persuaded the court by means of acceptable evidence that no other reasonable alternative exists to enforce its rights. In view of the present wording of rule 46(1)*(a)*(ii) and the positive law, it is submitted that the principle laid down in the *Ntsane* case will in an appropriate case form part of the 'relevant circumstances' contemplated in the rule.

21 2011 (4) SA 314 (GNP) at 336A–G.

22 These circumstances are the ones set out in the rules of practice laid down by the full court in *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at 473D–H, and which appear in the earlier text above.

23 See the preceding paragraph in the text.

24 2011 (4) SA 314 (GNP) at 336E–G.

25 In *Absa Bank Ltd v Xonti* 2006 (5) SA 289 (C) Selikowitz J held (at 290D–F) that, as a result of s 26 of the Constitution of the Republic of South Africa, 1996, an application to declare residential immovable property executable can no longer be brought on simple notice of motion in terms of rule 6(11). Such an application, it was held, has to be brought on the long form of notice of motion (i e Form 2*(a)*) so that the court can discharge its obligation in terms of s 26, either as a matter of default because the respondent has failed to take advantage of the notice so given or as a substantive application opposed by the respondent. *Sed quaere*.

26 See the majority decision of the Supreme Court of Appeal in *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 507C–513B.
27 2018 (4) SA 463 (GP).
28 At 466I–467H.
29 2011 (6) SA 111 (WCC) at 117B–D.
30 *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) at 129C–G.
31 See paragraph 33 of the Western Cape Consolidated Practice Notes in Volume 3, Part N1.
32 As to the rule of practice made in *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA) at 277C–F, see the notes to rule 17(2)*(b)* s v 'Summons . . . in accordance with Form 9' above.
33 2011 (6) SA 111 (WCC) at 127C–129B.
34 *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 336E–F. The relevant paragraph (i e paragraph 54 of the judgment) is quoted in the text s v 'The position in Gauteng' above.
35 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) at 161I–163B. See, in this regard, the examples of the relevant circumstances given in the *Jaftha* case which appear in the first paragraph of the text to subrule (1)*(a)*(ii) above.
36 2012 (6) SA 166 (WCC).
37 At 169I–170C.
38 2012 (6) SA 151 (WCC) at 155A–D.
39 At 161D–E.
40 *Absa Bank Ltd v Marshall* (unreported, WCC case nos 8850/2011 and 1192/2011 dated 29 November 2011) at paragraphs 30–31.
41 At 162A–C.
42 At 163C–D.
43 Now the Western Cape Division of the High Court, Cape Town — see ss 6(1)*(i)* and 50(1)*(m)* of the Superior Courts Act 10 of 2013, which came into operation on 23 August 2013, in Volume 1 third edition, Part D.
44 2011 (6) SA 111 (WCC) at 127C–129B.
45 2012 (6) SA 166 (WCC).
46 2012 (6) SA 151 (WCC).
47 2011 (4) SA 314 (GNP) at 336A–G.
48 At 115F–116A.
49 2006 (2) SA 264 (SCA).
50 2011 (3) SA 608 (CC).
51 2011 (4) SA 314 (GNP).
52 2011 (4) SA 363 (GSJ).
53 2005 (2) SA 140 (CC).
54 2006 (6) SA 103 (CC).
55 2010 (4) SA 509 (KZP).
56 2012 (1) SA 1 (SCA).
57 2013 (1) SA 481 (WCC).
58 At 494F–496F.
59 2016 (6) SA 400 (GJ). See also Douglas Shaw 'Too quick to execute — how does SA's new rules on sale of execution compare internationally?' 2016 (August) *De Rebus* 28–34.
60 At 404A.
61 *Nedbank Ltd v Bestbier (Scholtz Intervening)* (unreported, WCC case no 12654/18 dated 17 September 2020) at paragraphs [39]–[43], confirmed on appeal by the Supreme Court of Appeal *sub nomine Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA). An appeal against the order of the Supreme Court of Appeal was dismissed by the Constitutional Court on 12 April 2024 *sub nomine Bestbier and Others v Nedbank Ltd* (unreported, CC case no CCT 181/22 dated 12 April 2024). The legislative and historical context of rule 46A is set out in the judgment of the Supreme Court of Appeal at paragraphs [8]–[15]. See also *ABSA Bank Limited v Shaw* (unreported, GJ case no 38990/2021 dated 28 June 2022) at paragraphs [31]–[36]; *The Standard Bank of South Africa Limited v Young* (unreported, KZD case no D8880/2021 dated 4 August 2022) at paragraphs [24]–[28].
62 *Nedbank Ltd v Bestbier (Scholtz Intervening)* (unreported, WCC case no 12654/18 dated 17 September 2020) at paragraphs [24]–[25], confirmed on appeal by the Supreme Court of Appeal *sub nomine Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA). Rule 46A renders inapplicable the decision in *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at 472J–473A referred to in the notes s v 'The position under former rule 46(1)*(a)*' above. In other words, rule 46A also applies to hypothecated residential immovable property of a judgment debtor. See also, in general, Michael Lombard 'Amendments of rules in line with constitutional rights to adequate housing' 2018 (May) *De Rebus* 30; C Singh 'To foreclose or not to foreclose: Revealing the "cracks" within the residential foreclosure process in South Africa' (2019) 31(1) *SA Merc LJ* 145; Ciresh Singh 'Unlocking the door to reserve price sales in execution' 2021 (May) *De Rebus* 20; Ciresh Singh 'Eeny, meeny, miny, moe, to which court will foreclosures go? A brief analysis of recent foreclosure proceedings and a consideration of the need for specialised foreclosure courts in SA' 2019 (October) *De Rebus* 31–2 and 2021 (September) *De Rebus* 29; Ciresh Singh 'Eeny, meeny, miny, moe, to which court will foreclosures go? (Part 3): The Constitutional Court has confirmed the position' 2023 (April) *De Rebus* 6; R Brits 'Execution against residential immovable property in terms of High Court rule 46A' (2021) 321 *SLR* 47; Ciresh Singh '"Notice" You "Noticing" Me: A Critical Analysis of the Section 129 Notice of the National Credit Act, and Recommendations for the Implementation of a "Specialised Foreclosure Notice"' (2021) 33 *SA Merc LJ* 56.
63 The relevant principles are dicussed by DE van Loggerenberg 'Pending suits in the magistrates' courts — The effect of the lack of transitional provisions in the new rules of court' 2011 (4) *SALJ* 607.
64 See the definition of 'court' in rule 1 above.
65 Rule 46A(2)*(a)*(i).
66 Rule 46A(2)*(a)*(ii).
67 Rule 46A(2)*(b)*.
68 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.
69 This position can be gleaned from rule 46A as a whole. See also *Van den Bos NO v Mohloki* 2022 (2) SA 616 (GJ) at paragraphs [27]–[29].
70 In terms of the proviso to rule 46A(5).
71 Cf *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 3326A–G.
72 2022 (2) SA 616 (GJ).
73 2021 (6) SA 403 (SCA).
74 At paragraphs [12] and [25].
75 At paragraphs [13] and [22]–[23].
76 At paragraph [23].
77 At paragraph [24].
78 Unreported, GJ case no 2021/5838 dated 18 August 2022.
79 At paragraph [15].
80 At paragraphs [10]–[25] and [27].
81 Which came into operation on 1 March 2018 and was revised and amended with effect from 16 October 2018, as to which see Volume 3, Part H3.
82 At paragraph 10.17.
83 2018 (6) SA 492 (GJ). See also H Kawadza 'Taming the mechanics of mortgage foreclosures: The case of *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ)' (2019) 52.1 *De Jure* 102.
84 At 506C–507A.
85 At 508C–D.
86 The Practice Directive is reproduced in Volume 3, Part H4. On 28 May 2018 the Judge President issued a further Practice Directive (2 of 2018) that:

(a) all foreclosure matters already enrolled be postponed *sine die* pending the decision of the full court; and
(b) no new matters involving the issues that would be considered by the full court can be enrolled until the full court has made its decision.
The Practice Directive of 28 May 2018 is also reproduced in Volume 3, Part H4.
Subsequently, the Judge President advised that the Practice Directive of 28 May 2018:
(a) applies to both the Gauteng local seat, Johannesburg, and the Gauteng main seat, Pretoria, of the High Court;
(b) does not cover foreclosures where the property is not a primary residence;
(c) applies to all foreclosure matters where the property is a primary residence, including matters where only a money judgment is sought.

87 *Author's note:* The relevant portions of the Practice Directive are reproduced here without editorial intervention.

88 *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) at 508E–526E (footnotes omitted).

89 2019 (2) SA 620 (WCC).

90 2018 (6) SA 492 (GJ).

91 The Practice Direction was published in 2019 (2) SA 643 (WCC) and is reproduced in Volume 3, Part N1. With effect from 2 October 2023 the Practice Direction was amended to include applications to adjust a reserve price if the reserve price set was not achieved. The amended Practice Direction is also reproduced in Volume 3, Part N1.

92 2020 (5) SA 146 (KZP).

93 At paragraphs [8]–[18].

94 In the case of an application for summary judgment, provided the plaintiff has complied with the requirements of rule 46(A), there is an onus on the defendant, at the very least, 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 (see the majority decision of the Supreme Court of Appeal in *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 509E–G). While the High Court has the duty to investigate a defendant's position if it involved an unrepresented litigant, or the loan is not exclusively of a commercial nature, or where at least some evidence suggests that the execution is in respect of the defendant's primary residence, the defendant's complete failure to avail himself of rights that were expressly drawn to his attention in the summons dictates the contrary (*NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 512D–I). Imposing an obligation on a court to exercise judicial oversight under such circumstances would also cause significant uncertainty, and arguably serious damage, to the efficient provision of credit in the economy (*NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 512G–I). See also *Haasbroek v Moolman NO* (unreported, NWM case no M487/2019 dated 15 October 2020) at paragraphs [49]–[51]; *Standard Bank of South Africa Ltd v Lamont* 2022 (3) SA 537 (GJ); R Brits 'Executing a debt against residential property: The potential application of rule 46A of the *Uniform Rules of Court* beyond a literal reading of "property of a judgment debtor"' 2020 45(2) *JJS* 74.

95 *Nedbank Ltd v Bestbier (Scholtz Intervening)* (unreported, WCC case no 12654/18 dated 17 September 2020) at paragraph [18], confirmed on appeal by the Supreme Court of Appeal *sub nomine Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA). An appeal against the order of the Supreme Court of Appeal was dismissed by the Constitutional Court on 12 April 2024 *sub nomine Bestbier and Others v Nedbank Ltd* (unreported, CC case no CCT 181/22 dated 12 April 2024).

96 *Nedbank Ltd v Bestbier (Scholtz Intervening)* (unreported, WCC case no 12654/18 dated 17 September 2020) at paragraph [18], confirmed on appeal by the Supreme Court of Appeal *sub nomine Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA). An appeal against the order of the Supreme Court of Appeal was dismissed by the Constitutional Court on 12 April 2024 *sub nomine Bestbier and Others v Nedbank Ltd* (unreported, CC case no CCT 181/22 dated 12 April 2024).

97 Support for this view is to be found in *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust* (unreported, GP case no 7901/2017 dated 9 July 2019); *Nedbank Ltd v Bestbier (Scholtz Intervening)* (unreported, WCC case no 12654/18 dated 17 September 2020) at paragraphs [19]–[22], confirmed on appeal by the Supreme Court of Appeal *sub nomine Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA) (an appeal against the order of the Supreme Court of Appeal was dismissed by the Constitutional Court on 12 April 2024 *sub nomine Bestbier and Others v Nedbank Ltd* (unreported, CC case no CCT 181/22 dated 12 April 2024)) and *Nqaba Guarantee Spv (Pty) Ltd v Khayelihle Trust* (unreported, GJ case no 47603/2017 dated 29 June 2023) at paragraphs [26]–[38] [*sic*]. For a different view, see *Investec Bank Ltd v Fraser NO* 2020 (6) SA 211 (GJ) at paragraphs [53]–[73] and *Morula Resources CC v National Urban Reconstruction and Housing Agency NPC* (unreported, GJ case no 21247/2018 dated 10 February 2021). In *Assetline South Africa (Pty) Ltd v Manhattan Delux Properties (Pty) Ltd* (unreported, GJ case no 30996/19 dated 10 May 2020) a defence was raised by the respondents that Assetline, a company, failed to comply with the requirements of rules 46 and 46A. In the answering affidavit, Mr Denenga, the deponent on behalf of Manhattan, stated that to his knowledge, the property that was sought to be declared specially executable, was the primary home of one Mr Matienga. Keightley J stated that even if the property was Mr Matienga's primary home, it was not his property, it was the property of Manhattan, a juristic person (at paragraph [14]). Whilst the court did not pronounce on the legal position, it did find that because the loan was advanced to Manhattan for purposes of a business venture (and not to provide funding to purchase the property), the rule 46A defence was without merit (at paragraphs [17]–[19]). See also R Brits 'Executing a debt against residential property: The potential application of rule 46A of the *Uniform Rules of Court* beyond a literal reading of "property of a judgment debtor"' 2020 45(2) *JJS* 74.

98 Cf *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 332C–333D.

99 2018 (5) SA 548 (GJ).

100 At 550E–551C (footnotes omitted).

101 In *FirstRand Bank Ltd v Mgedesi* (unreported, MWN case no 727/2016 dated 5 June 2020) Brauckmann AJ, not following *Absa Bank Ltd v Schuurman* 2019 JDR 0353 (GP) found (at paragraph [12]), in the context of the joinder/non-joinder of an occupier (i e a tenant) of the immovable property against which execution is sought, that the occupier 'has the sole interest of occupation' which 'is not related to the subject matter of the proceedings to have immovable property declared specially executable' and, consequently, that the occupier need not be joined in such proceedings (at paragraph [15]). It was, however, found (at paragraph [21]) that 'because a sale in execution, will or, may affect the rights to accommodation that the tenant has or might have in terms of Section 26 of the Constitution, such process must be served on such tenant' as contemplated in subrule (3)*(b)*. In *Nedbank Ltd v Bestbier (Scholtz Intervening)* (unreported, WCC case no 12654/18 dated 17 September 2020) (confirmed on appeal by the Supreme Court of Appeal *sub nomine Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA); an appeal against the order of the Supreme Court of Appeal was dismissed by the Constitutional Court on 12 April 2024 *sub nomine Bestbier and Others v Nedbank Ltd* (unreported, CC case no CCT 181/22 dated 12 April 2024)) Kusevitsky J, following the *Mgedesi* case, held (at paragraph [37]) that the occupiers of the immovable property concerned neither had a legal interest requiring joinder in proceedings relating to executability of the property nor had a legal interest which would warrant their intervention at that stage of the proceedings between the plaintiff and the defendant. Not following the *Mgedesi* case, it was held, however, (at paragraph [38]) that the occupiers did not at the rule 46A stage of the proceedings have a legal interest in the proceedings which would warrant service of notice of the proceedings on them as contemplated in subrule (3)*(b)*. See also *Haasbroek v Moolman NO* (unreported, NWM case no M487/2019 dated 15 October 2020).

102 *The Standard Bank of South Africa Limited v Young* (unreported, KZD case no D8880/2021 dated 4 August 2022) at paragraph [22].

103 Cf *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) at 249G–250F. As to the difference in meaning between 'grounds' and 'material facts', see *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd* 1978 (1) SA 74 (D) at 77.

104 *The Standard Bank of South Africa Limited v Young* (unreported, KZD case no D8880/2021 dated 4 August 2022) at paragraph [22].

105 This view was cited with approval in *Standard Bank of South Africa v Daniels* (unreported, GP case no 006569/2022 dated 29 November 2023) at paragraph [12] footnote [5].

106 Cf *Nedbank Ltd v Van der Berg* 1987 (3) SA 449 (W) at 452G; *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) at 247F–249G; and see *Mayibuye Centre-CD-Rom Publications v Workgroup Holdings (Pty) Ltd* [1998] All SA 105 (A) at 109*d*.

107 Cf *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd* 2014 (2) SA 119 (WCC) at 121B–F, 121I–122B and 124D–F, and also at 122D–F, 122F–G, 123C–127D and 127H–128A.

108 Unreported, GJ case nos 2023/035447; 2023–022259; 2023–028511 dated 29 April 2024.

109 At paragraphs [82]–[85].

110 Michael Lombard 'Amendments of rules in line with constitutional rights to adequate housing' 2018 (May) *De Rebus* 30 states the following in regard to 'market value' (at 31/32):
'The property industry accepts the following definition of "market value", as provided by the International Valuation Standards Council:
"Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing where the parties had each acted knowledgeable, prudently and without compulsion."
Market value is directly dependent on existing factors and the element of supply and demand, applies to all commodities in the free and open

market. The credit system supports this free and open market and even though it is regulated by the NCA, the credit system assists consumers in achieving the demand factor, which is stimulated by the desire for a particular commodity (s 3 of the NCA).
The residential property industry in South Africa is the largest of most commodities and banks hold approximately R 923 billion of residential mortgage loans and approximately R 274 billion of commercial mortgage loans (SA Reserve Bank "Selected South African banking sector trends" January 2017).
The banks apply the loan to value (restricting the loan to value percentage) method, a barometer tool to determine the value of a property and the extent to which a property may be discounted at a sale in execution. Despite these strict assessment and valuation methods that banks use, the outcome will not suffice when a mortgage debt is not speedily and sufficiently converted to cash. (A Wight and V Ghyoot *The Property Finance Business in South Africa* (Unisa Press: 2005) at 133–160, 145–146, 176). The dilemma for banks is that the new rules inevitably prolong the execution process.'

111 Cf *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 454C.

112 See the majority decision of the Supreme Court of Appeal in *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 507C–513B.

113 2018 (6) SA 492 (GJ).

114 2019 (2) SA 620 (WCC).

115 2021 (4) SA 297 (GJ).

116 At paragraph [20].

117 Unreported, GP case no 8021/2022 dated 12 December 2022.

118 At paragraph [23].

119 2023 (3) SA 530 (GJ).

120 2011 (3) SA 608 (CC) at paragraph [54].

121 At paragraph [14].

122 1997 (3) SA 721 (SCA) at 734F.

123 At paragraph [16].

124 At paragraphs [18]–[25].

125 *Changing Tides 17 (Pty) Ltd NO v Khubeka* 2022 (5) SA 168 (GJ) at paragraph [9]). This view was endorsed in *Standard Bank of South Africa Ltd v Tchibamba* 2022 (6) SA 571 (WCC) at paragraph [11]. See also *First Rand Bank Limited v Mavukakaseni* (unreported, GP case no 61746/2013 dated 10 February 2023) at paragraph [15].

126 This is deserving of further consideration by the Rules Board for Courts of Law of rule 46A(9)*(c)*, *(d)* and *(e)*. In *Standard Bank of South Africa Ltd v Tchibamba* 2022 (6) SA 571 (WCC) the Chief Registrar was directed to forward a copy of the judgment to the Secretary of the Rules Board for Courts of Law with a request that it be placed before the Board for consideration.

127 2022 (5) SA 168 (GJ).

128 At paragraph [25].

129 At paragraph [26].

130 At paragraph [37].

131 At paragraph [39].

132 At paragraph [39].

133 At paragraph [39].

134 At paragraph [40].

135 At paragraph [47].

136 At paragraph [48].

137 2022 (6) SA 571 (WCC).

138 At paragraph [32].

139 At paragraph [33].

140 At paragraph [35].

141 At paragraph [36].

142 At paragraph [37].

143 At paragraph [38].

144 At paragraph [39].

145 At paragraph [40].

146 At paragraph [41].

147 At paragraph [42].

148 Practice Directive 33A is reproduced in Volume 3, Part N1.

149 At paragraph [43].

150 At paragraph [43].

151 Unreported, GP case no 34524/2016 dated 16 March 2022.

152 At paragraph [6].

153 2022 (6) SA 571 (WCC).

154 At paragraph [54].

155 2023 (2) SA 298 (GJ).

156 At paragraph [11].