

Guidelines

Sales in execution: Immovable Property

January 2019

The South African Sheriff Society (SASS) conducted a workshop in December 2018 to address the challenges of sheriffs when they conduct sales in execution of immovable property under the amended regulations, introducing the reserve price and others.

We trust these guidelines will be of assistance to sheriffs.

Rule 46 in this document refers to Rule 46 of the Uniform Rules of the Superior Courts Act 10 of 2013. Rule 43 of the Magistrate's Court Act 32 of 1944 was uniformly amended in concurrence with Rule 46. Therefore, when reference is made to Rule 46, it also refers to the matching rule in Rule 43 of the Magistrate's Court Act.

THE RESERVE PRICE

Sheriffs are faced with various challenges when a sale in execution is subject to a reserve price. In practice, courts issue orders with varying provisions relating to the reserve price, yet sheriffs are expected to be consistent when conducting the sale.

We came across the following examples:

- The Reserve price is set at R.....
If the reserve price is not met, then and in that event, the sheriff is authorised and mandated to sell the property at the open market value.
- The Property to be sold in execution by the sheriff with a reserve price of R..... , alternatively without reserve.
- The Sale is subject to a reserve price of R..... , alternatively such reserve price as may be set by the court.

The following guidance is given to SASS members for all sales in execution of immovable property where the sale is **subject to a reserve price**:

- The provisions of the court order detailing the reserve price, must be followed carefully at all times.



We suggested to the banking forum that the reserve price court orders be phrased as follows:

1. The sale shall be subject to a reserve price of R.....
2. In the event the reserve price is not achieved, the property must be sold without reserve.

- In practice, there will be two auctions: firstly when the reserve price is not achieved at the first auction and then, a sale without reserve.
- At the (attempted) first auction, the property will be put up for sale, subject to the reserve price and bidding must start at the reserve price.
No bids lower than the reserve price can be accepted.
Should there be no bids, the second auction will be conducted immediately.

It is not necessary for the court to cancel the first auction, as the sale was not concluded and is therefore not acknowledged as a legitimate sale. The second auction will be regarded as a continuation of the first sale.

It is recommended that the sheriff announces at this stage that the reserve price was not achieved at the sale and that a new sale will now commence.

- At the second sale, the property will be put up for auction without the reserve price and any bids can be accepted.
Buyers must be made aware that this sale is subject to confirmation by court on the highest bid offered.
The purchaser must complete and sign the Conditions of sale, pay the 10% commission and the auctioneer's commission.
all money received for the sale must be paid into the sheriff's trust account, including the commission.
Only upon confirmation of the sale in terms of Rule 46A (9) (e), the commission may be transferred from the trust account.

Who applies to court for confirmation that the highest bid is accepted? – see bullet point below

Should the sale not be confirmed, the purchaser must be refunded the deposit and commission.

There is currently no prescribed fee for sales that were not approved by court in terms of Rule 46A(9)(e). This shortcoming has been reported to the authorities.

- The sheriff must compile a report in terms of Rule 46A(9)(d) and must submit the report to court within 5 days of the date of sale.
See example of the report per annexure; please take note of Subrule 46A(9)(d)(i) – (iv) for the requirements of the report content.

It is recommended that sheriffs, or the provincial management of SASS, arrange meetings with their respective High Courts (Judge President and Registrars), to agree on the practicalities and logistics of the submission of the report and handling thereof at court.



The following should form part of the discussions at the meeting:

1. The new rules and provisions must be brought to the attention of the court.
2. Confirmation must be obtained on the preferred manner in which the report be submitted to court.
It is recommended that the report be submitted by email to a designated person and designated email address.
This information must be distributed within the province for uniformity.
3. Confirmation must be obtained that the application will be treated as a chamber book application and must not be heard in open court.
4. The JP must be made aware of the urgency of the application and that any delays will be to the detriment of the judgment debtor, the purchaser and the general image of sales in execution. The JP of the Free State High Court agreed to attend to the applications within 3 weeks from date of submission.

Streamlined processes at court is critical; SASS is proposing interaction with courts on national level

More notes on reserve price:

- Publication of the reserve price:
The reserve price does not appear in the Notice of Sale and is therefore not published. However, the defendant is made aware of the reserve price prior to the sale, as the reserve price appears in the Conditions of Sale, which must be served upon the defendant 15 days prior to the date of sale in terms of Rule 46(8)(c).
The sheriff will make the reserve price known to the buyers, by announcing the amount of the reserve price at the auction.
- A perception exists that the reserve price will put off buyers and they will not attend auctions. It is unfortunately true that the new procedure, introducing the reserve price, will not go well with buyers, but was intended to prevent the sale of property far below market value. We believe that once all stakeholders (including buyers) adapted to these new provisions, the sales in execution will stabilize.
- It is our view as SASS, that the sheriff profession must highlight and address the shortcomings in the rules and the implementation thereof, in order to streamline and professionalize the auction process.

1. PRIMARY RESIDENCE

The primary residence of a person can be described as the main residence or the dwelling where a person usually lives. The new rules were implemented to introduce further measures to ensure all available remedies have been exhausted before the primary residence of a person is attached and sold in execution.



The sheriff has no role or obligation in terms of the determination of primary residence. The creditor must provide information to court when application is made for judgment to have the property attached and sold.

Lastly, the reserve price is only applicable to sales in execution where the relevant property is the primary residence of the debtor. It is not applicable to second properties or commercial properties.

2. OCCUPATIONAL RENT

Occupational rent was also introduced with the latest amendments.

In principle, the purchaser of a property cannot have free occupation from the date of sale up to the date of registration of transfer. In practice, some buyers purchase properties on auction but never fulfil the other obligations under the Conditions of Sale, while collecting rent from the tenant.

To avoid this situation, the clause was introduced in the Conditions of Sale where the purchaser, delaying transfer, is liable for occupational rent at a percentage of the sale price.

It was previously communicated to SASS members that the attorney must collect the occupational rent. This arrangement was made to take the burden off the sheriff, however, sheriffs are not prohibited from collecting and managing occupational rent. It will in fact be advisable to do so when there is no bond holder involved or when it is a third party sale.

It is recommended that sheriffs take note of the following scenarios:

1. Sales in execution with no bond holder
2. Third party sales with bond holder
3. Sales where there is a shortfall

For the above 3 scenarios the occupational rent should be collected by plaintiff's attorney or sheriff and must reflect as income on the distribution account, or as payment/s on the certificate of payment

4. Sale where the judgment debt is fully covered by the purchase price

For this scenario, any occupational rent collected from purchaser must be paid over to the sheriff and must form part of the surplus, refunded to the judgment debtor

The following problematic aspects of the Conditions of Sale were identified and will be reported to the authorities for guidance:

- a. The Conditions of Sale is not clear as to who is entitled to receive the occupational rent and it becomes particularly problematic when the property is sold in third party sales and when there is no bond holder.
- b. Clarity is required on what is considered to be "when possession is taken"
The following scenarios were identified:
Upon signing of COS



Upon signing of COS and payment of deposit and commission

When purchaser moves in or puts a tenant in the property

When purchaser collects rent from occupant occupying the property at the time of the sale.

- c. It is unclear at what point the purchaser assumes responsibility of the property – on signature of the Conditions of sale, on payment of deposit or when possession of the property is taken. There will in any event be a gap in responsibility from date of sale to date the purchaser assumes responsibility.
- d. Who is responsible for the property in the event the reserve price was not achieved and the court's confirmation is awaited on the highest bid, as indicated in the sheriff's Rule 46 report in terms of Rule 46A (9)(d) report.

3. PRIVATE SALES

It has been reported that banks often follow the route of private sales before escalating the matter for sale in execution. What happens in reality is that the debtor will give the bank a mandate to market and sell his/her property in the normal open market. It is the banks' prerogative to engage the debtor to put the property on a private sale, it is a legitimate process and is explained as a measure to assist the debtor.

However, members are requested to report any unlawful activities, for example, illegal court orders where private auctioneers are authorised to conduct the auction. Another example of unlawful conduct is where auctions are advertised as "sales in execution" whereas it is a private sale, etc. Only sheriffs are allowed to conduct sales in execution.

Lastly, we call upon sheriffs to ensure their auctions are conducted in a professional manner. This means that Sheriffs must take and put more effort with their auction sales – maximise exposure, advertise the auction as wide as possible, publish on website, create a mood and interest in the auction, etc

4. SETTLE OF CONDITIONS OF SALE

We received mainly the following two questions relating from the settle of the Conditions of Sale:

1. What is considered by the sheriff when the Conditions of Sale are settled?
2. Is the sheriff obliged to communicate anything to the creditor in this regard?

The Rules of Court are the basis upon which the Conditions of Sale are settled; In terms of Rule 46(8) (a)(i) the execution creditor must prepare the Conditions of sale corresponding substantially with Form 21. This essentially means the wording can differ, but the content cannot be illegal and must comply with the Rules. When the Conditions of Sale are settled, the sheriff must use his/her discretion.



The Banking Forum considered Form 21 and amplified it to make provision for some practical facets of a sale in execution and elaborated on some points. The Banking Forum consists of the four major commercial banks, the Board for sheriffs and the two voluntary sheriff organizations.

A copy of the Banking Forum's Form 21 is enclosed and can be considered as the norm in the market.

When the Conditions of Sale are settled in terms of Rule 46(8)(a)(iv) it is recommended that a return to that effect is issued to the creditor, confirming same and the relevant fee of R78.50 for considering the Conditions of sale is then charged.

3. RATES & TAXES

Outstanding rates & taxes have a huge impact on the purchase price of properties sold in execution, as the purchaser must pay these to obtain transfer.

By now we have established that the only amounts allowed to be included by the municipality for clearance certificates are:

2 years property rates and 3 years for services, for example water and electricity.

The levy of the body corporate is also payable by the purchaser and must be included in the calculation.

It is advisable to announce the estimated amount payable at the sale. This is to inform purchasers of the approximate amount they will be expected to pay to obtain transfer, and the amount will influence the purchaser when deciding what amount he/she will be prepared to bid on the property.

Did you know?

The municipal rates claim is considered to be "tax" and ranks higher in preference on the sheriff's distribution account, than the claim of body corporate levies.

4. VAT VENDOR STATUS OF EXECUTION DEBTOR

Another aspect that influences the total cost of the sale transaction is whether the defendant is a VAT vendor (a person or entity, registered for VAT).

Should the owner of the property be a VAT vendor, the sale would attract VAT on the purchase price, instead of transfer duty.

The beforementioned VAT / transfer duty is not collected by the sheriff, but forms part of the transfer cost by the conveyancer and the purchaser pays these amount directly to the attorney attending to the transfer.

It is therefore recommended that the VAT status of the debtor be announced at the sale.

The information relating to the VAT status of the judgment debtor can be obtained from SARS, by doing an on-line search, or to apply directly to your local SARS office. For this purpose we enclose an example of a form that can be submitted to SARS.



The views expressed in this document are intended as guidance for SASS members in their day to day challenges, is not binding and cannot be considered to be legal advice. SASS escalated various aspects to the authorities for further consideration and clarity. The information will be updated in due course and members informed. Sheriffs must still apply the rules as they deem fit.

