

**SUBMISSION BY THE LAW SOCIETY OF SOUTH AFRICA  
ON PROPOSED AMENDMENTS TO THE RULES AND FORMS  
OF THE HIGH AND MAGISTRATES' COURTS  
PERTAINING TO EXECUTION AGAINST IMMOVABLE PROPERTY**

**1. INTRODUCTION**

The Law Society of South Africa (LSSA) has considered the proposed amendments and supports the underlying objective of giving meaningful expression to the constitutional right to have access to adequate housing and the introduction of a reserve price for sales in execution of immovable property as primary residence.

The LSSA also supports the increased uniformity that will result between the Rules of the High and Magistrates' Courts through the proposed amendments.

The LSSA is however concerned that some of the proposed rules are overly prescriptive and will have a negative impact on the execution of immovable property.

**2. AMENDMENT OF THE RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE SEVERAL PROVINCIAL AND LOCAL DIVISIONS OF THE HIGH COURT OF SOUTH AFRICA**

**Comments to Rule 46 – Execution of Immovables**

**Proposed Rule 46(4)(c)** – The power granted to the sheriff to enter buildings or structures on the immovable property may, in reality, only be possible with the assistance of the South African Police Service. The Rules Board should consider making specific provision for the sheriff to call upon the assistance of the South African Police Service. Consideration will have to be given as to whether this can be achieved by provision in the Rules of Court or whether statutory provision is required.

**Proposed amendment to Rule 46(5)(a)** – The LSSA recommends that provision should be made for Home Owners' Associations in all situations where provision is made for Body Corporates. This is because a restriction in favour of the Home Owners' Association may usually be registered within the title deed.

**Proposed amendment to Rule 46(7)(c)** – The LSSA recommends that the Rules should throughout retain ‘Government Gazette’, alternatively make provision for a definition of Gazette as the ‘Government Gazette’. This is because there are other Gazettes within the public domain.

**Proposed amendment to Rule 46(9)** – The LSSA is of the resolute view that the sheriff should not appoint the ‘attorney’ to attend to the transfer of the immovable property when sold in execution. The power to appoint the attorney should remain with the execution creditor. The Rules Board may consider introducing appropriate controls to ensure that the transfer of property is not unduly delayed. Further, the phrase ‘an attorney’ should be retained and not be replaced with ‘conveyancer’. Attorneys are historically and legally entitled to attend to the preparation of the transfer of immovable property.

**Proposed amendment to Rule 46(14)(a)(ii)** – The LSSA recommends that the sheriff should be compelled to also give notice of the attachment to the local municipality.

#### **Comments to Rule 46A – Execution against residential immovable property**

**Proposed Rule 46A(3)(c)**– The LSSA is of the view that the proposed Rule 46A should make provision for service by the sheriff on the chosen domicilium citandi of the judgment debtor in the event that personal service is not possible. Such service can be directed by the Court. Rule 4 of the Uniform Rules of Court already makes provision for such service at application stage. Also, the proposed Rule 43B(3)(d) for the Magistrates’ Courts Rules has inserted the following proviso: *‘Provided that the court may order service in any other manner.’*

**Proposed Rule 46A(5)(a)** – The LSSA wishes to point out that the Local Government: Municipal Property Rates Act of 2004 defines ‘market value’, in relation to a property, as the value of the property determined in accordance with section 46 of that Act. Section 46(2) of the Act provides that the general evaluation, determined by a municipality, must reflect the market value of properties determined in accordance with market conditions that applied as at the date of valuation and any other applicable provisions of this Act. The LSSA is concerned that the introduction of ‘market value’ of the property (as generally understood beyond the ambit of this Act) will have cost implications and may therefore negatively impact on sales in execution.

We recommend that the Rules should grant the Court a general discretion to ease the requirements, in situations where the property cannot get sold through an auction.

**Proposed Rule 46A(6)(a)** – The LSSA recommends that provision be made for a replying affidavit.

**Proposed Rule 46A(8)(f)** – This is another example of where provision should be made for Home Owners' Associations, for the reasons stated above.

**Proposed Form 21A** – The LSSA is of the view that the inclusion of 'alternatively request' is inappropriate as a court of law is not requested, but courts are approached through application.

### **3. AMENDMENT OF RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE MAGISTRATES' COURTS OF SOUTH AFRICA**

**General Comment** – The LSSA's comments to the amendment of Rules regulating the conduct of proceedings of the High Courts are equally applicable to the amendment Rules regulating the conduct of proceedings of the Magistrates' Courts, in particular:

- a) **Proposed Rule 43(4)(c)** - Provision should be made for the sheriff to call upon the assistance of the South African Police Service to enter buildings and structures on immovable property.
- b) **Proposed Rule 43(7)(a)** – Provision should be made for sheriffs to be required to give notice of the attachment to the local municipality.
- c) **Proposed Rule 43(7)(c) and elsewhere** - The phrase 'Government Gazette' should be retained, alternatively provision should be made for a definition of Gazette as the 'Government Gazette'.
- d) **Proposed Rule 43(9)** - The execution creditor to retain the power to appoint the attorney – not the sheriff, e.g. proposed Rule 43(9).

- e) **Proposed Rule 43(9) & paragraph 14 of No. 34A Conditions of Sale in Execution of Immovable Property** - An attorney should be appointed by the execution creditor and not only a 'conveyancer' to attend to the preparation of the transfer of immovable property.
- f) **Proposed Rule 43B(5)** – The Court should be granted a general discretion to ease the procedural requirements, in situations where the property cannot get sold through an auction.
- g) **Proposed Rule 43(5)(a) and elsewhere** – Provision should be made for notices to Home Owners' Associations.
- h) **Proposed Form No 34B: Notice to Cancel Sale of Immovable Property in terms of Rule 43(12)(a) and elsewhere** – The reference to 'alternatively request' when approaching a court should be deleted.

**Proposed Rule 43(11)** – The LSSA recommends that the Rules Board considers the implications of the proposed rule on the Fidelity Fund for Sheriffs and the trust accounts operated by sheriffs under the Sheriff's Act. Auctioneers do not operate with trust accounts and the Rules Board should consider the provision of security by an auctioneer for a particular auction.