



**RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA**

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17 January 2014

Our ref : Raj Daya/C Kemp

Your ref :

PER: E-MAIL

Dear Sir/Madam,

RE: PROPOSED AMENDMENT TO UNIFORM RULE 46 AND MAGISTRATES' COURTS' RULE 43

The Rules Board for Courts of Law is considering amending Rule 46 of the Uniform Rules and Rule 43 of the Magistrates' Courts to provide for the court, in the exercise of its judicial oversight function when ordering execution against primary residential immovable property, to set a reserve price at which bidding must begin at sales in execution.

The right to adequate housing and the need for judicial oversight into sales in execution involving residential property were considered in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) and interpreted in *Standard Bank Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) and *Mkhize v Mvoti Municipality and Others* 2012 (1) SA 1 (SCA).

Mkhize, interpreted *Jaftha*, to find that the object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated.

The purpose of the amendment to the Uniform Rule and Magistrates' Courts' Rule would be:

- (a) To provide for the setting of the reserve price by the court, under the auspices of section 26(1) of the Constitution, as judicially interpreted; and
- (b) To provide for the court to determine whether a reserve price is to be set and to set the reserve in the pursuance of its judicial oversight function.

To assist the Board in assessing whether to provide for the court to determine whether a reserve price is to be set and set the reserve price in the pursuance of its judicial oversight function, the Board requests your comments on whether it is desirable that a reserve price be considered in the judicial sale of primary residential immovable property.

We advise that we are currently engaged in the harmonisation of Uniform Rule 46 and Magistrates' Courts Rule 43 and this request for comment is an integral part of that process of harmonisation.

Copies of Uniform Rule 46 and Magistrates' Courts Rule 43 are attached.

Kindly submit your comments to the Rules Board Secretariat by no later than **28 February 2014**. Same can be sent via hand delivery, post, facsimile or email as follows:

Physical address: 8th Floor, Die Meent Building, 226 Thabo Sehume Street, Pretoria

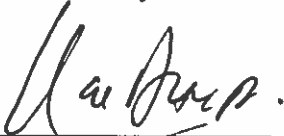
Postal address: P O Box 13106, The Tramshed, 0126

Facsimile: (012) 326-8018

E-mail: Charmaine Kemp (ChKemp@justice.gov.za)

Further enquiries may be directed to 012 326 8014.

Yours faithfully,



Raj Daya

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46 Execution - Immovables

(1) (a) 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.

(b) A writ of execution against immovable property shall contain a full description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the sheriff; and shall be accompanied by sufficient information to enable him or her to give effect to subrule (3) hereof.

[Subrule (1) amended by GN R2410 of 30 September 1991 and substituted by GN R981 of 19 November 2010 (wef 24 December 2010).]

(2) An attachment shall be made by any sheriff of the district in which the property is situate or by any sheriff of the district in which the office of the registrar of deeds or other officer charged with the registration of such property is situate, upon a writ corresponding substantially with Form 20 of the First Schedule.

[Subrule (2) amended by GN R2410 of 30 September 1991 and by GN R1343 of 12 December 2008 wef 12 January 2009.]

(3) (a) The mode of attachment of immovable property shall be by notice in writing by the sheriff served upon the owner thereof, and upon the registrar of deeds or other officer charged with the registration of such immovable property, and if the property is in the occupation of some person other than the owner, also upon such occupier.

(b) Any such notice as aforesaid shall be served according to the provisions of rule 4.

[Subrule (3) amended by GN R2410 of 30 September 1991 and substituted by GN R980 of 19 November 2010 (wef 24 December 2010).]

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

[Para. (a) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

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

[Para. (b) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

[Subrule (4) amended by GN R2410 of 30 September 1991.]

(5) No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless-

(a) the execution creditor has caused notice, in writing, of the intended sale to be served by registered post upon the preferent creditor, if his address is known and, if the property is rateable, upon the local authority concerned calling upon them to stipulate within ten days of a date to be stated a reasonable reserve price or to agree in writing to a sale without reserve; and has provided proof to the sheriff that the preferent creditor

has so stipulated or agreed, or

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

[Subrule (5) amended by GN R2410 of 30 September 1991.]

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

[Subrule (6) amended by GN R2410 of 30 September 1991.]

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

[Para. (a) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

(b) The execution creditor shall, after consultation with the sheriff conducting the sale, prepare a notice of sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the sheriff conducting the sale, and he or she shall furnish the said sheriff with as many copies of the notice as the latter may require.

[Para. (b) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

(c) The execution creditor shall publish the notice once in a newspaper circulating in the district in which the immovable property is situate and in the *Government Gazette* not less than 5 days and not more than 15 days before the date of the sale and provide the sheriff conducting the sale, by hand or by facsimile, with one photocopy of each of the notices published in the newspaper and the *Government Gazette*, respectively, or in the case of the *Government Gazette*, the number of the *Government Gazette* in which the notice was published.

[Para. (c) substituted by GN R2004 of 15 December 1967, by GN R785 of 5 June 1998 and by GN R1024 of 7 August 1998 and amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

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

[Para. (d) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

(e) Not less than 10 days prior to the date of the sale, the sheriff conducting the sale shall affix one copy of the notice on the notice-board of the magistrate's court of the district in which the property is situate, or if the property be situate in the district in which the court out of which the writ issued is situate, then on the notice-board of such court, and one copy at or as near as may be to the place where the said sale is actually to take place.

[Para. (e) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

[Subrule (7) amended by GN R2410 of 30 September 1991.]

(8)(a) (i) The conditions of sale shall, not less than 20 days prior to the date of the sale, be prepared by the execution creditor corresponding substantially with Form 21 of the First Schedule, and the said conditions of sale shall be submitted to the sheriff

conducting the sale to settle them.

(ii) The execution creditor shall thereafter supply the said sheriff with two copies of the conditions of sale, one of which shall lie for inspection by interested parties at his or her office and the sheriff conducting the sale shall forthwith furnish a copy of the conditions of sale to all other sheriffs appointed in that district.

[Para. (a) amended by GN R2410 of 30 September 1991 and by GN R1343 of 12 December 2008 wef 12 January 2009.]

(b) Any interested party may, not less than 10 days prior to the date of the sale, upon twenty-four hours' notice to the execution creditor and the bondholders apply to the magistrate of the district in which the property is to be sold for any modification of the conditions of sale and the magistrate may make such order thereon, including an order as to costs, as to him may seem meet.

[Para. (b) amended by GN R2410 of 30 September 1991.]

(9) The execution creditor may appoint an attorney to attend to the transfer of the property when sold in execution.

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

[Subrule (10) amended by GN R2410 of 30 September 1991.]

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

[Para. (a) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

(b) The purchaser shall be responsible for any loss sustained by reason of his or her default, which loss may, on the application of any aggrieved creditor whose name appears on the said sheriff's distribution account, be recovered from him or her under judgment of the judge pronounced summarily on a written report by the said sheriff, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purpose.

[Para. (b) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

(c) If such purchaser is already in possession of the property, the said sheriff may, on 10 days' notice apply to a judge for an order ejecting him or her or any person claiming to hold under him or her therefrom.

[Para. (c) amended by GN R1343 of 12 December 2008 wef 12 January 2009.]

[Subrule (11) amended by GN R2410 of 30 September 1991.]

(12) Subject to the provisions of subrule (5), the sale shall be without reserve and upon the conditions stipulated under subrule (8), and the property shall be sold to the highest bidder.

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

[Subrule (13) amended by GN R2410 of 30 September 1991 and by GN R1343 of 12 December 2008 wef 12 January 2009.]

(14)(a) The sheriff conducting the sale shall not pay out to the creditor the purchase money until transfer has been given to the purchaser, but upon receipt thereof he or she shall forthwith pay into the deposit account of the magistrate of the district all moneys received in respect of the purchase price and simultaneously inform all other sheriffs

appointed in that district of such payment.

[Para. (a) amended by GN R2410 of 30 September 1991 and by GN R1343 of 12 December 2008 wef 12 January 2009.]

(b) The said sheriff shall as soon as possible after the sale prepare in order of preference, as hereinafter provided, a plan of distribution of the proceeds and shall forward a copy of such plan to the registrar of the court and to all other sheriffs appointed in that district. Immediately thereafter the said sheriff shall give notice by registered post to all parties who have lodged writs and to the execution debtor that the plan will lie for inspection for 15 days from a date mentioned at his or her office and at the office of the registrar, and unless such parties shall signify, in writing, their agreement to the plan, such plan shall so lie for inspection.

[Para. (b) substituted by GN R2021 of 5 November 1971 and amended by GN R2410 of 30 September 1991 and by GN R1343 of 12 December 2008 wef 12 January 2009.]

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

- (i) The claims of preferent creditors ranking in priority in their legal order of preference; and thereafter
- (ii) the claims of other creditors whose writs have been lodged with the sheriff in the order of preference appearing from sections *ninety-six* and *ninety-nine* to *one hundred and three* (inclusive) of the Insolvency Act, 1936 (Act 24 of 1936) as amended.

(d) Any interested person objecting to such plan shall, within five days of the expiry of the period referred to in paragraph (b) of this subrule give notice in writing to the sheriff and all other interested persons of the particulars of his objection and shall bring such objection before a judge for review on 10 days' notice to the sheriff and the said persons.

[Para. (d) amended by GN R2410 of 30 September 1991.]

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

(f) If-

- (i) no objection be lodged to such plan, or
- (ii) the interested parties signify their concurrence therein, or
- (iii) the plan is confirmed or amended on review,

the magistrate shall, on production of a certificate from the conveyancer that transfer has been given to the purchaser and on the request of the sheriff, pay out in accordance with the plan of distribution. If the address of a payee is not known the amount due to him shall be paid into the Guardian's Fund established under any law relating to the administration of estates.

[Subrule (14) amended by GN R2410 of 30 September 1991.]

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

[Subrule (15) added by GN R1843 of 1 October 1993.]

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

[Subrule (16) added by GN R1746 of 25 October 1996.]

43 Execution against immovable property

(1) A warrant of execution against immovable property shall contain a full and complete description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the sheriff, and shall be accompanied by sufficient information to enable the sheriff to give effect to the provisions of subrule (2).

(2)(a) The mode of attachment of immovable property shall be by notice by the sheriff served in like manner as a summons together with a copy of the warrant of execution upon the execution debtor as owner thereof, upon the registrar of deeds or other officer charged with the registration of such immovable property, upon all registered holders of bonds (other than the execution creditor) registered against the property attached and, if the property is in the occupation of some person other than the execution debtor, also upon such occupier, and upon the local authority in whose area the property is situated.

(b) If the period of attachment is extended as referred to in section 66(5) of the Act, notice of such extension shall be given to the persons referred to in paragraph (a) in the manner referred to in that paragraph.

(c) If the attachment of immovable property lapses in terms of section 66(4) or section 66(5) of the Act, the Sheriff shall notify the persons who are entitled to receive notice in terms of paragraph (a) that such attachment has lapsed.

(3) After the attachment of immovable property the sheriff shall ascertain and record whether the property is subject to any claim preferent to that of the execution creditor and, if that be the case, he or she shall thereupon notify the execution creditor of the existence of any such claim to enable the latter to give notice in terms of section 66(2) of the Act.

(4) The sheriff may by notice, served in like manner as a summons, require the execution debtor to deliver to him or her all documents in his or her possession or under his or her control relating in any way to his or her title to attached immovable property.

(5) Where attached immovable property is situated in a district other than that in which the judgment was given, the party requiring execution shall forward the warrant of execution to a sheriff of the court of the district in which the property is situated, who shall proceed to attach the property in the manner provided in this rule.

(6)(a) The sheriff shall appoint a day and place for the sale of attached immovable property which day shall, except by special leave of the court, be not less than one month after service of the notice of attachment.

(b) The execution creditor shall, after consultation with the sheriff, prepare a notice of sale containing a short description of the attached immovable property and its situation, the date, time and place for the holding of the sale and the material conditions thereof and furnish the sheriff with as many copies of the said notice as he or she may require.

(c) The execution creditor shall publish a notice prepared in terms of paragraph (b) once in a newspaper registered with the Audit Bureau of Circulations of South Africa circulating in the district in which the immovable property is situated and in the *Government Gazette* not less than 5 days and not more than 15 days before the date of the sale and provide the sheriff, by hand or by facsimile, with one photocopy of each of the notices published in the newspaper and the *Government Gazette*, respectively, or, in the case of the *Government Gazette*, the number of the *Government Gazette* in which the notice was published.

(d) Not less than 10 days prior to the date of the sale in execution of immovable property the sheriff shall forward by registered post a copy of the notice of sale prepared in terms of paragraph (b) to every execution creditor who has lodged a warrant of execution and to every mortgagee in respect of the immovable property whose address is reasonably ascertainable.

(e) Not later than 10 days before the day appointed for a sale in execution of immovable property the sheriff shall affix one copy of the notice of the sale on the notice board or door of the court-house or other public building in which the said court is held and one copy at or as near as may be to the place where the said sale is actually to take place.

(7)(a) The conditions of sale for a sale in execution of immovable property shall be prepared by the execution creditor and shall, *inter alia*, provide for payment by the purchaser of interest on the purchase price from the date of sale of the property to date

of payment of the purchase price.

(b) The execution creditor shall not less than 20 days prior to the appointed date of a sale in execution of immovable property, deliver two copies of the conditions of sale to the sheriff and one copy thereof to each person who may be entitled to notice of the sale.

(c) Any interested party may not less than 15 days prior to the appointed date of a sale in execution of immovable property, upon 24 hours' notice to such other persons as may have received a copy of such conditions of sale and to the execution creditor, apply to a judicial officer for a modification of such conditions of sale and such judicial officer may make such order as he or she may deem fit.

(8) The execution creditor may appoint the conveyancer for the purposes of transfer of immovable property sold in execution.

(9)(a) The execution creditor or any person having an interest in the due and proper realisation of attached immovable property may, by notice given to the sheriff within 15 days after attachment, but subject to the provisions hereinafter contained, require that such property shall be sold by an auctioneer in the ordinary course of business and may in such notice nominate the auctioneer to be employed.

(b)(i) Where a notice in terms of paragraph (a) is given by any person other than the execution creditor, such notice shall be accompanied by the deposit of a sum sufficient to cover the additional expense of sale by an auctioneer in the ordinary course of business, and in default of such a deposit such notice shall be void.

(ii) A notice in terms of paragraph (a) shall lapse if in fact the services of an auctioneer are not obtainable.

(iii) If after satisfying the claim of the execution creditor and all warrants of execution lodged with the sheriff on or before the day immediately preceding the date of the sale and all costs there are surplus proceeds of such property, such deposit shall be returned to the depositor, but if there is not such a surplus such deposit shall, as far as may be necessary, be applied in payment of the auctioneer's fees and expenses.

(c) If two or more notices in terms of paragraph (a) are given, the first shall have the preference.

(10) A sale in execution of immovable property shall be by public auction without reserve and the property shall, subject to the provisions of section 66(2) of the Act and to the other conditions of sale, be sold to the highest bidder.

(11) A sale in execution of immovable property shall be held at a place deemed fit by the sheriff or, for good cause shown, at such other place as the magistrate may determine.

(12) Where immovable property is situate in a district other than that in which the judgment was given, the sale in execution of the property shall be effected by a sheriff of the court of the district in which it is situate in the manner provided in this rule.

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

(b) If the purchaser fails to carry out his or her obligations under the conditions of sale, the sale may be cancelled by a magistrate in chambers on the request and report of the sheriff conducting the sale, after due notice to the purchaser, and the property may again be put up for sale.

[Subrule (13) substituted by GN R685 of 31 August 2012]

(14)(a) Subject to paragraph (b), all moneys in respect of the purchase price of immovable property sold in execution shall be paid to the sheriff of the court and not to the execution creditor or any other person on his or her behalf, and the sheriff shall retain such moneys in trust until transfer has been given to the purchaser.

(b) The sheriff shall as soon as possible after the sale in execution of immovable property prepare in order of preference as provided in this rule, a plan of distribution of the purchase money received and such plan shall lie in his or her office for inspection of persons having an interest therein for a period of 15 days after the date of sale, unless all such persons inform the sheriff before the expiration of that period in writing that

they have no objection to such plan, and a copy thereof shall be lodged with the registrar or clerk of the court and with any other sheriff who submitted a certificate referred to in rule 39(2)(c).

(c) After deduction from the purchase money of the costs of execution, the following shall be the order of preference:

(i) The claims of any creditors ranking in priority to the judgment debt in their legal order of preference;

(ii) the claim of the execution creditor to the extent of his judgment plus costs and the claims of other execution creditors who have lodged warrants of execution in terms of rule 39(2) plus costs; and

(iii) the claims of creditors secured in respect of that property in their legal order of preference.

(d) Any person having an interest in a plan prepared in terms of paragraph (b) and objecting thereto shall, within a period of 10 days after the expiration of the period referred to in paragraph (b), give notice in writing to the sheriff, the registrar or clerk of the court and all other persons having an interest therein of the particulars of his objection and may, if the grounds for his or her objection are not removed within 15 days after the expiration of the first-mentioned period, bring such plan before the court for review.

(e) A review under paragraph (d) shall be on 5 days' notice to the persons mentioned in that paragraph: Provided that if such notice is not given within 20 days after the expiration of the period of 15 days mentioned in that paragraph, the objection will be deemed to be withdrawn.

(f) The court, on review, may hear and determine the matter in dispute in a summary manner and may thereafter amend or confirm the plan of distribution or may make such order as it may deem fit.

(g) if-

(i) no objection be lodged to a plan of distribution; or

(ii) the persons having an interest signify their concurrence therewith; or

(iii) an objection be lodged to such plan and notice in accordance with the proviso in paragraph (e) be not duly given; or

(iv) the plan be amended or confirmed on review,

the sheriff shall pay out the moneys retained by the sheriff in trust in terms of paragraph (a) in accordance with the plan of distribution, and any surplus shall, subject to section 71 of the Act, be paid to the execution debtor, if he or she can be found: Provided that if the sheriff is an officer of the Public Service and has certified that-

(aa) no objection has been lodged against such plan; or

(bb) all the persons having an interest therein have informed him or her that they have no objection; or

(cc) an objection has been lodged against such plan and notice in accordance with the proviso in paragraph (e) has not been given; or

(dd) the plan has been amended in accordance with an order of the court or has been confirmed on review,

such amount shall be paid out by the sheriff or any person authorised thereto by him or her in accordance with the plan of distribution so certified.

(h) Rule 41(11) shall, subject to section 71 of the Act, *mutatis mutandis* apply to any surplus amount not paid out to an execution debtor under paragraph (g).

(15) The sheriff shall, when notifying the result of the execution in terms of rule 8(3)(a), also show the disposal of the amount recovered by him or her, and the notification to the registrar or clerk of the court shall be supported by a receipt for every amount paid out by him or her.