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# Unsettling the 'Reserves': A Consideration of Rule 46A (9) of the Uniform Rules of Court and the Setting of Sale in Execution Court-Set Reserve Prices: *Changing Tides 17 (Proprietary) Limited N.O. v Kubheka and Others 2022 5 SA 168 (GJ)*; and *Standard Bank of South Africa Limited v Tchibamba 2022 6 SA 571 (WCC)*

**Ciresh Singh\***

Associate Law Professor  
University of South Africa

## Abstract

*Rule 46A of the Uniform Rules of Court provides that a court must consider setting a sale in execution reserve price during an application for execution against immovable property. Rule 46A(9) further provides that if that court-determined reserve is not met at a sale in execution, a court must reconsider the reserve and direct how execution should proceed. Both Rule 46A and Rule 46A(9) fail to provide any clarity as to all the practical factors that should be taken into account by a court when considering a reserve price. Furthermore, Rule 46A(9) fails to provide any guidance as to how such an application must be brought before the court. The cases of *Changing Tides v**

\* LLB, LLM, PhD (University of KwaZulu-Natal)

*Kubheka, and Standard Bank v Tchibamba expose some of the lacunae in Rule 46A(9) and brings to light the need for clarity and consistency.*

**Keywords:** Rule 46A(9) of the Uniform Rules of Court; court-set reserve prices; sale in execution

## 1 INTRODUCTION

Over the years, the lack of judicial oversight surrounding the sale in execution process has been a source of concern. Before its various amendments, Rule 46 of the Uniform Rules of Court<sup>1</sup> — Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa<sup>2</sup> ( Uniform Rules of Court) allowed a property to be sold at a sale in execution, to the highest bidder, without a reserve price. This position raised much concern amongst academics, legal practitioners, and the greater public as this process allowed for homes to be sold for a fraction of their true value.<sup>3</sup> In order to prevent the situation of homes being sold for less than their true value, Rule 46A<sup>4</sup> of the Uniform Rules of Court was introduced to allow courts the discretion to set a reserve price for a sale in execution.<sup>5</sup> In summary, Rule 46A(9) of the Uniform Rules of Court now provides that the court “must” consider the setting of a “reserve price” for a sale in execution. The amendment seeks to protect debtors by ensuring that homes are not sold for extremely low prices. The effect of the amendment is that if the sale fails to reach its court-set reserve price, that property will not be sold, and the court will be required either to set another reserve price for the property, consider selling the property at the highest bid, or consider alternatives. Arguably, Rule 46A(9) has many gaps. First, the Rule fails to prescribe what “exact” factors the court should take into consideration when determining a reserve price or how the reserve price should be calculated, and, second, it fails to prescribe clarity on the process to be followed when a reserve is not met at the sale in execution.<sup>6</sup> Accordingly, the purpose of this article is to consider the application of Rule 46A(9), discuss the challenges within the application of the Rule, and provide some suggestions on how these challenges can be resolved.

## 2 RULE 46A(9) OF THE UNIFORM RULES OF COURT

Rule 46A(9) of the Uniform Rules of Court currently deals with the setting of a reserve price and read as follows:

(a) In an application under this rule, or upon submissions made by a respondent, the court

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1 GN R981, *Government Gazette* 2010: 33689, as amended.

2 GN R48, *Government Gazette* 1965: 999, as amended. The Uniform Rules of Court are made by the Rules Board for Courts of Law, with the approval of the Minister of Justice and Correctional Services. See also s 6 of the Rules Board for Courts of Law Act 107 of 1985.

3 See *Nxazonke and Another v Absa Bank Ltd and Others* (18100/2012) [2012] ZAWCHC 184, wherein a property was sold for R10.00 (ten rand), when the municipal value of the property was R81 000. See also Brits “Purging Mortgage Default” *Stell LR* 2013 165, Brits, “The Reinstatement of Credit Agreements: Remarks in Response to the 2014 Amendment of Section 129 (3)-(4) of the National Credit Act” 2015 *De Jure*,75, and Shaw, “Too Quick to Execute — How Does SA’s New Rules on Sale in Execution Compare Internationally?” 2016 *De Rebus* August 32.

4 GN R1272, *Government Gazette* 2017: 41257, as inserted.

5 At the time of writing this article (September 2022), it was also noted that another proposed amendment to R45 and R46A was sought to the effect, *inter alia*, allowing sales in execution to be conducted online.

6 See Singh, “Unlocking the Door to Reserve Prices in Sale in Execution Reserve Prices” 2021 *De Rebus*, May 20.

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;

(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 circumstances of such occupation;

(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.

(d) Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within 5 days of the date of the auction, which report shall contain—

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

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

(iii) the highest bid or offer made; and

(iv) Any other relevant factor which may assist the court in performing its function in paragraph (c).

(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.

In respect of the setting of a reserve price, Rule 46A(9) merely provides that the court must consider, *inter alia*, the market value and municipal rates of the property. The Rule does not mention how the creditor should obtain this information, or how it should be presented to the court.<sup>7</sup> It also does not mention other factors applicable to a sale, such as transfer costs,

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<sup>7</sup> Brits 2021 *Stell LR* 56.

eviction costs, commissions, and holding costs. Further, it is unclear whether factors such as, *inter alia*, the debtor's repayment history, the arrears owing on the mortgage, or the debtor's personal circumstances, should be taken into account. It is submitted that further guidance is required to enable a court to make a fair assessment and calculation of a sale in execution reserve price.<sup>8</sup> In addition to not providing any clarity as to the factors a court must consider when determining a reserve price, Rule 46A does not provide any methodology or formula for the calculation of the price.<sup>9</sup> Research has revealed that the courts are currently setting reserve prices in accordance with the "market value" or "forced sale value" of the property.<sup>10</sup> In most instances, these properties are not sold at the sale in execution due to the high reserve price.<sup>11</sup> In terms of Rule 46A(9)(c), (d), and (e), it results in the matter being referred back for the court to reconsider the reserve price.<sup>12</sup> In other words, another application is required to be made for a new reserve to be set. It is argued that such a process and delay is detrimental to both the debtor and creditor because it results in increased litigation costs, disinterest in the property, and deterioration of the dwelling.

More importantly, Rule 46A(9) fails to provide any clarity to how an application to vary a court reserve, must be brought. The cases of *Changing Tides 17 (Proprietary) Limited N.O. v Kubheka*; *Changing Tides 17 (Proprietary) Limited N.O. v Mowasa*; *Changing Tides 17 (Proprietary) Limited N.O. v Bucktwar*; *Changing Tides 17 (Proprietary) Limited N.O. v Horsley* 2022 5 SA 168 (GJ) ( *Changing Tides*) and *Standard Bank of South Africa Limited v Tchibamba* 2002 6 SA 571 (WCC) ( *Standard Bank*) expose some of the lacunae in Rule 46A(9) and brings to light the need for clarity and consistency.

### 3 *CHANGING TIDES v KUBHEKA*

#### 3.1 The Facts

In this matter to reconsider the initial court-set reserves, four cases in terms of Rule 46A(9)(c), (d), and (e), had been brought before Fisher J in chambers.<sup>13</sup> In other words, these four cases had already proceeded to a sale in execution, however, the court-set reserve at the sale was not reached. Subsequently, the matters were referred back to court to reconsider the reserve. These matters were presented before the judge in the absence of bringing an application before the open court and without service of the documents upon the judgment debtor.

Fisher J found that Rule 46A(9)(c), (d), and (e) dealing with the reconsideration of a court-set

8 See Singh, "A Consideration of R 46A (9) and the Setting of Court Set Reserve Prices for Sales in Execution" 2019 *De Rebus* 8, and Singh 2021 *De Rebus*. Another flaw with R46A is that it fails to indicate what process to follow when a bid is not received at a court-set reserve sale. In cases where the court reserve is not reached at the sheriff's sale in execution, there is a lot of inconsistency as to whether this simply results in a no-bid no-sale, or whether the sheriff is allowed to start the auction with fresh bidding until it reaches a bid as close as possible to the reserve price. This is particularly important because if the sheriff opens the floor for bidding, the court can approve the highest reasonable bid from the sale, even if it is below the court set reserve. It also gives the court an indication of what buyers are prepared to pay for the property and this can be considered if a new reserve price is required to be set. Alternatively, if it is a simple no-bid no-sale, then there is no such information at hand. See also Singh "To Foreclose or Not to Foreclose: Revealing the 'Cracks' within the Residential Foreclosure Process in South Africa" 2019 *SA Merc LJ* 145, 156–158.

9 Brits *Stell LR* 66.

10 See Brits *Stell LR* 68, and Singh 2019 *De Rebus*, 8. A "forced sale value" is described as the value that a property may be sold for under forced market conditions. This value is usually set to 80% or 70% of the market value.

11 See Singh 2019 *De Rebus*, 8, and Singh 2021 *De Rebus*, 20.

12 In most instances, where a reserve is not met at the initial sale in execution, the court is prone to not set a reserve price for any sales thereafter.

13 *Changing Tides*, para 1.

reserve price was not framed with precision, and accordingly had the potential to lead to much inconsistency.<sup>14</sup> Fisher J observed that there were different approaches used by practitioners when a reserve was not reached at a sale in execution. Some practitioners applied to open court for relief, while others approached judges in chambers. Some practitioners served the application on the judgment debtor, while others sought it *ex parte*. Furthermore, the evidence put forward was, in most instances, not of a high quality and such an approach was arguably inconsistent with the spirit and import of Rule 46A.<sup>15</sup>

In the current matters, the attorney for the judgment creditor set out in an affidavit that no bids were received above the reserve price at the auctions. It was argued that, given the ever-increasing liability to the local authority, a further delay in the sale will cause prejudice to both parties. It was further contended by the creditor's attorney that personal service was not a requirement in terms of the sub-rule.<sup>16</sup> The creditor accordingly requested the court to either (a) authorise the sale of the property without reserve; approve the highest bid received or substantially lower the reserve price; or (b) make an order as to how execution against the immovable property should proceed.<sup>17</sup>

Fisher J noted several gaps in the papers of the four cases before her. In some matters, the sheriffs' report from the sale in execution had not been filed with the court papers; the judgment order was not attached to the court papers; none of the documents had been served on the debtors; and several months, and in one instance an entire year, had lapsed since sale in execution before the application was launched.<sup>18</sup>

## 3 2 The Court's Decision

### 3 2 1 Should the matter be brought before a judge in chambers or before an open court

Fisher J found that there may have been some misunderstanding as to the process for Rule 46A(11) and Rule 46A(9). Rule 46A(11) relates to the cancellation of a sale in execution due to non-compliance by the purchaser at the sale in execution. Rule 46A(11)(a) provides that the sale "may be cancelled by a judge summarily on the report of the sheriff conducting the sale". The definition of "judge" in terms of Rule 1 means a judge sitting other than in open court — i.e. in chambers. This process, in terms of Rule 46A(11), may have created the erroneous assumption that a judge may be approached in chambers, in terms of Rule 46A(9), once the sale in execution has taken place and failed to achieve a bid higher than the court-set reserve. Fisher J held that this was not the correct process, as unlike Rule 46A(11), Rule 46A(9) does not use the term "judge" and Rule 46A(9) clearly provides that "the court" must undertake the reconsideration process.<sup>19</sup>

Accordingly, Fisher J held that the application for the reconsideration of the initial court-set reserve is interlocutory to the original application.<sup>20</sup> The applicant to such an application must thus approach the open court for relief by way of an affidavit.<sup>21</sup>

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14 *Changing Tides*, paras 9–10.

15 *Changing Tides*, paras 11–12.

16 *Changing Tides*, para 21.

17 *Changing Tides*, para 15.

18 *Changing Tides*, paras 17–23. The prescribed period for submitting the sheriff's report is five days after the sale in execution. This suggests that the reconsideration of a court-set reserve must be done without delay. The sheriff's report should contain information such as the number of people who attended the sale and the highest bid received for the property.

19 *Changing Tides*, para 26.

20 *Changing Tides*, para 27.

21 *Changing Tides*, para 29.

### 3 2 2 Factors to consider when reconsidering the reserve price

Fisher J held that the appropriate market price is the starting point of the Rule 46A(3) application for the determination of the reserve price. This is considered again in a reconsideration application in terms of Rule 46A(9).<sup>22</sup> A rote approach that suggests that the property should have no reserve, that the market price should be dropped, or that the property should simply be sold to the lowest bidder without further ado, simply because it was not sold at the reserve price, does not strike an appropriate balance between the interests of consumers and credit providers.<sup>23</sup> Fisher J held that:

An application for reconsideration should at least:

- seek specific relief in the notice of motion;
- satisfy the court that the auction was properly advertised, at least, in accordance with the rules;
- assert that there are, to the best of the deponents belief, no reasons other than the reserve price being too high which could rationally be said to be a reason for the failure to achieve a bid at the reserve;
- be brought as interlocutory to the main application so that the court is afforded access to all documents in the main application and all other interlocutory matters;
- be brought as soon as possible after the sheriff's report is issued;
- explain any failure to hold the sale within six months of the handing down of the foreclosure order;
- place before the court any additional reliable evidence of the true value which could assist in the reconsideration process - for example information relating to other recent property sales in the area.
- if the auction was held more than six months after the foreclosure order was handed down a court may wish to be furnished with a fresh sworn valuation.<sup>24</sup>

The court confirmed that the determination of the reserve price was a delicate judicial task involving the balancing of the respective rights of the parties.<sup>25</sup> The determination entails a consideration of the likelihood of the proposed reserve price being achieved and the respective prejudice to the interested parties if it is not achieved. Thus, the prospect of the execution process not yielding the price set, is a feature in the evaluation from the beginning of the process.<sup>26</sup>

### 3 2 3 Personal service or ex parte

Fisher J found that a foreclosure application is one of the processes specifically singled out for personal service by the Uniform Rules of Court. Personal service was necessary to satisfy the court that the debtor had been afforded an opportunity to be heard on what must entail their most

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22 *Changing Tides*, paras 30–32, referring to Lombard “Amendments of Rules in Line with Constitutional Rights to Adequate Housing” 2018 *De Rebus* 30.

23 *Changing Tides*, para 35.

24 *Changing Tides*, paras 37–38.

25 *Changing Tides*, para 6.

26 *Changing Tides*, para 7.

fundamental rights.<sup>27</sup> The constitutional imperatives inherent in the Rule 46A(9) application and the fact that the foreclosure application itself requires personal service is sufficient to justify the requirement that these applications also be personally served.<sup>28</sup>

### 3 2 4 The final order

Given the above, Fisher J concluded that the cases before her did not constitute applications and were irregular steps. The judge declined to entertain the matters in chambers and made no order in respect of any of them.

## 4 *STANDARD BANK v TCHIBAMBA*

### 4 1 The Facts

In this matter, the court had initially set a reserve price of R973 032,05.<sup>29</sup> On 7 December 2021, during the sale in execution, the property attained a highest bid of R700 000. The successful bidder was aware of the reserve price, but reportedly refused to increase the bid as he considered the property to be in poor condition and was concerned that a costly eviction process would be required to evict the foreign nationals living on the property.<sup>30</sup> The highest bidder duly signed the conditions of sale and attended to payment of a deposit to the sheriff.<sup>31</sup> The judgment creditor now sought to make an application in terms of Rule 46A(9) for the reconsideration of the reserve.

### 4 2 The Court's Decision

At the outset of the judgment the court acknowledged the problematic questions raised by the practical working of Rule 46A(9).<sup>32</sup> The court confirmed that “[p]aragraphs (c), (d) and (e) of Rule 46A(9) were not clearly worded”.<sup>33</sup> In addition to the individual paragraphs not reading clearly, they failed, conspicuously, to provide any procedural framework in terms of which the mandatory reconsideration is to happen.<sup>34</sup> The shortcoming of Rule 46A(9) was clearly recognised in *Changing Tides*.<sup>35</sup> The gaps in the Rule meant that the courts were unavoidably thrown back on their own devices to fill them. The inevitable result is the current lack of predictability and, lack of uniformity.<sup>36</sup>

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27 *Changing Tides*, para 5.

28 *Changing Tides*, para 48.

29 *Standard Bank*, para 5.

30 *Standard Bank*, para 7.

31 *Standard Bank*, para 8.

32 *Standard Bank*, para 1.

33 Referring to Van Loggerenberg *Erasmus*, *Superior Court Practice* Vol 2 (2015), and *Changing Tides*, para 9.

34 *Standard Bank*, para 11.

35 *Standard Bank*, para 12.

36 *Standard Bank*, para 13.

#### 4 2 1 How (in chambers or open court) and who (sheriff or judgment creditor) should bring the application

In the current matter, the sheriff, in compliance with Rule 46A(9), had compiled a report highlighting the events from the sale in execution. Once the sheriff had made his report, confusion reigned as to how and who should bring the reconsideration application before court.<sup>37</sup> After the sheriff had produced his report, the judgment creditor brought an application in February 2022 for the matter to be heard as a matter of urgency. The registrar, however, only allocated a date in August 2022.<sup>38</sup> Concerned about the prejudicial implications of the delay between February and August, the judgment creditor's attorneys addressed a letter to the judge president seeking directions as to how these reconsideration applications should be dealt with. The judge president's registrar responded to the letter simply indicating that the matter would now be heard in open court as soon as possible. The reply did not assist the judgment creditor's attorneys in determining how the matter might be brought before a judge in open court expeditiously.<sup>39</sup> After several inquiries with the chief registrar, the judgment creditor's attorneys were advised that an application in terms of Rule 46A(9) had to be brought by the sheriff, not the judgment creditor.<sup>40</sup> The facts of the case thereafter depict how the judgment creditor's attorneys were forced to run around in circles in order to get a court date.<sup>41</sup> During that time, the application had become opposed by the judgment debtors. The judgment debtors took a misjoinder point, and contended that the sheriff did not have standing to bring the application.<sup>42</sup>

The court found that both the sheriff and the judgment creditor had a real interest in obtaining further directions from the court as to how the matter would proceed. After the sale in execution, the sheriff became party to an executory contract of sale with the successful bidder, which was subject to the court's confirmation.<sup>43</sup> It was clear from Rule 46A(9) that the court could only undertake the reconsideration with updated information and the opportunity for input from the protagonists in the original Rule 46A application. Rule 46A(9) was deficient in that it did not provide for how those parties were to be given notice of the reconsideration or in what manner and by when they should exercise their right to adduce evidence or address argument.<sup>44</sup>

In *Changing Tides*, Fisher J found that Rule 46A(9) required that an application for a reconsideration had to be brought by the judgment creditor. However, the court in the current matter, did not subscribe to that view and found that the wording of the Rule directs the sheriff to submit a report to the court and requires the court receiving thereport to undertake the necessary reconsideration, irrespective of whether anyone applies for it.<sup>45</sup> The court found that parties have been making applications for the reconsideration of reserve prices simply because the Rule does not provide the procedural framework for getting the sheriff's report before a judge and enabling the judge to obtain the necessary information to undertake a reconsideration. The Rule does not put anyone on terms to institute interlocutory proceedings for the prescribed

37 *Standard Bank*, paras 14–16.

38 *Standard Bank*, para 17.

39 *Standard Bank*, paras 18–20.

40 *Standard Bank*, para 22.

41 *Standard Bank*, paras 23–26. The judgment creditors' attorneys addressed letters to the judge president and the chief registrar seeking clarity as to why an application had to be brought by the sheriff. The chief registrar responded by indicating, *inter alia*, that: "the rules were unclear as to who should bring an application"; and, "the latest directives ('33A RESERVE PRICE / RULE 46A') issued by the court indicate that the judge who set the price must attend to the matter." The letter concluded by indicating that the judge president had to be approached to refer the matter to a judge for determination in open court.

42 *Standard Bank*, para 31.

43 *Standard Bank*, para 36.

44 *Standard Bank*, para 37.

45 *Standard Bank*, para 32.

reconsideration.<sup>46</sup> It is not surprising in the circumstances that resort has been had to a variety of procedural methods in an endeavour to make the subrule work.<sup>47</sup>

#### 4 2 2 New proceedings or continuation

Binns-Ward J noted that it did not appear to have been appreciated by any of the parties that the reconsideration prescribed by Rule 46A(9)(c) is a procedural requirement, hence, it is not a process that can be opposed. It is a process in which the court must consider any relevant evidence put before it, but the process is not an adversarial one.<sup>48</sup> The exercise that is involved is nothing more than a consideration by the court on whether to amend the order that it has already given. The reconsideration does not occur in a new matter. The directive recognises that the judge who initially fixes the reserve price is not *functus* until the contemplated sale in execution has been concluded at or above the determined reserve price. Accordingly, the prescribed reconsideration must take place in open court, as it is an extension of the proceedings commenced in terms of Rule 46A(3). Such proceedings are ordinary motion proceedings, and thus subject to the general requirements of section 32 of the Superior Courts Act 10 of 2013. One cannot imagine how a court could properly undertake a consideration of the factors set out in Rule 46A(9)(b) other than in open court regarding the submissions by the interested parties.<sup>49</sup> Further, reference to “applications” in the directive falls to be interpreted to mean the reconsiderations prescribed in Rule 46A(9)(c), and thus not to imply fresh proceedings on notice of motion. The directive holds that the judge determining the “initial price” may “retain the matter”. The verb “retain” means “to keep in possession”; one cannot “retain” an application that has yet to be made.<sup>50</sup>

Accordingly, Binns-Ward concluded that the reconsideration exercise prescribed in Rule 46A(9)(c) is to be an extension of the original application provided for in Rule 46A(3). It followed that the original application continues on the basis of supplemented papers, commencing with the sheriff’s report. There is no new application to be instituted. If there were, one would expect the Rule to provide for it.<sup>51</sup>

The unfortunate lacunae in Rule 46A(9) require the court itself to deal with the consequences pending the remedial intervention plainly called for by the Rules Board. The provisions of the subrule imply that the registrar should place the sheriff’s report before a judge and make the necessary arrangements to render the prescribed reconsideration ripe for hearing in open court.<sup>52</sup> This would not entail an altogether novel process, as the registrar already sets down case management matters for consideration by case manager judges.<sup>53</sup>

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46 *Standard Bank*, para 33.

47 *Standard Bank*, para 34.

48 *Standard Bank*, paras 29–35.

49 *Standard Bank*, para 43.

50 *Standard Bank*, para 43.

51 *Standard Bank*, para 38.

52 *Standard Bank*, para 39.

53 *Standard Bank*, para 40.

### 4 2 3 Final court order

By the time the matter appeared at court the judgment debtors had concluded a sale of the property privately for R1,9 million. The judgment creditor's counsel confirmed that the mortgagee would have no objection to the private sale proceeding, provided that it did so without undue delay.<sup>54</sup>

In the circumstances, the judge made an order to allow the judgment debtors a reasonable opportunity to transfer the property in terms of the private sale agreement, failing which the judgment creditors will be authorised to readvertise a sale in execution without a reserve price to be conducted at the site of the property.<sup>55</sup> It shall be a condition of any such sale in execution that if the highest bid obtained at the readvertised sale does not exceed that obtained at the auction held on 7 December 2021, the sale to the purchaser at that auction will be deemed to have been confirmed. In the event that transfer of the property to the purchasers in terms of the deed of sale is not effected on an application made in chambers, the judgment creditor is authorised to readvertise the sale in execution of the attached property in the manner provided in the rules of court.<sup>56</sup> Binns-Ward J further found Rule 46A(9) deserving of further consideration by the Rules Board, and accordingly referred the judgment to the Board for consideration.<sup>57</sup>

## 5 ANALYSIS, CONCLUSION, AND RECOMMENDATIONS

The *Changing Tides v Khubeka* and *Standard Bank v Tchibamba* judgments expose some of the flaws within Rule 46A(9) of the Uniform Rules of Court. The paragraphs below summarise some of the gaps within the subrule that were discussed in the abovementioned cases, and also provide recommendations as to how these flaws can be remedied.

### 5 1 In Chambers or before Open Court?

In both *Changing Tides* and *Standard Bank*, the courts expressed concern about the fact that Rule 46A(9) failed to provide any clarity as to how a reconsideration application should be brought. Due to the lack of clarity in this regard, some practitioners brought such applications before judges in chambers, while others brought these applications in open court. In both *Changing Tides* and *Standard Bank*, the courts found that such applications should be brought before an open court. The cases also found that all the necessary information and evidence must be brought before the court to assist it in making a decision as to a new reserve price, and this could only be done in open court and not in chambers.

Despite the courts' finding, currently, in practice, there is still a lack of uniformity as to how these matters can proceed, as several jurisdictions still allow Rule 46A(9) reconsideration applications to be brought in chambers. It is trite that there is a need for consistency and uniformity nationally, and accordingly, it is submitted that it is preferable for reconsideration applications to be heard in open court.

The lacunae in Rule 46A(9) in respect of the failure to provide clarity on how a reconsideration application should proceed, brings to light the lack of clarity with foreclosure proceedings in South Africa. It is recommended that the lack of uniformity can be remedied by establishing a separate court roll, or special foreclosure court, within each division of the High Court,

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54 *Standard Bank*, para 50

55 *Standard Bank*, para 52. The court was of the view that the sale in execution would have achieved a higher bid if the sale had occurred on-site, and not at the sheriff's premises. The writer is not in concurrence with this view, as the court failed to take into account that debtors who face execution against their homes are in most instances very disgruntled and having the forced sale on their home on-site may create a very hostile environment.

56 *Standard Bank*, para 54.

57 *Standard Bank*, para 44.

exclusively for foreclosure matters. This special foreclosure court or foreclosure court roll will only consider foreclosure-related cases and consequently could bring clarity, consistency, expertise, and uniformity to all foreclosure matters across the country.<sup>58</sup>

## 5 2 Is Personal Service Required?

The requirement for personal service has created much debate during foreclosure proceedings. The Uniform Rules of Court provide that a Rule 46A application must be personally served upon the judgment debtor.

While it is agreed that service or notice is required to satisfy the *audi alteram partem* rule, personal service for the purposes of reconsideration applications may be a yard too far. In other words, while it is accepted that personal service should be required for Rule 46A(3), personal service should not be a requirement for a Rule 46A(9) reconsideration application. It may be fair to assume that a debtor who is in default on this mortgage agreement is fully aware of the default and should know that the property is being foreclosed. Consequently, under such circumstances, it is not foreign for a *mala fide* debtor to escape service of court documents and frustrate the creditors' legal process.<sup>59</sup>

As indicated in *Standard Bank*, the reconsideration application is a continuation of initial proceedings and is not a fresh process. Accordingly, it is submitted that since notice has already been given to the judgment debtor, personally, during the initial execution proceedings,<sup>60</sup> notice of the reconsideration application need not be served "personally" again. Personal service will only delay proceedings and increase legal costs. Hence, it is submitted that personal service should not be a requirement for a reconsideration application, and the service of such an application should be allowed via technological mechanisms such as email, which is cheaper and faster.<sup>61</sup>

## 5 3 What Information Needs to be Brought before the Court for the Reconsideration Application?

As indicated above, Rule 46A does not provide a detailed list of factors for a court to consider when determining a reserve price. Furthermore, it is unclear what factors can or cannot be considered by the court when determining a reserve price. This lacuna has created much uncertainty and inconsistency between the different divisions especially.

In *Changing Tides*, the court held that the market value of the property must be considered when determining a reserve price. The market value is described as the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing where the parties had each

58 See Singh "A Need for a Specialized Foreclosure Act?" *Without Prejudice* April 2020 76; Singh "Eeny, Meeny, Miny, Moe, to which Court will Foreclosures Go? A Brief Analysis of Recent Foreclosure Proceedings and a Consideration of the Need for Specialised Foreclosure Courts in SA" 2019 *De Rebus* 31; and Singh "Eeny, Meeny, Miny, Moe, to which Court will Foreclosures Go? (Part 2), The SCA has Spoken" 2021 *De Rebus* 29.

59 See *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC), and *Absa Bank Limited v Mkhize and Another (and two similar cases)* 2014 1 All SA 1 (SCA).

60 See also s 129 of the National Credit Act 34 of 2005. It must be noted that prior to proceeding with an R46A application, a creditor is required to deliver several notices and legal documents to a debtor, including a letter of demand, s 129 notice, and summons.

61 See Singh "You've Got Mail – Have the Electronical Communications Become the New Registered Mail?" 2022 *Without Prejudice* 74; and Singh "I Notice you Noticing me – A Critical Analysis of the Section 129 Notice of the National Credit Act, and Recommendations for the Implementation of a 'Specialised' Foreclosure Notice" 2021 *SA Merc LJ* 25.

acted knowledgeably, prudently, and without compulsion.<sup>62</sup> In disagreement, it is submitted that the market value should not be the sole factor considered when determining a reserve price.<sup>63</sup> In *Changing Tides*, the court failed to consider the fact that a sale in execution does not occur under favourable marketing conditions and does not represent a willing seller and willing buyer. In most instances, a sale in execution is a forced or distressed sale, wherein the seller is not a willing participant. Accordingly, it is unlikely for such a sale to reap market value prices. In most instances where a market value reserve is set, the properties are not sold, or even bid for, at the sale in execution.<sup>64</sup> As a result, the matter has to be referred back to court, and the court may reconsider the reserve price. It is submitted that such a process and delay is detrimental to both the debtor and creditor because of increased litigation and municipal costs, disinterest in the property, and deterioration of the dwelling. Accordingly, such scenarios should be avoided and a just and equitable balance needs to be struck by the courts when determining a reserve price ensuring that the interests of all interested parties are protected.

#### 5 4 Proposals

When determining a reserve price the courts should step into the shoes of a reasonable bidder or purchaser and consider what price he or she would willingly bid for the property under distressed or forced market conditions. It is submitted that a diligent purchaser at a sale in execution takes into account several factors before bidding for a property. A bidder will consider, *inter alia*: general transfer and conveyancing fees; sheriff's commission; outstanding municipal and body corporate bills; electrical and compliance certificate; maintenance, upgrading, or renovation costs; possible eviction costs; and costs of resale of the property such as estate agents' commission. These factors are currently not taken into account by the courts when determining a reserve price.

In order to avoid the current challenges and uncertainties, it is suggested that a standard formula be adopted by the courts to calculate a sale in execution reserve price. It is suggested that a reserve price should be approximately 70% of the forced sale value of the property minus outstanding rates and taxes. For example, for a property with a forced sale value of R 1 million, with outstanding arrear rates of R 50 000, the reserve price of the property should be calculated using the conservative formula: [(FSV x 70%) – rates]. In our example, a reserve of R 650 000 would be estimated: [(R 1 million x 70%) – R 50 000 = R 650 000.]<sup>65</sup>

The discussion in this article confirms that there is much uncertainty with the application of Rule 46A(9) when reconsidering a reserve sale in execution price. The question must further

62 *Changing Tides*, paras 30–32.

63 It is submitted that the “forced sale value” of the property should be considered, instead of the market value. The forced sale value is approximately 80% of the market value. The forced sale value is usually included in most professional valuation reports.

64 See *Changing Tides v Bisschoff*, (unreported case no 44126/2018) GLDHC. Due to the high court-set reserves in this matter this property was set down for auction on four occasions, resulting in delaying the judgment creditors' execution for over three years. In July 2019, the court set a reserve of R 1 500 000 for the property (the market value of this property was approximately R 1 300 000). No bids were received during the first sale of the property, as the bidders were all of the view that the reserve was too high. An R46A(9) application was made a few months later and the reserve was lowered to R 1 250 000. Similar to the first auction, no bids were received at the second auction. Another R46A(9) application was made, and the reserve was lowered to R 900 000. During the third auction, no bids were received. A third R46A(9) application was made in May 2022, wherein the court granted an order for the property to be sold with no reserve.

65 It is recommended that a standard formula be used to create consistency in practice. The proposed formula above takes into account the fact that sales in execution naturally do not reap market related prices. Further, the majority of bidders at auction sales are speculators who are not willing to bid high prices for distressed houses. When bidding for a property, one needs to consider several costs, such as, sheriff's commissions, possible eviction costs, and arrears body corporate levies, and municipal rates and taxes.

be asked whether the idea of setting a court-set reserve is favourable in the South African economy. It is submitted that while the setting of a reserve price may potentially resolve the problem of homes being sold at low prices, the disclosure of a reserve price by the court may reduce the potential selling price of the property at the sale in execution, because buyers will reduce their bidding prices in accordance with the court-set reserve price. On the other hand, should the court-set reserve be too high and not met, buyers will detach themselves from these sales and this may result in some homes becoming non-equitable — leaving mortgagees without any security. It must be accepted that sales in execution, which by their very nature are forced sales, will not always achieve market-value prices. Nevertheless, it is necessary that procedural checks are in place to ensure that all outcomes from the sale in execution process are in line with our constitutional values.