"Sold to the Highest Bidder" – Not Any More: A Consideration of Rule 46A(9) of the Uniform Rules of Court and Court-Set Reserve Prices in Sales in Execution

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SUMMARY

Prior to the implementation of rule 46A(9) of the Uniform Rules of Court, immovable properties judicially auctioned at a sale in execution were sold, without a reserve price, to the highest bidder. This process changed in December 2017 when the Uniform Rules of Court were amended. Rule 46A now provides that a court must consider setting a reserve price for a sale in execution during an application for execution against immovable property. Rule 46A(9) further provides that if the court-set reserve is not met at a sale in execution, a court must reconsider the reserve and direct how execution should proceed. These provisions were implemented to ensure that a person's home was not sold for unrealistically low prices to the detriment of judgment debtors. Rule 46A(9), however, fails to provide any clarity on the practical factors that should be taken into account by a court when determining a reserve price, nor does it provide any guidance on how such an application must be brought before the court. Consequently, many court reserves are set at high market prices and fail to be sold at sales in execution. These matters are referred back to court, and in many instances the properties concerned become stale in the market, deteriorate in value and become unsellable. The rule 46A(9) process of requiring the court to set a reserve price may thus have created a stumbling block for creditors seeking rightfully to execute against hypothecated immovable property.

KEYWORDS: rule 46A(9), reserve price, sale in execution, immovable property

1 INTRODUCTION

The *South African Concise Oxford Dictionary* defines an "auction" as a public sale in which goods or property are sold to the highest bidder.[1] In foreclosure proceedings, the auction process is one of the primary legal remedies used by creditors to recover their claim against a defaulting (non-

[1] See *South African Concise Oxford Dictionary* (2010).

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paying) debtor. This process essentially allows the creditor, after compliance with several legal requirements,[2] to auction the hypothecated immovable property at a sheriff's auction. The general rule is that the auctioning of a person's home is undertaken as an absolute last resort and only after all other remedies are unfruitful.[3]

Over the years, there has been much concern surrounding the judicial auction process (otherwise known as a sale in execution), and in particular, with the very low prices at which auctioned properties (and more specifically homes) were sold.[4] Before its various amendments, rule 46 of the Uniform Rules of Court[5] – Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa[6] – allowed immovable property to be sold at a sale in execution, to the highest bidder, without any reserve price. This position allowed homes to be sold for a fraction of their true value, well below the market value of the property.[7] To prevent the situation of homes being sold for unrealistically low prices, below their true value, rule 46A[8] of the Uniform Rules of Court was introduced to allow courts the discretion to set a reserve price for a sale in execution.

Currently, rule 46A(9) of the Uniform Rules of Court provides that the court "must" consider the setting of a "reserve price" for a sale in execution.[9] The amendment seeks to protect debtors by ensuring that homes are not sold for extremely low prices. The effect of the amendment is that all auctioned immovable property (homes)[10] should ideally be sold with a court-set reserve price. If a sale in execution fails to reach the court-set reserve price, the property will not be sold, and the court will be required to set another reserve price for the property, consider selling the property at the highest bid achieved at the auction, or consider alternatives.[11]

Despite its noble intentions to create greater protection for debtors, rule 46A(9) has created several challenges. First, the rule fails to prescribe

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2 See Singh (*A Critical Analysis of the Home Mortgage Foreclosure Requirements and Procedure in South Africa and Proposals for Legislative Reform* (PhD thesis, University of KwaZulu-Natal) 2018 https://researchspace.ukzn.ac.za/handle/10413/18970) for a detailed discussion of the foreclosure process and requirements.

3 See *Jaftha v Schoeman* 2005 (2) SA 140 (CC) par 59.

4 See Brits "Purging Mortgage Default" 2013 *SLR* 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; Shaw "Too Quick to Execute – How Does SA's New Rules on Sale in Execution Compare Internationally?" August 2016 *De Rebus* 32.

5 GN R981 in *GG* 33689 of 2010, as amended.

6 GN R48 in *GG* 999 of 1965, as amended.

7 See *Nxazonke v Absa Bank Ltd* [2012] ZAWCHC 184, wherein a property was sold for R10.00, when the municipal value of the property was R81 000.

8 Inserted in terms of GN R1272 in *GG* 41257 of 2017.

9 The rule provides that the court "must" *consider* setting a reserve price. On a strict interpretation, it is submitted that the setting of a reserve is not required in every case, as it is the "consideration" of setting a reserve that is a "must", and not the setting of the reserve itself. Accordingly, a court is entitled to set no reserve price after the relevant considerations.

10 It must be noted that rule 46A only applies to immovable property utilised as a primary residence or home of the debtor. Rule 46A does not apply to holiday homes, investment properties or commercial buildings. See *FirstRand Bank v Folscher* 2011 (4) SA 314 (GNP), *Nedbank v Khoza* 2019 ZAGPJHC 171 and *Bestbier v Nedbank Ltd* 2023 (4) SA 25 (SCA).

11 See rule 46A(9)(c) and (e).

the "exact" factors the court should take into consideration when determining a reserve price or how the reserve price should be calculated. Secondly, rule 46A(9) fails to provide any clarity on the process to be followed when the court-set reserve is not met at a sale in execution. Moreover, it is unclear how such an application should be brought before a court, who should bring such an application, and what information should be placed before the court.[12] This lacuna has created much inconsistency in practice and has also created significant delays and stumbling blocks for creditors seeking to enforce their foreclosure rights.

Accordingly, the purpose of this article is to consider the application of rule 46A(9), discuss the challenges with the application of the rule, and provide some suggestions on how these challenges can be resolved. This article is divided into four parts. Part one serves as an introduction to the topic. Part two provides an analysis of rule 46A(9), its processes and its challenges. Part three considers the most important judicial cases on the topic of court-set reserve prices, and part four serves as a conclusion to this article and provides recommendations on how the challenges exposed can be remedied.

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

The origins of the Uniform Rules of Court can be traced back to the 1950s. The Uniform Rules of Court were initially established in terms of the Supreme Court Act[13] and are currently governed by the Rules Board for Courts of Law Act.[14] The primary purpose of the Uniform Rules of Court is to establish a uniform system for court process to create clarity and consistency in litigious matters.

Since the implementation of the Constitution,[15] the Uniform Rules of Court, in particular the rules governing foreclosure against a home, namely rules 46 and 46A − have been amended on several occasions. The most relevant amendments to the rules relating to the foreclosure against a home were in 2010 and 2017.[16] The developments leading up to the introduction of rule 46A and its amendments have been traced extensively in various publications.[17]

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12 See Singh "Unlocking the Door to Reserve Prices in Sale in Execution Reserve Prices" May 2021 *De Rebus* 20.

13 59 of 1959.

14 107 of 1985. The Uniform Rules of Court are currently made by the Rules Board for Courts of Law Act, with the approval of the Minister of Justice and Correctional Services. See s 6 of the Rules Board for Courts of Law Act.

15 *Constitution of the Republic of South Africa*, 1996.

16 GN R1272 in *GG* 41257 of 2017. In December 2010, rule 46 was amended to the effect of introducing judicial oversight into the execution process against residential immovable property. In December 2017, rule 46A came into effect and inserted some additional procedural requirements into the judicial execution process, such as the requirement for courts to set a sale-in-execution reserve price. It should also be noted that at the time of writing this article (2025), the Rules Board of Court proposed several new amendments to Rule 46A. These amendments are still being considered, and no new rules have been published yet

17 See Brits "Execution Against Residential Immovable Property in Terms of the High Court Rule 46A" 2021 1 *SLR* 32; Brits *Mortgage Foreclosure Under the Constitution: Property,*

As indicated, rule 46 read with rule 46A of the Uniform Rules of Court currently governs the foreclosure process against a home. In 2017, the Uniform Rules of Court were amended to the effect of requiring the court to set a reserve price for immovable properties (homes) in a sale in execution. Rule 46A(9) governs the setting of a reserve price for a sale in execution and currently reads as follows:

> "*(a)* In an application under this rule, or upon submissions made by a respondent, 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;
> (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."

Despite the purpose of the Uniform Rules of Court being to create certainty in litigious proceedings, there has been much inconsistency with the application and interpretation of rule 46A. The inconsistencies surrounding rule 46A are evident from the many judicial decisions interpreting the rule and from the fact that these rules have been amended several times over

Housing and the National Credit Act (LLD thesis, University of Stellenbosch) 2012 91; Brits, *Real Security* 1ed (2016) ch 2–3; Singh *A Critical Analysis of the Home Mortgage Foreclosure Requirements and Procedure in South Africa and Proposals for Legislative Reform*; Steyn *Statutory Regulation of Forced Sale of a Home in South Africa* (LLD thesis, University of Pretoria) 2012.

the last decade and a half.[18] Despite the efforts by the judiciary and lawmakers to create clarity in the application and interpretation of the rule, there is still much inconsistency in several areas.

One example of inconsistency can be noted in respect of the setting of a reserve price. Rule 46A(9) provides that the court must take into account, *inter alia,* the market value and municipal rates of the property when setting a reserve price. No mention is made of how the creditor should obtain any of this information, or how such information is to be placed before the court.[19] It is submitted that, given the inefficiencies of most local authorities, the obtaining of rates amounts from municipalities can be a difficult and long process. In addition, obtaining a formal valuation of a property can also be a lengthy and costly exercise. The rules do not make any provision for how these reports should be obtained and who should bear the costs thereof.

Of particular concern is that the rule makes no mention of the other factors applicable to a sale, such as transfer costs, possible eviction costs, commissions, certificates and holding costs. These are some of the costs that a prudent purchaser takes into account before buying or bidding for a property. Some courts may take the above factors into account when determining a reserve price, and other courts may not – this inconsistency leads to a lack of uniformity. Moreover, it is unclear whether or not factors such as the debtor's repayment history, arrears owing on the mortgage, or the debtor's and occupants' 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.[20]

In addition to not providing any clarity as to the factors a court must take into account when determining a reserve price, rule 46A does not provide any methodology or formula for the calculation of the reserve price.[21] Research has revealed that courts are currently setting reserve prices in

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18 The conflicting decisions interpreting rule 46A are discussed in part 3 of this article. For a discussion of some of the inconsistencies with rule 46, see also *Nedbank v Mortinson* 2005 (6) SA 462 (W); *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 SCA*; Campus Law Clinic, University of KwaZulu-Natal v Standard Bank Ltd* 2006 (6) SA 103 (CC); *Nedbank v Mashiya* 2006 (4) SA 422 (T); *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC); *FirstRand Bank v Folscher* 2011 (4) SA 314 (GNP); *Absa Bank Ltd v Mokebe* 2018 (6) SA 492 (GJ); *Standard Bank of South Africa Limited v Hendricks* 2019 (2) SA 620 (WCC); *Bestbier v Nedbank Ltd* 2024 (4) SA 331.

19 Brits 2021 *SLR* 56.

20 See Singh "A Consideration of R 46A (9) and the Setting of Court Set Reserve Prices for Sales in Execution" December 2019 *De Rebus* 8; Singh May 2021 *De Rebus* 20. Another flaw of rule 46A is that it fails to indicate what process to follow when a bid is not received at a court-set reserve at a sale in execution. In cases where the court reserve is not reached at the sheriff's sale in execution, uncertainty exists as to whether or not 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 as, when 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 *South African Mercantile Law Journal* 145 156–158.

21 Brits 2021 *SLR* 66.

accordance with the "market value" or "forced sale value" of the property.[22] In most instances, these properties are not sold at the sale in execution owing to a high reserve price.[23] Consequently, these matters are referred back, in terms of rule 46A(9), for the court to reconsider the reserve price.[24] In other words, another application is required to be made to court for a new reserve price to be set. In practice, these applications can take more than seven to eight months to be heard, and it is submitted that such process and delay are detrimental to both debtor and creditor, as it results in increased litigation costs, escalating mortgage and municipal rates, lack of interest in the marketability of the property, and physical deterioration of the dwelling.

Another major challenge with rule 46A(9) is that it fails to provide any clarity on how an application to vary or reconsider a court-set reserve must be brought, and who should bring such an application. The rule is unclear as to whether a reconsideration application can be made "in chambers" or must be made in "open court". It is also unclear as to whether the application must be brought by the judgment creditor, the sheriff of the High Court, or the judgment debtor.

These gaps in the rules have resulted in much confusion in practice and in conflicting case law. The section below discusses some recent prominent judicial cases that have considered rule 46A(9) and which have exposed some of the inconsistencies and gaps with the rule.

3 RECENT CASE LAW

3 1 *Changing Tides v Kubheka*[25]

In this matter, four cases in terms of rule 46A(9) – brought to reconsider the court-set reserves – were before Fisher J in chambers.[26] The creditor sought an order to: authorise the sale of the properties without a reserve; or approve the highest bid received at the sale; or substantially lower the court-set reserve prices; or make an order as to how execution against the immovable properties was to proceed.[27] All these matters were presented to the judge without bringing an application before open court and without service of the documents upon the judgment debtors.

Fisher J found that rule 46A(9) was not framed with precision and had the potential to lead to inconsistency.[28] Consequently, different approaches were

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22 See Singh "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" 2023 37(1) *Speculum Juris* 175; Brits 2021 *SLR* 68; Singh December 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 80% or 70% of the market value.

23 See Singh December 2019 *De Rebus* 8–9; Singh May 2021 *De Rebus* 20.

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

25 *Changing Tides 17 (Proprietary) Limited NO v Kubheka; Changing Tides 17 (Proprietary) Limited NO v Mowasa; Changing Tides 17 (Proprietary) Limited NO v Bucktwar; Changing Tides 17 (Proprietary) Limited NO v Horsley* 2022 (5) SA 168 (GJ).

26 *Changing Tides supra* par 1.

27 *Changing Tides supra* par 15.

28 *Changing Tides supra* par 9–10.

used by different practitioners when a court-set 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 in these applications was not of a high quality, and such an approach was inconsistent with the spirit of rule 46A.[29]

In the current matters, the attorney for the judgment creditor set out in an affidavit that no bids were received above the court-set reserve price at the auctions. It was argued that, given the ever-increasing liability to the local authority, a further delay in the sale would cause prejudice to both parties. It was further contended that personal service was not a requirement in terms of the subrule.[30]

Fisher J noted several gaps in the papers of the four cases. In some matters, the sheriff's 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 the sale in execution before the application was launched.[31]

Fisher J noted that a foreclosure application was 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. The constitutional imperatives inherent in the rule 46A(9) application and the fact that the foreclosure application itself required personal service were sufficient to justify the requirement that these applications also be personally served.[32]

In respect of the reconsideration of a court-set reserve price, Fisher J held:

> "A rote approach which says that the mere fact that the property was not sold is enough to suggest that the property should have no reserve, that a significant drop in the market price should be allowed or that the property should simply be knocked down to the lowest punter without further ado does not … strike an appropriate balance between the interests of consumers and credit providers."[33]

Fisher J held that the starting point of the rule 46A(3) application for the determination of the reserve price was the appropriate market price. This is considered again in a reconsideration application in terms of rule 46A(9).[34]

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29 *Changing Tides supra* par 11–12.

30 *Changing Tides supra* par 21.

31 *Changing Tides supra* par 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 (although in practice this is rarely achieved, and it usually takes two to three months for the sheriff's report on the sale in execution to be received). 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.

32 *Changing Tides supra* par 5 and 48.

33 *Changing Tides supra* par 35.

34 *Changing Tides supra* par 30–32, and par 37–38, referring to Lombard "Amendments of Rules in Line With Constitutional Rights to Adequate Housing" May 2018 *De Rebus* 30.

The determination of the reserve price was thus a delicate judicial task involving the balancing of the respective rights of the parties.[35] The determination entailed a consideration of the likelihood of the proposed reserve price being achieved and the respective prejudice to the interested parties if it were not achieved. The prospect of the execution process not yielding the price set was a feature in the evaluation from the beginning of the process.[36]

With regard to whether an application to reconsider the court-set reserve must 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 (9) respectively. 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 otherwise than in open court – that is, 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 a sale in execution has taken place but 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". Rule 46A(9) clearly provides that "the court" must undertake the reconsideration process.[37] Accordingly, Fisher J held that an application for the reconsideration of the initial court-set reserve was an interlocutory application.[38] The applicant to such an application must thus approach the open court for relief by way of affidavit and should not approach a judge in chambers.[39]

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.

3 2 *Standard Bank v Tchibamba*[40]

In this matter, the court had initially set a reserve price of R973 032.05 (it is unclear how the court reached such an odd figure; however, it is assumed that this figure was recommended by the creditor after the use of a formula

Fisher J further 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; assert that there are 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; 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; and, place before the court any additional reliable evidence of the true value that could assist in the reconsideration process.

35 *Changing Tides supra* par 6.

36 *Changing Tides supra* par 7.

37 *Changing Tides supra* par 26.

38 *Changing Tides supra* par 27.

39 *Changing Tides supra* par 29.

40 *Standard Bank of South Africa Limited v Tchibamba* 2002 (6) SA 571 (WCC).

to calculate reserve prices).[41] During the sale in execution in December 2021, 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.[42] The judgment creditor now sought to make an application in terms of rule 46A(9) for reconsideration of the reserve.

At the outset of the judgment, the court acknowledged the problematic questions raised by rule 46A(9).[43] It was clear that rule 46A(9) was "not clearly worded" and failed conspicuously to provide any procedural framework.[44]

In the current matter, the sheriff 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 rule 46A(9) application before the court.[45]

In *Changing Tides*, Fisher J found that a rule 46A(9) application had to be brought by the judgment creditor. The court in the current matter, however, did not subscribe to that view and found that the wording of the rule directed the sheriff to submit a report to the court and required the court receiving such a report to undertake the necessary reconsideration, irrespective of whether anyone had applied for it or not.[46] The court found that parties had been making applications for the reconsideration of reserve prices simply

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41 *Standard Bank of South Africa Limited v Tchibamba supra* par 5.

42 *Standard Bank of South Africa Limited v Tchibamba supra* par 7. As submitted by the writer, eviction costs are not one of the factors the court is required to consider when determining a reserve price.

43 *Standard Bank of South Africa Limited v Tchibamba supra par 1.*

44 *Standard Bank of South Africa Limited v Tchibamba supra* par 11, referring to Van Loggerenberg *Erasmus Superior Court Practice* Vol 2 (Juta) (2017) (loose-leaf), and *Changing Tides supra* par 9.

45 *Standard Bank of South Africa Limited v Tchibamba supra* par 14–37. After the sheriff 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 for the matter to be heard in six months. Concerned about the prejudicial implications of the delay, the judgment creditor's attorneys addressed a letter to the Judge President seeking directions as to how these applications should be dealt with. The Judge President's registrar responded to the letter, indicating that the matter would 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. 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. 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. 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. 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. 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 as to in what manner and by when they should exercise their right to adduce evidence or address argument.

46 *Standard Bank of South Africa Limited v Tchibamba supra* par 32.

because the rule did not provide the procedural framework for getting the sheriff's report before a judge to enable the judge to obtain the necessary information to undertake a reconsideration. The rule did not place anyone on terms to institute interlocutory proceedings for the prescribed reconsideration.[47] 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.[48]

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) was a procedural requirement; hence, it was not a process that could be opposed. It was a process in which the court must consider any relevant evidence put before it, but the process was not an adversarial one.[49] The exercise involved was nothing more than a consideration by the court of whether to amend the order that it had already given. The reconsideration did not occur in a new matter. The directives recognised that the judge who initially fixed the reserve price was not *functus* until the contemplated sale in execution had been concluded at or above the determined reserve price. Accordingly, the prescribed reconsideration must take place in open court, as it was an extension of the proceedings commenced in terms of rule 46A(3). Such proceedings were ordinary motion proceedings and thus subject to the general requirements of section 32 of the Superior Courts Act.[50] One could not imagine how a court could properly undertake a consideration of the factors set out in rule 46A(9)(b) other than in open court with regard to the submissions by the interested parties.[51] Moreover, reference to "applications" in the directive fell to be interpreted to mean the reconsiderations prescribed in rule 46A(9)(c), and thus not imply fresh proceedings on notice of motion. The directive held that the judge determining the "initial price" may "retain the matter". The verb "retain" meant "to keep in possession"; one could not "retain" an application yet to be made.[52]

Accordingly, Binns-Ward concluded that the reconsideration exercise prescribed in rule 46A(9)(c) was to be an extension of the original application provided for in rule 46A(3). It followed that the original application continued on the basis of supplemented papers, commencing with the sheriff's report. No new application was to be instituted. If that were so, one would expect the rule to provide for it.[53]

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.[54] This would not entail an altogether novel process, as the registrar already sets

47 *Standard Bank of South Africa Limited v Tchibamba supra* par 33.
48 *Standard Bank of South Africa Limited v Tchibamba supra* par 34.
49 *Standard Bank of South Africa Limited v Tchibamba supra* par 29–35.
50 10 of 2013.
51 *Standard Bank of South Africa Limited v Tchibamba supra* par 43.
52 *Standard Bank of South Africa Limited v Tchibamba supra* par 43.
53 *Standard Bank of South Africa Limited v Tchibamba supra* par 38.
54 *Standard Bank of South Africa Limited v Tchibamba supra* par 39.

down case-management matters for consideration by case-manager judges.[55]

Given all the delays in this matter, by the time the matter appeared in 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.[56] 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 would be authorised to readvertise a sale in execution without a reserve price to be conducted at the site of the property.[57] In the event that transfer of the property to the purchasers in terms of the deed of sale was not effected, on application made in chambers, the judgment creditor was authorised to readvertise the sale in execution of the attached property in the manner provided in the rules of court.[58]

Binns-Ward J also found rule 46A(9) deserving of further consideration by the Rules Board and accordingly referred the judgment to the Board for consideration.[59] To date, the rule is still under consideration.

3 3 *Nedbank v Mabaso*[60]

In this matter, the court initially set a reserve price of R596 305.99 for the property. The property was thereafter set down for auction in October 2020, where the highest bid achieved was R300 000.[61] In light of the reserve price not being reached, Nedbank approached the court in terms of rule 46A(9), seeking an order for the court to allow the property to be sold without a reserve. They claimed that by virtue of the onerous reserve price, no purchasers were interested in bidding for the property; in not setting a reserve, more buyers would attend and bid at the sale.[62]

The court, however, did not agree with this argument and noted with concern that Nedbank's unsupplemented arguments and failure to submit an updated valuation of the property suggested a cavalier approach to the matter on their part.[63]

Moultrie AJ found that it would not be proper in the circumstances to make an order in terms of rule 46A(9) for the property to be sold to the highest

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55 *Standard Bank of South Africa Limited v Tchibamba supra* par 40.

56 *Standard Bank of South Africa Limited v Tchibamba supra* par 50.

57 *Standard Bank of South Africa Limited v Tchibamba supra* par 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: having the forced sale of their home on-site may create a very hostile environment.

58 *Standard Bank of South Africa Limited v Tchibamba supra* par 54.

59 *Standard Bank of South Africa Limited v Tchibamba supra* par 44.

60 *Nedbank v Mabaso* 2023 (3) SA 298 (GJ).

61 *Nedbank v Mabaso supra* par 1–2.

62 *Nedbank v Mabaso supra* par 4.

63 *Nedbank v Mabaso supra* par 5.

bidder at the auction, as it was questionable whether that bidder, who was not a party to the application, was still interested in pursuing the sale given the long period (two years) that had elapsed since the auction. Furthermore, Nedbank did not consider this as a possibility as it was not an order for which they had prayed.[64] It also did not appear proper to allow a sale in execution of the property without a reserve price, simply in the hope that it would attract more bidders, as contended by Nedbank.[65]

The court found that the most sensible approach to setting a reserve price was played out in the auction, as this was the clearest and most accurate indication of the property value. Accordingly, the court set a new reserve price of R300 000, in alignment with the highest bid reached at the auction.[66]

3 4 *Firstrand Bank Limited v Khan*[67]

In this matter, FirstRand made an application in terms of rule 46A(9) for: the authorisation of a sale of an immovable property to the highest bidder, as the court-set reserve price had not been met at the sale in execution; alternatively, for the court to cancel the sale and authorise another sale in execution to proceed without a reserve price. The court-set reserve price was R3.3 million, and the property was sold for R3 010 000 at the sale in execution.[68]

The facts of the case revealed that the Khans had fallen in arrears on their mortgage repayments, whereupon FirstRand had initiated foreclosure proceedings. In February 2020, the property was declared specially executable subject to a reserve price of R5 million. At that stage, the judgment debt was approximately R4.5 million.[69]

The first sale in execution of the property took place in November 2020 and fetched a price of R2 million, only after the sheriff restarted the sale without the reserve price of R5 million.[70] FirstRand thereafter launched a rule 46A(9) application for confirmation of the sale, or cancellation of the sale and the setting of a lower reserve price. In October 2021, almost a year after the sale, the court cancelled the sale and set a lower reserve price of R3.7 million.[71]

A second sale in execution took place in February 2022 and achieved a selling price of R3 870 000. However, this sale was cancelled in January 2023 owing to a breach by the purchaser.[72]

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64 *Nedbank v Mabaso supra* par 17.

65 *Nedbank v Mabaso supra* par 19. During the argument, Nedbank contended that a formula be used to calculate a reserve price [(market value – outstanding rates) – 30%], which amounted to R417 000). The court, however, noted that the figures used by Nedbank for the formula were out of date.

66 *Nedbank v Mabaso supra* par 20.

67 *Firstrand Bank v Khan* (unreported, case no 2019/20373), Johannesburg High Court.

68 *Firstrand Bank v Khan supra* par 1–2.

69 *Firstrand Bank v Khan supra* par 4–7.

70 *Firstrand Bank v Khan supra* par 8.

71 *Firstrand Bank v Khan supra* par 9.

72 *Firstrand Bank v Khan supra* par 10.

A third sale proceeded in June 2023. At this stage, the market value of the property was R6.5 million, with a forced-sale value of R5.2 million and a municipal value of R7.1 million. The judgment debt had escalated from R4.5 million to over R7 million, and the outstanding rates had increased from R500 000 to R900 000.[73]

Once again, no bids were received at the sale after the reserve price of R3.7 million was announced. The sheriff then restarted the auction without a reserve, and the highest bid achieved was R3 010 000.[74] Since the court-set reserve of R3.7 million was not achieved, FirstRand was once again required to apply to the court in terms of rule 46A(9).

The court considered rule 46A(9) and found that its provisions required the sheriff to submit a report to the court outlining, *inter alia*, the bidding at the auction and the final outcome. Rule 46A(9) then required the court to reconsider the factors relevant in determining the initial reserve price, such as the market value and outstanding rates, and make an order as to how execution would proceed. Where the reserve price was not achieved at the sale, the court could order the property to be sold to the highest bidder.[75]

The court found that the selling price achieved at the sale in execution was generally regarded as an accurate indication of the true value of the property.[76] Furthermore, FirstRand provided the court with sworn valuations attesting to the value of the property. The Khans did not provide any such information before the court and prevented any valuers from accessing the property to complete any valuations.

Raubenheimer AJ held:

> "The sale of the property does not have to result in the entire judgment debt being extinguished. The purpose of setting a reserve and the confirmation of a selling price is to ensure a just and equitable process in accordance with the law. The sale in execution is part of normal economic life and necessary balances have been adhered to."[77]

The two previous sales in execution had not reached the reserve price, and the possibility of the reserve being met was diminishing. Moreover, the escalating mortgage and municipal debt placed the creditors at substantial and increasing risk.[78]

Accordingly, Raubenheimer AJ confirmed the sale of R3 010 000 to the highest bidder.

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73 *Firstrand Bank v Khan supra* par 13–15. The Khans attempted to sell the property privately; however, no offers were received.

74 *Firstrand Bank v Khan supra* par 11.

75 *Firstrand Bank v Khan supra* par 18–19.

76 *Firstrand Bank v Khan supra* par 21, referring to *Nedbank v Mabaso supra* par 17.

77 *Firstrand Bank v Khan supra* par 33–34, referring to *Gundwana v Steko Development* 2011 (3) SA 608 (CC) par 54.

78 *Firstrand Bank v Khan supra* par 31–32.

4 CONCLUSION AND RECOMMENDATIONS

The above-mentioned 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 above-mentioned cases and also provide recommendations as to how these flaws can be remedied.

4 1 Is the rule 46A(9) application required to be brought "in chambers" or before "open court"?

In the four cases discussed above, all 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. In *Changing Tides,* Fisher J found that rule 46A was not framed with any precision, potentially leading to much inconsistency.[79] In *Standard Bank,* the court held that the rule failed to provide a procedural framework for the reconsideration application, and it was not surprising that this led to a variety of procedures being used.[80] Owing to a lack of clarity in this regard, some practitioners brought such applications before judges in chambers, while others brought them in open court.

In *Changing Tides* and *Standard Bank*, the courts found that rule 46A(9) applications should be brought before an open court, and not in chambers. These cases found that all the necessary information and evidence must be brought before the court to assist it in determining a new reserve price. This determination or reconsideration could only be done in open court and not in chambers.[81]

Despite the courts' findings, in practice, there is currently still a lack of uniformity as to how these matters can proceed, as several jurisdictions allow rule 46A(9) reconsideration applications to be brought in chambers, while other jurisdictions require them to be brought in open court. It is trite that there is a need for consistency and uniformity nationally.

In concurrence with the findings in *Changing Tides* and *Standard Bank*, it is submitted that it is preferable for reconsideration applications to be heard in open court, as it is a process that requires the court to consider a number of factors and make a determination as to a new reserve price. Furthermore, the rule clearly indicates that the "court" (that is, open court) and not a "judge" must consider the application.[82]

The lacunae in rule 46A(9) (that is, the failure to provide clarity on how a reconsideration application should proceed) bring to light the uncertainty

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79 *Changing Tides supra* par 9–10.

80 *Standard Bank of South Africa Limited v Tchibamba supra* par 34.

81 Interestingly, in *Standard Bank* par 54, the court held that in the event the private sale of the property did not proceed, the creditor was entitled to make an application in chambers for an order to proceed with a sale in execution without a reserve price.

82 See *Changing Tides supra* par 27–29, and rule 46A(9)(c).

within foreclosure proceedings in South Africa.[83] It is recommended that the lack of uniformity be remedied by establishing within each division of the High Court a separate foreclosure court roll, or a special foreclosure court, exclusively for foreclosure matters. This special foreclosure court or foreclosure court roll would only consider foreclosure-related cases and consequently bring clarity, consistency, expertise and uniformity to all foreclosure matters across the country.[84]

A special court roll will be dedicated to hearing foreclosure-related matters, and this will prevent the extensive delays currently experienced with these cases. In *Changing Tides*, it was noted with concern that a full year had passed since the sale in execution before the rule 46A(9) application was brought to court. In *Nedbank,* two years had passed, and in *Firstrand Bank*, four years had passed between the time the initial reserve price was set and the time the property was eventually sold. It is submitted that these delays were a result of the lack of clarity with the procedural framework for rule 46A and the current overburdened court rolls. It is submitted that implementation of a specialised foreclosure court roll would create consistency and clarity in the process and eradicate the delays currently experienced in foreclosure-related matters.[85]

4 2 Is it required that the rule 46A(9) application be personally served on the debtor?

The requirement for personal service has created debate during foreclosure proceedings, and there has been much discussion over the years as to whether a summons and application notices (relating to foreclosure proceedings) must be personally served upon the debtor.[86]

The Uniform Rules of Court currently provide that a rule 46A(3) application must be personally served upon the judgment debtor. This practice is aligned with the *audi alteram partem* rule, which ensures that both parties to a dispute have an equal opportunity to have their views heard. It is submitted that since there is a requirement that the rule 46A(3) application be served personally upon the debtor, there is no need for personal service of the reconsideration application, as the debtor is already aware of the ongoing process. It is fair to assume that a debtor who is in default on their mortgage agreement is fully aware of the default and should be aware of the

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83 See Singh (*A Critical Analysis of the Home Mortgage Foreclosure Requirements and Procedure in South Africa and Proposals for Legislative Reform* ch 3) for a consideration of the lack of clarity in the foreclosure process.

84 See Singh "A Need for a Specialized Foreclosure Act?" April 2020 *Without Prejudice* 48-49; 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" October 2019 *De Rebus* 31; Singh "Eeny, Meeny, Miny, Moe, to Which Court Will Foreclosures Go? (Part 2), The SCA Has Spoken" September 2021 *De Rebus* 29.

85 See Singh ("A Call for Specialized Foreclosure Courts and a Separate Foreclosure Court Roll" 2023 *SALJ* 40 418) for a deeper discussion on the recommendation to implement specialised foreclosure courts or foreclosure court rolls.

86 See 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 Mercantile Law Journal* 25.

fact that the property is being foreclosed upon and set for a sale in execution. Moreover, the foreclosure process requires a creditor to notify the debtor at each stage of the process. The debtor is notified by the creditor sending notices such as a letter of demand, a summons delivered by the sheriff of the court, and several other court notices, *inter alia*, a notice for judgment, a warrant of attachment and the notice of sale for the sale in execution. Furthermore, in practice, creditors usually make contact with debtors via other informal means such as telephone calls, SMSes and emails.

Accordingly, a debtor is at all times aware of the foreclosure proceedings, and there is no need for personal service of notices. The requirement to personally serve the rule 46A(9) application increases legal costs, further delays proceedings and also creates an opportunity for *mala fide* debtors to escape service of court documents and frustrate the creditor's legal process.[87] Moreover, it is submitted that, given the technological age we live in, digital forms of service, such as service by email, should be considered as opposed to physical personal service by hand.[88] Accordingly, imposing a requirement that the rule 46A(9) application be served personally upon the debtor seems unrealistic and unnecessary.

In addition, as indicated in *Standard Bank*, the rule 46A(9) reconsideration application is a continuation of the initial rule 46A(3) proceedings and 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 (that is, rule 46A(3)), notice of the reconsideration application (that is, rule 46A(9)) need not be served "personally" again. Hence, it is submitted that personal service should not be a requirement for a reconsideration application, and service of such an application should be allowed via technological mechanisms such as email, which is cheaper and faster.[89]

4 3 Who should bring the application: the sheriff, the creditor or the debtor?

Rule 46A(9) provides that the sheriff must prepare a report detailing the information about the sale in execution and furnish same to the court within five days from the date of the sale. A strict application of rule 46A(9) may imply that the sheriff is responsible for preparing the sale-in-execution report and also for bringing the reapplication before the court. In reality, however, this is highly unlikely to occur, as it is improbable that the sheriff will expend the time and costs to appoint an attorney to bring an application in which they have no personal interest (it must also be noted that the rule is unclear as to who should bear the costs of the reconsideration application).

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

88 See Singh ("Bye Bye Mr Postman: A Consideration of the Electronic Delivery of Notices in Terms of the National Credit Act 34 of 2005" 2024 27 *PELJ* 1) for a discussion on the evolution of the delivery of legal documents.

89 See Singh "You've Got Mail – Have the Electronical Communications Become the New Registered Mail?" Quarter 1 2022 *Without Prejudice* 29-30; Singh 2021 *SA Mercantile Law Journal* 25.

The rule requires the sheriff to compile the sale-in-execution report within five days. This appears to be an unrealistic timeline, and, in practice, it is noted that several delays are experienced in receiving these sheriff's reports.

In practice, it is the credit providers who follow up on the sheriff's report, obtain the new valuations and rates figures for the property, and prepare new court papers and submissions or recommendations as to a new reserve price. This was the approach followed in and approved by the court in *Changing Tides*; however, in *Standard Bank,* the court was of the view that the sheriff should bring the rule 46A(9) application before the court.

It is submitted that the approach in *Standard Bank* is unfavourable, as the sheriff does not have the resources and capacity to bring such applications, and requiring this will further delay proceedings. It is suggested that the rule should be amended to allow "*any interested person*" to be able to bring the application before court. Such persons should include, *inter alia*, the judgment creditor, the judgment debtor, the sheriff and even the buyer or bidder from the sale in execution. All these persons have an interest in determining the status of the sale and obtaining clarity and finality in the proceedings.

4 4 What information needs to be brought before court for the rule 46A(9) application?

As indicated above, rule 46A does not provide a detailed list of factors for a court to consider when determining a reserve price. Rule 46A(9) merely provides that the court must consider the valuation of the property and the municipal rates (and/or body corporate levies) outstanding against the property. The rule fails to indicate how these documents and figures should be obtained, who should bear the costs of obtaining these documents and how old or recent these documents should be.[90]

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 in the different divisions of the High Court.

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 acted knowledgeably, prudently and without compulsion.[91] It is submitted that the market value should "not" be the sole factor considered when determining a reserve price.[92] It is trite that a sale in execution does not occur under favourable marketing conditions and does not feature a

[90] See *Nedbank v Mabaso* (*supra* par 5), where the court refused to accept the figures provided by the credit provider, indicating that the figures were too old.

[91] *Changing Tides supra* par 30–32.

[92] 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 70–80% of the market value. The forced-sale value is usually included in most professional valuation reports.

willing seller and willing buyer. In most instances, a sale in execution is a forced or distressed sale, wherein the seller (that is, judgment debtor) 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 for a sale in execution, the properties are not sold or even bid for at the auction.[93] This results in the matter having to be referred back to court for reconsideration of the reserve price. It is submitted that such a process and inevitable delay are detrimental to both debtor and creditor, the result being increased litigation and municipal costs, lack of interest 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.

It is submitted that when determining a reserve price, courts should step into the shoes of a reasonable bidder or purchaser at a sale in execution and consider what price they would willingly bid for the property under distressed or forced market conditions. A diligent purchaser or bidder 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 costs; maintenance costs, upgrading or renovation costs; possible eviction costs; and costs of resale of the property, such as estate agents' commission. In terms of rule 46A(9), these factors are not strictly listed as factors required to be taken into account by the courts when determining a reserve price. Accordingly, some courts may consider this when determining a reserve price, while other courts may not. There is a need for consistency and clarity to be established.

4 5 How should a reserve price be calculated?

In order to avoid the current challenges and uncertainties, it is suggested that a standard formula be adopted by the courts to calculate the sale-in-execution reserve price. It is suggested that a reserve price should be approximately 70 per cent of the "forced sale value" of the property minus outstanding rates and taxes.[94] For example, in the case of a property with a forced-sale value of R1 million, with outstanding arrear rates of R50 000, the reserve price of the property should be calculated using the conservative

[93] See *Changing Tides v Bisschoff*, (unreported case no 44126/2018) GLDHC. Owing to the court-set reserves in this matter, this property was set down for auction on four occasions, which resulted in delaying the judgment creditors' execution for over three years. In July 2019, the court set a reserve of R1 500 000 for the property (the market value of this property was approximately R1 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. A rule 46A(9) application was made a few months later, and the reserve was lowered to R1 250 000. As with the first auction, no bids were received at the second auction. Another rule 46A(9) application was made, and the reserve was lowered to R900 000. During the third auction, no bids were received. A fourth rule 46A(9) application was made in May 2022, wherein the court granted an order for the property to be sold with no reserve.

[94] See also *Nedbank v Mabaso* (*supra* par 19), where Nedbank proposed the use of a formula for calculation of a reserve [(market value – rates) – 30%].

formula: [(FSV x 70%) – rates]. In our example, a reserve of R650 000 would be estimated: [(R1 million x 70%) – R50 000 = R650 000].

It is submitted that a standard formula for the calculation of a sale-in-execution reserve price will create consistency and clarity in practice. The above proposed formula considers the fact that sales in execution naturally do not reap market-related prices. The majority of bidders at auction sales are speculators who are not willing to bid high prices for distressed houses. It is submitted that the proposed formula is a fair calculation for a reserve price for a property. Moreover, it must be remembered that this is a "reserve price" and not the price at which the property will eventually be sold. The reserve price is the value at which the property will be open on the market and where bidding will begin. It is the absolute minimum value at which the property will be sold, and in most circumstances, higher bids than the reserve will be received, leading to the property being sold at a price much higher than the reserve price.

4 6 Concluding remarks

The discussion in this article has confirmed that there is much uncertainty in the application of rule 46A(9) when reconsidering a reserve sale-in-execution price. The question must therefore be asked whether or not the idea of 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 public disclosure of a reserve price by the court may reduce the potential selling price of the property at the sale in execution, as buyers may reduce their bidding prices in accordance with the court-set reserve price. On the other hand, should the court-set reserve be too high, buyers will disengage from these sales, and this may result in some homes becoming non-equitable, leaving mortgagees without any security. Furthermore, as noted throughout this article, the process of reconsidering a reserve price in instances where the initial reserve is not met is unclear, cumbersome and lengthy.

It must be accepted that sales in execution, which by their very nature are forced or distressed sales, will not always achieve market-value prices. Nevertheless, procedural checks must be in place to ensure that all outcomes from the sale-in-execution process are in line with our constitutional values, and that homes are not sold for ridiculously low prices. Accordingly, there is a need to revise rule 46A(9) and address some of the procedural flaws noted here to create consistency and fairness in the foreclosure process.