



RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA

UNIFORM RULE 46A: PROPOSED DRAFT AMENDMENTS

GENERAL EXPLANATORY NOTE:

[] Words or expressions in bold type in square brackets indicate omissions from existing rules

_____ Words or expressions underlined with solid line indicate insertions into existing rules

46A Execution against residential immovable property

(1) This rule applies whenever an execution creditor seeks to execute against—

(a) the residential immovable property of a judgment debtor; or

(b) residential immovable property owned by a judgment debtor, where the whole or part of such property is occupied by any person other than the judgment debtor, as such person’s primary residence.

Notes:

1. An alternative phrasing of paragraph (b) could read:

“residential immovable property owned by a judgment debtor *which is not a natural person*, where the whole or part of such property is occupied by any person [other than the judgment debtor.] as such person’s primary residence.”

2. Role-players are requested to consider both options and indicate a preference.

(2)(a) A court considering an application **[under]** in terms of subrule (3) of this rule must—

Note:

The phrase “in terms of subrule (3) of” is proposed to be inserted to make it clear which application is being referred to.

(i) enquire into and establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor or person contemplated by paragraph (b) of subrule (1) ; and

(ii) consider any alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the **[judgment debtor’s primary residence]** the immovable property occupied by the judgment debtor or other person as such person’s primary residence.

Notes:

1. Subparagraph (i) is proposed to be amended by insertion of the phrase “enquire into and” to make it clear that the court seized with an application in terms of this rule must conduct such an enquiry as alluded to in the *P J Bestbier* case.
2. In subparagraph (ii) the phrase “judgment debtor’s primary residence” is proposed to be replaced by the phrase “the immovable property occupied by the judgment debtor or other person as such person’s primary residence” so as to align with the amendments to subrule (1), which cover instances where the right to adequate housing of an occupant who is not the owner of the property, or is not the judgment debtor, is implicated.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor or person contemplated in paragraph (b) of subrule (1) unless the court, having considered all relevant factors, considers that execution against **[such]** the property of the judgment debtor is warranted.

(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor which is sought to be attached in execution unless a court has ordered execution against such property.

Note:

The proposed amendments to paragraphs (b) and (c) are intended to align with the amendments to subrule (1), to include the judgment debtor and persons for whom the immovable property is their primary residence.

- (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) and subrule (1)(b) hereof: 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 must 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;
 - (iii) appoint a physical address within 15 kilometres of the office of the registrar at which the applicant will accept service of all documents in these proceedings; and
 - (iv) state the applicant's postal, facsimile or electronic mail address where available.
- (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 15 kilometres of the office of the registrar at which documents may be served upon such respondent; and
 - (iii) state the respondent's postal, facsimile or electronic mail address where available.

(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]** in terms of subrule (3) 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]** residential property sought to be attached if there is no other satisfactory means of satisfying the judgment debt;

Notes:

1. In the preamble to subrule (8) the phrase “under this rule” is proposed to be substituted by “in terms of subrule (3)” so as to be more specific.
2. In paragraph (d) the phrase “primary residence of a judgment debtor” is proposed to be replaced by “property sought to be attached” to include occupants of the property, for whom the property may be their primary residence.

(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]** in terms of subrule (3), or upon submissions made by a respondent in terms of subrule (6), 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 or other property charges;
 - (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 rights and circumstances of such occupation and any prejudice which such occupant is likely to suffer;

Note:

The inclusion of the phrase "any prejudice which such occupant is likely to suffer" is intended to cover the section 26 Constitutional right to adequate housing which may be implicated and which is the foundation of the rule.

- (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]** in the exercise of its oversight function, reconsider the further sale in execution of the attached property and may—

(i) order that a new sale in execution is to be conducted with a new reserve price, in which event the court must determine a new reserve price;

(ii) order that a new sale in execution is to be conducted without a reserve price;

(iii) include any condition upon which a sale in terms of either subparagraph (i) or (ii) is to be conducted;

(iv) stay any further sale in execution of the property, with or without any conditions which it deems appropriate; or

(v) make any other order which it deems just and appropriate, regarding execution against the property.

Notes:

The proposed amendments to paragraph (c) are intended to:

1. Indicate that the court must exercise its judicial oversight function in the event of the reserve price not being achieved and accordingly consider whether the property is to be put up for sale again, but that in so doing it has certain options which it may consider, including any factor which it may itself consider; and
2. To indicate the procedure to be followed to bring the reconsideration of the reserve price before the court.

(d) Where the reserve price is not achieved at a sale in execution— [,]

(i) the sheriff must submit a report to the court, within 5 days of the date of the auction, which report shall contain—

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

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

[(iii)] (cc) the highest bid or offer made; and

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

(ii) the registrar must, upon receipt of the sheriff's report and after conferring with a judge for directions, enrol the matter for the purposes referred to in paragraph (c), upon 10 days

notice to the execution creditor and the judgment debtor.

Notes:

1. The amendments proposed to paragraph (d) seek to set out the procedure for enrolling the reconsideration of the reserve price process and consist of two parts, namely:
 - (a) The functions of the sheriff; and
 - (b) The functions of the registrar.
2. Paragraph (d) is therefore proposed to be divided into two portions: one dealing with the functions of the sheriff and the other with the functions of the registrar.

[(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.]

Note:

The Rules Board considered that paragraph (e) above, should be deleted.

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