

PROPOSED CHANGES TO STATUTORY LEGISLATION AND RULES OF COURT RELATING TO SALES IN EXECUTION OF IMMOVABLE PROPERTY

1 Legality of certain sub-rules of Rule 46 and 46A of the Uniform Rules of Court (“URC”)

1.1 Rule 46(1)(b)(i) of the URC

It is proposed that this Rule be amended to also include the property description as set out in the title deed as the registrar of deeds will not accept a notice of attachment without a title deed description.

1.2 Rule 46(3)(a) of the URC

It is proposed that this Rule be amended to also include the writ of execution so as to provide for service of the writ of execution and the notice of attachment on the parties mentioned therein.

1.3 Rule 46(11) of the URC, Form 21 and Form 21A

1.3.1 Rule 46(11) of the URC

In terms of this Rule the completed sale may only be cancelled by a Judge summarily on the report of the sheriff who conducted the sale, after due notice to the purchaser, and the attached immovable property may be put up for sale again. Further, the said Rule states that the report shall be accompanied by a notice corresponding substantially with Form 21A which form clearly states that the request for cancellation is directed to “a Judge in chambers”.

1.3.2 Current Practice Directive – 18 April 2019

A Practice Directive was issued by the Judge President of Gauteng Division of the High Court on the 18th of April 2019 (“2019 Practice Directive”). This directive directs that Rule 46(11) applications will no longer be dealt with by a Judge in chambers and shall be set down in the interlocutory court.

1.3.3 Previous Practice Directive - 26 May 2017

A Practice Directive was issued by the Judge President of Gauteng Division of the High Court on the 26th of May 2017 (“2017 Practice Directive”). This directive directs that:

- 1.3.3.1 If an application in terms of Rule 46(11) is unopposed it is dealt with by a judge in chambers. If the application is opposed the application will be heard in open court.
- 1.3.3.2 The notice of motion must, *inter alia*, be served on the purchaser against whom relief is sought. The notice of motion must inform the purchaser of the time within which and the manner in which the applicant and the registrar must be informed of the purchaser's intention to oppose the relief sought, if any.
- 1.3.3.3 If no intention to oppose the relief sought is filed, the applicant must depose to an affidavit stating that fact. The affidavit must be placed in the court file before the application comes before the judge.
- 1.3.3.4 It is required that the fate of deposits paid pursuant to a sale be dealt with in the reports submitted by the sheriff. Reports submitted to a Judge requiring cancellation of a sale shall set out the amount of any deposit paid by the purchaser and held by the sheriff and how it is proposed to deal with the deposit after completion of any subsequent sale envisaged in Rule 46(11).

1.3.4 Conflict between both Practice Directives and Rule 46(11) of the URC

- 1.3.4.1 The said 2019 Practice Directive is in conflict with Rule 46(11) to the extent that it requires the Rule 46(11) application to be set down in the interlocutory court regardless of whether it is opposed or unopposed. Furthermore, the said Rule states that the report shall be accompanied by a notice corresponding substantially with Form 21A which form clearly states that the request for cancellation is directed to "a Judge in chambers".
- 1.3.4.2 The said 2017 Practice Directive is in conflict with Rule 46(11) to the extent that it requires the Rule 46(11) application to be heard in open court if it is opposed. Furthermore, the said Rule states that the report shall be accompanied by a notice corresponding substantially with Form 21A which form clearly states that the request for cancellation is directed to "a Judge in chambers".
- 1.3.4.3 Section 171 of the Constitution states that all courts function in terms of national legislation, and their rules and procedures must be provided for in

terms of national legislation. Therefore, the said Practice Directives are *ultra vires*.

1.3.4.4 In light of the above, it is proposed that the 2017 Practice Directive should be followed and that Rule 46(11) and Form 21A be amended in accordance therewith for the following reasons:

1.3.4.4.1 If the Rule 46(11) application is unopposed, then it is in the interests of justice that the sale be cancelled expeditiously by a judge in chambers and put up for sale again;

1.3.4.4.2 If the Rule 46(11) application is opposed, then it is in the interests of justice that the application be properly ventilated in open court.

1.3.5 Rule 46(11)(b) of the URC

In light of the fact that a distribution account is only prepared after the registration of transfer, it is proposed that this Rule be amended by deleting the following words "*whose name appears on the sheriff's distribution account*" and replacing such words with the following words, namely: "*referred to in Rule 46(14)(c)*"

1.3.6 Form 21 - Clause 10(b)

In the event that the rental income received in respect of the property may have been ceded to the mortgagee in terms of the mortgage loan agreement it is proposed that the following sentence be added to this clause, namely:

"In the event that a mortgage bond is registered over the property, then the occupational rental will be paid directly to the mortgagee. Should no mortgage bond be registered over the property then the occupational rental shall be paid to the sheriff."

1.4 Rule 46A(9)(e) of the URC

In terms of this Rule, where the reserve price is not achieved at a sale in execution ("SIE"), 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.

1.5 Conflict between the CPA and the URC

- 1.5.1 Rule 46(8)(a)(v) of the URC states that the sale in execution and the conditions of sale must comply, *inter alia*, with the provisions of the Consumer Protection Act 68 of 2008 “(CPA”).
- 1.5.2 Section 45(1) of the CPA states that “auction” includes a SIE.
- 1.5.3 Section 45(3) of the CPA states that a SIE is complete when the auctioneer announces its completion by the “fall of the hammer” or any other customary manner, and until that announcement is made a bid may be retracted. Therefore, if the SIE is not completed on the fall of the hammer, there is no sale, suspensive or otherwise. Further, Section 45(3) of the CPA clearly states that a “bid may be retracted” prior to this “announcement”.
- 1.5.4 The CPA does not allow for a SIE with a suspensive condition.
- 1.5.5 Rule 46A(9)(e) of the URC states that 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.
- 1.5.6 Section 45(3) of the CPA does not allow for the scenario as set out in Rule 46A(9)(e) of the URC as Rule 46A(9)(e) allows for the SIE to be suspended when the reserve is not achieved, pending the decision of the Court as to whether the property is to be sold to the person who made the highest bid.
- 1.5.7 Furthermore, a bidder may at any stage retract his/her bid prior to the “fall of the hammer”. Therefore, this right which a bidder has at a SIE is extinguished by Rule 46A(9)(e) of the URC.
- 1.5.8 Therefore, it is clear that Rule 46A(9)(e) of the URC, which is subordinate/delegated legislation, is in direct conflict with Section 45(3) of the CPA, which is an Act of Parliament. Rule 46A of the URC is subordinate/delegated legislation and, if it is in any way in conflict with statutory legislation made by authority of an Act of Parliament, the latter must take precedence. Therefore, the provisions of the CPA cannot be superseded by the URC. As a consequence, Rule 46A(9)(e) will be *ultra vires* and void as a result thereof. In light hereof Rule 46A(9)(e) should be removed from the URC.

1.6 Rule 46A(9)(d) – Sheriff’s report

1.6.1 Rule 46A(9)(d)(iii)

Where the SIE is subject to a reserve price this fact and the reserve price amount must be stated in the conditions of sale (“COS”) as prescribed in form 21. The COS are open for public scrutiny and Rule 46(8)(b)(i) states that the COS must lie for inspection by interested parties at the office of the sheriff for 15 days prior to the date of sale. Furthermore, the COS are read out prior to the start of the auction and therefore the actual reserve price amount will be announced. In light hereof, the bidding must start at the reserve price and therefore this Rule must be deleted due to impossibility of performance.

1.6.2 No proper procedures prescribed in Rule 46A(9)(c) & (d)

1.6.2.1 Rule 46A(9)(c) currently states as follows:

“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.”

1.6.2.2 Where the reserve price is not achieved, the execution creditor will, on application, need to request the court to reconsider the reserve price. In light hereof it is proposed that the current Rule 46A(9)(c) be deleted and replaced with the following:

“If the reserve price is not achieved at a sale in execution, the court must, on application by the execution creditor, reconsider the reserve price, after taking into account the factors in paragraph (b) and any other factor raised by any interested party.”

1.6.2.3 In light of the above, Rule 46A(9)(d) will need to be amended so that it provides for the sheriff’s report to be submitted to the execution creditor and filed at court.

1.6.2.4 The reconsideration of the reserve price must be dealt with in open court due to the fact that there are other interested parties (e.g. execution debtor, local council, preferred creditors, etc.) who will need to receive notice that the reserve price is going to be reconsidered in terms of 46A(9)(c) so that they can

participate in this process should they wish to do so. This is in line with the “audi alteram partem” rule which is a fundamental principle of our law which is enshrined under the bill of rights in the Constitution of the Republic of South Africa, Act 108 of 1996.

1.7 Lacuna in the Superior Courts Act 10 of 2013 (“SCA”) and Rule 46(5)(b) of the URC

1.7.1 It is proposed that a new section be inserted into SCA as a new Section 45A which reads as follows:

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

- (a) the judgment creditor has caused such notice in writing of the intended sale in execution to be served personally upon the preferent creditor as may be prescribed by the rules; or*
- (b) the court in whose jurisdiction the property is situated has upon the application of the judgment creditor and after enquiry into the circumstances of the case, directed what steps shall be taken to bring the intended sale to the notice of the preferent creditor, and those steps have been carried out.”*

[Please note that this proposed amendment follows the wording of Section 66(2)(a) & (b) of the MCA but specifically excludes the provisions of Section 66(2)(c) & (d)]

1.7.2 It is proposed that the Rule 46(5)(b) of the URC be amended by the insertion of the following words:

“Subject to the provisions of Section 45A of the Act, the sheriff is satisfied”

1.7.3 The proposed amendments will result in uniformity between:

1.7.3.1 the SCA and MCA; and

1.7.3.2 the URC and the MCR.

(Please refer to the discussion hereunder on Section 66 of the MCA)

2 Legality of certain sub-rules of Rule 43, 43A and Form 33A of the Magistrates’ Courts Rules (“MCR”) and Section 66(2)(c) of the Magistrates’ Courts Act (“MCA”)

2.1 Rule 43 and 43A of the MCR

Paragraphs 1.1 to 1.8 regarding Rule 46 and 46A of the URC *supra* apply, *mutatis mutandis*, to Rule 43 and 43A of the MCR.

2.2 Section 66(2)(c) & (d) of the MCA

Section 66(2)(c) & (d) of the MCA states that no immovable property which is subject to any claim preferent to that of the judgment creditor shall be sold in execution unless (c) the proceeds of the sale are sufficient to settle the claim of such preferent creditor in full or (d) the preferent creditor confirms the sale in writing in which event he shall be deemed to have agreed to accept such proceeds in full settlement of his claim. (There is no similar provision in the Superior Courts Act, 10 of 2013)

2.2.1 Conflict between Section 66(2)(c) & (d) of the MCA and Rule 43A(5)(a) & (b) of the MCR

2.2.1.1 Rule 43(5)(a) & (b) of the MCR states that subject to Rule 43A, and any order made by the court, 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 of the intended sale, corresponding substantially with form 34 of annexure 1 to be served upon (i) preferent creditors personally, (ii) the local authority if the property is rated (iii) and the body corporate if the property is a sectional title unit, calling upon the aforesaid entities to stipulate within 10 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 such entities have so stipulated or agreed; or subject to the provisions of section 66(2)(b) of the Act, 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 being 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) within the time stated in such notice.

2.2.1.2 In light of the above, it is clear that Rule 43(5)(a) & (b) of the MCR, which is subordinate/delegated legislation, is in direct conflict with Section 66(2) of the MCA, which is an Act of Parliament. Therefore, the provisions of the MCA cannot be superseded by the MCR. As a consequence, Rule 43(5)(a) & (b) of the MCR will be *ultra vires* and void as a result thereof.

2.2.2 Conflict between Section 66(2)(c) of the MCA and Rule 43A(8)(e) of the MCR

2.2.2.1 The court may not set a reserve price if there is a preferent creditor as envisaged by section 66(2) of the MCA because no immovable property which is subject to any claim preferent to that of the judgment creditor shall be sold in execution unless the proceeds of the sale are sufficient to settle the claim of such preferent creditor in full or the preferent creditor confirms the sale in writing in which event he shall be deemed to have agreed to accept such proceeds in full settlement of his claim.

2.2.2.2 In terms of Rule 43A(8)(e) of the MCR the court may set a reserve price.

2.2.2.3 In light of the above, it is clear that Rule 43A(8)(e) of the MCR, is in conflict with Section 66(2)(c) of the MCA, because the property may not be sold unless the proceeds of the sale are sufficient to settle the claim of such preferent creditor in full or the preferent creditor confirms the sale in writing regardless of whether the preferent creditor sets a reserve price in terms of Rule 43(5)(a) & (b). In effect if the court sets a reserve price below the preferent creditor's claim there will be no sale if such preferent creditor does not confirm the sale in writing.

2.2.2.4 Whilst Rule 43A(8)(e) of the MCR is subordinate/delegated legislation, and in conflict with Section 66(2)(c) of the MCA, which is an Act of Parliament, it is proposed that, in light of the aforementioned exposition, Section 66(2)(c) of the MCA be deleted.

2.2.3 Conflict between Section 66(2)(d) of the MCA and Section 45(3) of the CPA

In light of the fact that in terms of Section 66(2)(d) the SIE is subject to the preferent creditor confirming the sale makes it a suspensive condition which is in conflict with Section 45(3) of the CPA, as the CPA does not allow for a SIE with a suspensive condition (para 1.7 *supra*). Therefore, it is proposed that Section 66(2)(d) of the MCA should also be deleted.

2.2.4 Consequences of the deletion of Section 66(2)(c) & (d) of the MCA

The deletion of Section 66(2)(c) & (d) of the MCA will have the following consequences:

2.2.4.1 It will resolve the conflict with the CPA; and

2.2.4.2 It will result in Rule 43(5)(a) & (b) and 43A(8)(e) of the MCR being valid and enforceable and will have the effect of bringing uniformity between the URC and the MCR.

2.3 Form 33A

The proposed amendments to Form 21 apply *mutatis mutandis*.

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