IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the applications of:

Case number: 11294/18

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

JAN HENDRICKS First Defendant

HENDRIEKA HENDRICKS Second Defendant

Case number: 15134/18

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

IVAN GERALD SAMPSON First Defendant

ELISE SAMPSON Second Defendant

Case number: 12777/18

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

LESLEY MALCOLM PETERSON First Defendant

NATHEMA PETERSON Second Defendant

Case number: 12285/18

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

LYNNDRIANNE ADVOLEEN EMERENTIA KAMFER Defendant

Case number: 13809/18

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

BRIAN ERNEST ADAMS First Defendant

ERONE ADAMS Second Defendant

Case number: 22263/17

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

RUTH BOTHA N.O. Defendant

(in her capacity as executrix of the Estate Late Anthony Hart)

Case number: 12365/18

ABSA BANK LIMITED Plaintiff

and

M LOUW Defendant

LUNGELO LETHU HUMAN RIGHTS FOUNDATION First Amicus Curiae

NATIONAL CREDIT REGULATOR Second Amicus Curiae

LEGAL AID SOUTH AFRICA Third Amicus Curiae

Coram: ERASMUS ET DOLAMO ET SAVAGE JJ

Heard: 18 November 2018

Delivered: 14 December 2018

Summary: Foreclosure - The application for the money judgment and an order of special execution against immovable property which is mortgaged to secure the loan and which is the primary residence of the judgment debtor are intrinsically connected and must be brought in one proceeding and not in a piecemeal manner as separate applications, where possible. The applications must be served personally on the debtor, unless ordered otherwise by the Court. The application for the money judgment may be

postponed together with the application for an order of special execution against property which is the primary residence of the judgment debtor given that the two applications are intrinsically linked and therefore together engage a debtor's s 26 constitutional right. All the facts should be placed before the court to sustain the relief sought in the combined application. A new practice direction 33A is proposed, together with the form of the affidavit which must be attached to the application for relief in such matters. A failure to adhere to this format, it is proposed would disentitle a party to relief. When a court is appraised of all the facts, a decision whether to place a reserve price on the sale of a house that may be sold in execution, can be properly taken. Each matter will depend on its own facts.

JUDGMENT

THE COURT:

Introduction

[1] Section 26(1) of the Constitution Act 108 of 1996 guarantees the right of access to adequate housing, with the Constitutional Court having recognised in that *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others ('Jaftha')*[1] that "(r)*elative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience*". Section 26(3) is clear that no one is to be evicted from their home "*without an order of court made after considering all the relevant circumstances*".

[1] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* ('*Jaftha*') 2005 (2) SA 140 (CC) at paras 39.

[2] While the Constitution requires judicial oversight over orders of execution made against immovable property which is the primary residence of the judgment debtor,[2] the manner and extent to which this oversight has occurred has received different treatment in our courts. This led to the promulgation of Uniform Rule 46A, which came into effect on 22 December 2017, and which is concerned with matters related to the execution against immovable property which is the primary residence of the judgment debtor. It is the application of this Rule which is, in the main, before us in this matter.

[3] On 13 September 2018, a number of foreclosure matters served in motion court before Savage J by way of application in which an order of execution was sought against immovable property which was the primary residence of the judgment debtor. This was the day after the judgment of the full court in the Gauteng Local Division in *Absa Bank Limited v Mokebe and similar matters* (‘*Mokebe’*)[3] had been delivered.

[4] Having regard to *Mokebe*, Savage J decided to invoke the provisions of s 14(1)(b) of the Superior Courts Act 10 of 2013. The matters before her, which are now the subject of this hearing, were postponed. The Judge President of this division, in terms of s 14(1)(a), thereafter referred the matters for hearing before this Court as a full bench. The legal practitioners involved in the applications, together with the *amicus curiae*, were invited to address the Court, in terms of sections 14 (1)(a) and (b), on the following issues:

1. Whether Rule 46A introduces substantive legal requirements for obtaining an order for the execution of judgments in mortgage contracts, and if so whether such substantive requirements can competently be introduced by the Rules Board or only by the legislature and whether

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[2] See *Jaftha* (above) 2005 (2) SA 140 (CC) at paras 34 and 54; *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA); *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W); and *FirstRand Bank Ltd v Folscher and similar matters* 2011 (4) SA 314 (GNP) at para 40.

[3] *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another (‘Mokebe’)* [2018] ZAGPJHC 487.

Rule 46A was made *ultra vires* the powers of the Rules Board and is accordingly invalid.

2. Whether, as is the practice in other divisions of the High Court, personal service by the sheriff is required prior to granting a money judgment for the accelerated full outstanding balance of monies lent, which monies are secured by a mortgage bond over immovable property.

3. The circumstances under which it may be appropriate to grant a money judgment for the accelerated full outstanding balance and then postpone the application to declare the property secured by the bond specially executable given the impact on costs and the potential for attachment and execution of movables in the meantime.

4. Whether the court has a discretion to decline to grant a default money judgment for the accelerated full outstanding balance and whether there are considerations to which regard should be had to ensure uniformity of treatment in this regard.

5. Whether the postponement of the application for the money judgment under certain circumstances is objectionable or desirable.

6. Whether the court has a discretion, when postponing an application for executability, to afford the mortgagor an opportunity to '*...remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue ...*' under the National Credit Act 34 of 2005 ('NCA').

7. Whether the operation of Rule 46A(9) insofar as the setting of a reserve price is concerned purports to amend the substantive law or not.

8. The circumstances under which a court is to set a reserve price and how this is to be determined in terms of the new uniform rule 46A, effective since 22 December 2017.

9. And any other issue the judges wish to hear the parties on.

Parties

[5] The parties to this matter are:

5.1 Standard Bank of South Africa Limited, a company with limited liability registered in terms of the company laws of South Africa, registered as a financial service provider and credit provider in terms of the NCA ('Standard Bank'); and

5.2 Absa Bank Limited, a public company with limited liability duly registered in accordance with company laws of South Africa, registered as a financial service provider and credit provider in terms of the NCA ('Absa').

[6] The individual defendants, as respondents in the matter, did not participate in the proceedings.

[7] The *amici curiae* before this Court are Lungelo Lethu Human Rights Foundation, a duly registered private company ('LLHRF'), admitted as the first *amicus curiae*; the National Credit Regulator ('NCR'), established in terms of s 12 of the NCA, admitted as the second *amicus curiae*; and Legal Aid South Africa ('Legal Aid'), admitted as the third *amicus curiae* in the matter.

[8] Although Changing Tides 17 (Pty) Ltd, also known as SA Home Loans, were initially joined as a party to this matter after concerns were raised in the judgment of *Changing Tides 17 (Pty) Ltd v Turner (5773/10) and Changing Tides 17 (Pty) Ltd v Jones & others (9707/18)* regarding the calculation of the interest rate on outstanding

amounts owed, attorneys for Changing Tides indicated subsequently that the application had been withdrawn.

Background

[9] The Constitutional Court in *Gundwana v Steko Development CC and Others*[4] emphasised that the constitutional requirement of judicial oversight did not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money when the judgment debtor had willingly put his or her home up in some manner as security for the debt.[5] The Court stated that:

> *'It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.'*[6]

[10] In *Jaftha*[7] the value of a home as a means by which to raise capital was recognised. In *Standard Bank v Saunderson ('Saunderson')*[8] the Court recognised the mortgage bond as *'an indispensable tool for spreading home ownership'*, with its value as an instrument of security existing through the *'confidence that the law will give effect to its terms'*.[9] In *Mouton v Absa Bank Limited; Haylock v Absa Bank Limited*,[10] it

[4] 2011 (3) SA 608 (CC) at paras 53 and 54.
[5] *Ibid* at para 47.
[6] *Ibid* at para 54.
[7] *Jaftha (above)* at para 58.
[8] 2006 (2) SA 264 (SCA).
[9] *Ibid* at paras 1 and 3.
[10] *Mouton v Absa Bank Limited; Haylock v Absa Bank Limited* (unreported judgment of the Gauteng Local Division under case no.: 17922/2014; 24820/2015) (14 July 2017) ('*Mouton'*) at para 97.

was recognised that this allows lenders to extend further credit which serves a broader social purpose in allowing the inclusion of new entrants in the market.

[11] In *Nedbank Ltd v Fraser and Another and Four Other Cases*[11] the Court stated that:

> *'To put residential immovable property which is a person's home into that class of assets beyond the reach of execution would be to sterilise the immovable property from commerce, thereby rendering it useless as a means to raise credit. Preventing debtors from using their homes as security to raise credit will create a class of homeless persons - those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. Furthermore, it would lock up capital and prevent the home owning entrepreneur from using his or her home as security to finance business initiative*.'

[12] The Constitutional Court in *Jaftha* noted that:

> *'If the procedure prescribed by the Rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is*

[11] 2011 (4) SA 363 (GSJ) ('*Fraser'*) at para 21.

> *likely to render the judgment debtor and his or her family completely homeless.*'[12]

[13] In *Bartezky and Another v Standard Bank of South Africa Limited and Others*[13] this Court stated that, as a fundamental aspect of the rule of law, execution mechanisms must be effective if they are to have legitimacy, and public confidence in them should not be lightly disturbed. They are also required to comply with mandatory consumer-protection processes before a sale in execution can occur. In *Kubyana v Standard Bank of South Africa Ltd* [14] the Constitutional Court was careful to explain that while the NCA is directed at consumer protection—

> '*this should not be taken to mean that the Act is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on consumers without any regard for the interests of credit providers. No. For just as the Act seeks to protect consumers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry*.'[15]

[14] The full bench in *Mokebe* considered Rule 46A and provisions of the South Gauteng Practice Manual[16] which regulated foreclosures. It was noted that divergent views had been expressed by judges on issues arising from applications to execute against immovable property which is the primary residence of the judgment debtor and that, with 80 judges in the North and South Gauteng courts, '(o)*ne can imagine the harm caused to the dignity of the Courts if everyone is to go his or her own way*'.[17] A full

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[12] *Jaftha* (above) at para 56.
[13] *Bartezky and Another v Standard Bank of South Africa Limited and Others* [2017] ZAWCHC 9 at para 9.
[14] *Kubyana v Standard Bank of South Africa Ltd* ('*Kubyana'*) 2014 (3) SA 56 (CC).
[15] *Ibid* at para 20.
[16] Chapter 10.17 of the Practice Manual of the Gauteng Local Division of the High Court of South Africa.
[17] *Mokebe* (above) at para 4.

bench of this division in *Standard Bank of South Africa Ltd v Bekker and Another*[18] noted similarly the difficulties which arise in—

> '*…the lack of consistency between individual judges of this court in respect of what is required of plaintiff mortgagees procedurally, rather than evidentially, to obtain orders authorising execution against property that has been hypothecated to them in security for the debts on which they seek, or have obtained, judgment when that property is, or appears to be, the defendant's home.*'[19]

National Credit Act 34 of 2005

[15] The National Credit Act 34 of 2005 ('the NCA') seeks to '*promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers*'.[20] Sections 80 to 83 prevent reckless lending by credit providers, s 90 prohibits the inclusion of unlawful contractual terms in credit agreements and ss 85 to 88 provide debt relief and the re-arrangement of a consumer's obligations as alternatives to enforcement mechanisms through the institution of legal proceedings.

[16] Home loans secured by mortgage bonds over property are an important method of facilitating increased access to housing and, over time, to capital. While the majority of home loan debtors pay their monthly bond instalments, for banks to extend credit this must be commercially viable. In this regard the NCA recognises that there must be reliable and effective enforcement mechanisms in the event of default, which according to the Banking Association of South Africa, at the end of 2016, occurred on around 4.4% of mortgage bond accounts. Of these, approximately 0.7% of the total number of mortgage accounts entered the sale in execution process.

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[18] 2011 (6) SA 111 (WCC).
[19] At para 11.
[20] Section 3.

[17] Before a credit provider institutes legal proceedings a notice in terms of s 129 of the NCA must be delivered drawing the default to the debtor's attention and proposing extra-judicial methods of curing the default.[21] Sections 129(3) and (4) enable the debtor to purge his or her default and thereby have the credit agreement reinstated at any time until the proceeds of the sale in execution are realised.

[18] The summons issued must draw the debtor's attention to s 26(1) of the Constitution and call on him or her to place before the court any information supporting a claim that his or her right to housing will be infringed.[22] If the debtor elects not to participate in the proceedings, a plaintiff may apply for default judgment. The plaintiff's founding affidavit filed in support of an application for default judgment must explain:[23] the amount of the arrears outstanding as at the date of the application for default judgment; whether the immovable property which is sought to be declared executable was acquired by means of or with the assistance of a State subsidy; whether, to the knowledge of the creditor, the immovable property is occupied or not; whether the immovable property is utilised for residential purposes or commercial purposes; and whether the debt which is sought to be enforced was incurred to acquire the immovable property sought to be declared executable or not.

[19] The application to declare the property specially executable must be heard by a judge in open court. The debtor is protected by the requirement that a judge must always consider '*all relevant circumstances*'.[24] If granted, a writ of execution is issued and an attachment effected by service of the writ on the judgment debtor and the occupant of the property. A sale in execution is then held by way of a public auction.

[20] While this may appear a standardised process, lenders adopt markedly different approaches to the manner in which judgment is sought in respect of the money order and

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[21] See *Sebola and Another v Standard Bank Ltd and Another* 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC).
[22] *Saunderson (above).*
[23] *Nedbank Limited v Mortinson* 2005 (6) SA 462 (W) at para 33.
[24] See *Jaftha (above)* at para 64 and *Fraser (above)* at para 16.

the execution against immovable property that is the primary residence of the judgment debtor. Although the banks share the aim to seek to bring its customers out of arrears and into compliance with their payment obligations insofar as it is possible, in this division, Standard Bank has been known to bring applications for an order in respect of the money debt, together with an order of special execution, where a debtor is only two months in arrears.

[21] While it is so that the banks are not in the business of selling immovable property and that they view sales in execution as a matter of absolute last resort, the alacrity with which such orders has been sought has contributed to very different approaches amongst judges to the issues that arise in this matter. It was submitted for Standard Bank that it generally proceeds to execute against a debtor's immovable property after the debtor is nine months in arrears.

[22] Absa detailed its foreclosure process, indicating that the average time taken between the start of the legal collections process and a sale in execution is 33 months. A policy decision has been taken by Absa not to cancel home loan agreements immediately when customers default and not to execute against the movables of a home loan debtor. This is because doing so may cause undue hardship to the debtor and it may worsen the debtor's financial position by removing an asset (such as a motor vehicle or sewing machine) that he or she requires to generate an income and thereby undermine his or her ability to repay the arrears. If a customer does default, Absa does not refer the account for legal recovery until it is in arrears in an amount equivalent to six months of instalments. Attempts to reach an agreement on a repayment arrangement or debt restructuring are made, with the bank offering the 'Help U Sell' programme that assists customers in selling their homes privately to avoid a sale in execution, which on average fetch a much lower sale price. Absa has appointed a committee to consider every case individually and the circumstances surrounding the default, before proceeding with a sale in execution, with a 'Risk Mitigation Officer' required to ascertain a customer's individual circumstances.

[23] Recognising the consequences of executing against immovable property in the secured credit market for homes, although '*part and parcel of normal economic life*', [25] the banks indicated that they seek to comply with both the provisions of s 26 of the Constitution and the NCA, while continuing to engage with debtors throughout the process, seeking to achieve a resolution and the payment of arrears where this is possible.

[24] It is against this backdrop that the issues before this Court are considered.

<u>Question 1</u>: Whether Rule 46A introduces substantive legal requirements for obtaining an order for the execution of judgments in mortgage contracts, and if so whether such substantive requirements can competently be introduced by the Rules Board or only by the legislature and whether Rule 46A was made ultra vires the powers of the Rules Board and is accordingly invalid.

[25] The first issue raised for consideration is whether rule 46A introduces substantive legal requirements as opposed to simply procedural requirements, and if so, whether the Rule is *ultra vires* the powers of the Rules Board. It is trite that the Rules of Court exist to ensure fair play and good order in the conduct of litigation.[26]

[26] In *Eke v Parsons*[27] it was stated that *"... the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to 'secure the inexpensive and expeditious completion of litigation and ... to further the administration of justice. ...".* [28] The Rules may not lay down substantive legal requirements for a cause of action. Rules may re-state the existing law and regulate the procedure that applies to that law[29] but where a rule of court is not procedural but substantive in nature, or seeks to expand the substantive law, it will be *ultra vires* and of no force or effect.[30]

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[25] *Gundwana* (above) at para 54.
[26] *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC) at para 9.
[27] 2016 (3) SA 37 (CC).
[28] At para 40.
[29] *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463F-G.
[30] *United Reflective Converters* at 463B-C and *Ex parte Christodolides* 1953 (2) SA 192 (T) at 195A-D.

[27] All of the parties before this Court, including the *amici curiae,* took the view that Rule 46A is *intra vires* the powers of the Rules Board in that it sets out only procedural matters which arise from rules of substantive law arising from the Constitution i.e. that execution against residential immovable property may not occur without judicial oversight.

[28] Since there was no issue taken with the *vires* of Rule 46A, the State Attorney did not pursue its request for a postponement of this matter in order to defend the Rule. In these circumstances, and having regard to the stance taken by the parties, including the *amici curiae*, our view is that it is not necessary to determine this issue at this time. For current purposes, it is therefore assumed that Rule 46A is *intra vires* the powers of the Rules Board.

***Question 2*: Whether, as is the practice in other divisions of the High Court, personal service by the sheriff is required prior to granting a money judgment for the accelerated full outstanding balance of monies lent, which monies are secured by a mortgage bond over immovable property.**

[29] Rule 46A concerns execution against the immovable property which is the primary residence of a judgment debtor. It is in this context that the question raised in the directive of the Judge President is considered, namely the service of process on a debtor where execution is sought against immovable property that constitutes the primary residence of such debtor. Rule 46A(3) states that:

> '*Every notice of application to declare residential immovable property executable shall be—*
> *(a) substantially in accordance with Form 2A of Schedule 1;*
> *(b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)(a): Provided that the court may order service on any other party it considers necessary;*
> *(c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and*

(d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.'

[30] Prior to Rule 46A being brought into operation, the South Gauteng Court in *Absa Bank Limited v Lekuku ('Lekuku')*[31] found that, despite the provisions of the *domicilium citandi* clause in the loan agreement, the requirement of personal service amounted to the introduction of a procedural step in the service of process which, within the framework of the Constitution, was directed at safeguarding primary residences being lost through inadequate service. The Pretoria High Court adopted the same approach.[32]

[31] In the stance taken by the parties and the *amici* in this matter, there was no difference of opinion. All agreed that personal service has benefits for the debtor and the banks. In matters where leave to execute against property which might be a person's home is sought, it was agreed that bringing notice of proceedings to the attention of the debtor by way of personal service leads to the possible resolution of a matter and can obviate the need for the matter to proceed to Court. The banks accept that, whether serving the foreclosure application on the debtor personally at the *domicilium citandi*, at his or her place of employment, or over a weekend at his or her home, is beneficial to the resolution of the matter and that a Sheriff's return of service which indicates blandly that personal service was not possible and the summons was affixed to an outer door or placed in a post box on its own is not sufficient or acceptable service where an order to execute against the primary residence of the debtor is sought.

[32] It is clear that the starting point for Rule 46A is personal service. Where this is not possible, '*the court may order service in any other manner*'. It follows that more must be said of the attempt to achieve personal service than simply a reference by the Sheriff to the fact that the debtor was '*not present*' or '*could not be found at the premises*'. This may include service at the debtor's workplace or at his or her home over the weekend.

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[31] *Absa Bank Limited v Lekuku* 2014 JDR 2137 (GP); [2014] ZAGPJHC 244 at para 25.
[32] *De Paul Albert and Another v Standard Bank of South Africa Ltd* [2015] ZAGPPHC 727 at para 12.

[33] The parties before us were in agreement that the forms of service which have very often to date in this Division been found by judges to constitute acceptable forms of service, such as by affixing the summons to a door or placing it in the post box, simply because service was affected at the *domicilium citandi* contained in the loan agreement, are inadequate. This is so even though they may comply with the form of service accepted and detailed in the Rules, prior to Rule 46A coming into operation. Since Rule 46A(3)(d) requires that if personal service by the Sheriff on the debtor with the proviso that "*the court may order service in any other manner*", it appears to us that it is not possible for the Court to approach service in the way it has been undertaken in the past. The Rule expressly requires that where personal service is not possible, the Court must be approached to order service in any other manner and that sufficient material is required to be placed before the Court to allow it to make such an order.

[34] It was further agreed by the banks and the *amici* that the practice in this Division which has seen the Sheriff charging an additional fee, apparently a 'danger fee', and/or an urgency fee for serving documents in township areas, which amount is ultimately billed to the judgment debtor, is unacceptable and should not be permitted to continue. The role of the Sheriff is to serve process and to differentiate between areas on the basis that some are historically township areas and others not is unfair, more so when the costs of this are borne by debtors who very often can least afford it. There is no reason, in our view, why this unacceptable practice should not be brought to the attention of the Sheriff's Board for further steps to be taken to prevent its continuation.

<u>Question 3</u>: The circumstances under which it may be appropriate to grant a money judgment for the accelerated full outstanding balance and then postpone the application to declare the property secured by the bond specially executable given the impact on costs and the potential for attachment and execution of movables in the meantime.

<u>Question 4</u>: Whether the court has a discretion to decline to grant a default money judgment for the accelerated full outstanding balance and whether there are considerations to which regard should be had to ensure uniformity of treatment in this regard.

[35] In *FirstRand Bank v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another* [33] it was stated that it '*is a long standing practice for the creditor to claim judgment for the money debt and for executability of the pledged goods in one action*.'

[36] In *Mokebe* it was recognised that to grant judgment for the repayment of the accelerated money debt and postpone the relief to declare the hypothecated immovable property specially executable, is a course which gives rise to an undue protraction of the proceedings and piecemeal handling of the matter with a resultant increase in costs.[34] The banks agreed that it is optimal to seek both orders together, given that it reduces the costs which are payable by the judgment debtor and avoids protracted proceedings and piecemeal litigation. The *amici curiae* agreed similarly. The LLHRF argued strongly for both orders to be considered together by the Court and, where appropriate, granted simultaneously to avoid debtors who are already in financial difficulty facing additional legal costs and risk the attachment of their movable property in addition to losing their house. The affidavit of Mrs Mapula Molokomme was put up by the LLHRF in support of their submissions. Her husband purchased their home in 1989 for R38 970. He financed the purchase with a loan from Nedbank. After judgment was taken by the bank, the Sheriff attached movable goods, including Mrs Molokomme's sewing machine which she used to run a small sewing business. The house was later sold in execution at an auction and purchased by BOE Bank Limited for R10. The property was subsequently sold for R35 000 and Mrs Molokomme was evicted from her home. The LLHRF indicated that it and other organisations have encountered cases similar to that of Mrs Molokomme.

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[33] [2014] ZAGPJHC 117 at para 6.
[34] *Mokebe* (above) at para 13.

[37] In *Mokebe* the full bench found the money judgment to be an intrinsic part of the cause of action and inextricably linked to the *in rem* claim for an order for execution, which is non-existent without the money judgment.[35] The default of the debtor and the money judgment are therefore a pre-condition for the entitlement of the mortgagee to foreclose, with the claim for execution being accessory in nature and dependent for its existence on the obligation which it secures. The mortgagee seeking execution must prove its entitlement to the money judgment which, in turn, is a necessary averment in order to sustain the action to obtain an order for execution. In the result, in *Mokebe* the full bench concluded that there is a duty on the creditor to bring their entire case, which includes the money judgment based on a mortgage bond, simultaneously in one proceeding. Should the matter require postponement for whatever reason, the Court took the view that the entire matter falls to be postponed and piecemeal adjudication is not appropriate.[36]

[38] The banks in this matter take no issue with the conclusion in *Mokebe* that an order for the accelerated loan amount as the money judgment should be heard and determined in a single hearing together with the order for special execution. The utility of doing so, it is accepted, creates predictability and certainty, reduces costs and avoid overburdening the court which is better for the administration of justice. Legal Aid and the LLHRF both agree. The consequence is that a combined application for the money judgment and the order of special executability against a primary residence, in terms of Rule 46A, require personal service.

[39] The banks and the *amici curiae* agreed that the practice by some judges in this Division to grant both the money and the order of special execution against the primary residence of the judgment debtor but to postpone the implementation of the latter order should not be encouraged. This is given that circumstances and considerations which are relevant to the determination of the order of special execution, in the application of rule

[35] *Mokebe* (above) at para 14.
[36] *Ibid* at para 29.

46A, may be time-specific and what may be relevant when the order is made may not apply when it is implemented. The rule is now the embodiment of the proportionality assessment that must be undertaken before a debtor's primary residence is taken away. It requires courts to consider the specific circumstances of the debtor, as they apply at the time the order is made, to ensure that execution against a primary residence is the last resort, that there are no alternative means of discharging the debt, and that the remedy is fair and proportionate in the circumstances. For these reasons, in our view, it is not appropriate to order a postponement of the implementation of the order of special execution.

[40] The view we take is that for the reasons set out in *Mokebe* and stated above, both the money order and the execution order should be sought simultaneously by the creditor. This is given the nature of the nature of the claims; the cost advantages in dealing with both orders at the same time; and the necessity to limit the piecemeal adjudication of such matters. In so far as this judgment binds single judges of our Division, we take the view that there would be an obvious advantage to a more uniform approach being adopted in such matters and that the Practice Manual of this division should be amended to reflect that the money judgment must be heard together with the claim for executability.

Question 5*: *Whether the postponement of the application for the money judgment under certain circumstances is objectionable or desirable.

[41] The Court in *Mokebe* found that since *'the claim for payment and the claim for execution must be heard simultaneously, it stands to reason that in the event of the claim for execution not being finalised and being postponed, the monetary claim should be dealt with in the same way'*.[37]

[42] The banks take issue with the power of the courts to postpone the money judgment. They argue that courts hold no general discretion, apart perhaps from where

[37] *Mokebe* (above) at para 31.

mala fides are shown to exist, to postpone the claim for the money judgment given that once the legal requirements for a money judgment are met, courts have no power to deprive credit providers of their contractual rights by refusing the orders they seek. They contend this to be so on a number of grounds. In the first instance they argue that the parties elected to enter into a contract in terms of which on default the accelerated balance outstanding in terms of the loan agreement would become due. Since the principle of *pacta sunt servanda* applies, it is not for the court to exercise a discretion in the manner of a court of equity, to postpone the claim for the money judgment. To refuse to do so would undermine the value of every commercial contract, which would violate the foundational principle that parties should comply with contractual obligations that have been freely and voluntarily undertaken.[38] It was contended that in such circumstances it is not open to the court to exercise a discretion to defeat the legitimate claims of creditors to repayment by simply asserting a constitutional right to housing.[39] To do so, argued the banks, would unjustifiably interfere with the creditor's contractual right to accelerate the discharge of obligations.[40]

[43] In *Folscher* the Court stated:

> '[T]*he creditor's position must first be considered in its proper context. The creditor has entered into an agreement with the debtor, that both parties concluded voluntarily, to enable the debtor to acquire the immovable property, or gain access to capital, against the security of the bond registered over the property.*'[41]

[44] The banks argued further that the granting of a money judgment does not implicate a constitutional right and that if it did, every commercial claim sounding in money would raise a constitutional issue and could thus be postponed. In this regard a

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[38] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 57.
[39] *Fraser* (above) at para 20.
[40] *Ibid* at para 37.
[41] *FirstRand Bank Ltd v Folscher and similar matters* 2011 (4) SA 314 (GNP) at para 38.

mortgagee cannot be in a worse position to other creditors. The power to decline to grant an order declaring a primary residence specially executable, where it would be disproportionate or constitute an abuse of process, is competent only because it directly implicates s 26 of the Constitution. It therefore engages s 172(1)(b) of the Constitution, which gives courts a broad discretion, '*(w)hen deciding a constitutional matter within its power*', to grant '*just and equitable*' relief. As the *Fraser* Court put it, the fact that the immovable property in respect of which execution is sought is a person's home is the '*relevant jurisdictional fact that enlivens s 26 of the Constitution*'.[42]

[45] To permit the Court a discretion to refuse or postpone the money judgment would put the mortgagee, a secured creditor, in a worse position than if it was unsecured.[43] The banks contended that this would not only be illogical, but also damaging to the secured credit market, as it would make lenders less likely to enter into agreements with mortgages as security. This is so since although causally linked to the money judgment, execution against the immovable property of the debtor is not the only execution option available. In addition, the banks submit that postponing only money judgments related to home loans would amount to irrational differentiation and would be arbitrary only because of the prospect that a person's right of access to housing may be implicated where there is a separate decision-making process, with different considerations, that must be engaged before a home is executed against.

[46] The banks therefore contend, with reference to *Gundwana*,[44] that '*(i)t is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing.'* Thus, they submitted, that the judgment for the accelerated full outstanding balance of the loan, where the entitlement to such order has been proved, may be granted with the application to declare the

[42] *Fraser* (above) at para 12.
[43] *FirstRand Bank v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another* [2014] ZAGPJHC 117 at para 16 and *Absa Bank Ltd v Njolomba & Other Cases* 2018 (5) SA 548 (GJ) at para 13.
[44] *Gundwana (above)* at para 54.

property secured by the bond specially executable where special execution would be disproportionate to the other means available to exact payment of a judgment debt.[45] However, the banks contended that if this court were to find that the courts do have a discretion to postpone the money judgment, this discretion should be exercised sparingly in that doing so has undesirable consequences. It increases the costs for both parties; creates unpredictability and uncertainty in the credit system; incentivises creditors not to exhaust all avenues to resolve the matter with the debtor before approaching the court; and discourages debtors from timeously meeting their commitments and bringing up their arrears.

[47] Legal Aid submitted that as both the money judgment claim and the execution order should be heard together, both should be postponed together. The NCR agreed on the basis that courts have a discretion to refuse to grant money judgments. This, the NCR argued, is because courts have a discretion to either grant or decline an order for specific performance and money judgment applications constitute claims for specific performance.

[48] The view we take of the matter is that a loan agreement secured by a mortgage bond over the primary residence of the judgment debtor has the potential to impact the s 26 right of access to housing, with the money order causally connected to and intrinsically linked to the order of special execution, given the existence of the mortgage bond over the primary residence of the debtor. In the vast majority of cases the satisfaction of the money judgment will not be possible other than through a sale in execution of the immovable property, with a clear distinction therefore existing between a loan agreement secured by a mortgage bond registered over the debtor's immovable property and a loan agreement which does not. Where the immovable property is the primary residence of the debtor this puts the nature of the entire transaction into a different category, one which, when the application for both orders is considered

[45] See *Mouton* (above) at para 50.3. A court will not grant an executability order where "*alarm bells warn of abuse or disproportionality*."

simultaneously in the manner supported by the banks, engages s 26 of the Constitution. As a result, we are of the view that, having regard to the debtor's s 26 right, the money judgment may be postponed together with the order for special execution where a court, on a proper consideration of the facts before it, considers this to be in the interests of justice.

[49] Furthermore, the Constitutional Court has recognised that the National Credit Act is designed to strike a balance between the competing interests of consumers and credit providers.[46] The practice in this division has developed in which certain banks proceed to court to seek both the money judgment and an order of special execution when the debtor is only two months in arrears with payments on his or her loan account. Granting an order in circumstances of trifling arrears does not strike the balance between the interests of the parties in the manner contemplated by the NCA. It has been found that debtors are entitled to reinstate their home loans by purging the arrears right up until the immovable is sold in execution.[47] The view we take is that having regard to the competing interests of the parties and given the relationship between both the money order and the order of special execution the court, s 26 of the Constitution is engaged even in the application for the money order before the Court given that the application for such order is intertwined with the order for special execution. The view we take is that the Court therefore holds a discretion to postpone the application for a money order in appropriate circumstances having regard to s 172(1)(b) of the Constitution. We are not persuaded that Parliament,

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[46] *Nkata v FirstRand Bank Limited* 2016 (4) SA 257 (CC) ("*Nkata'*) at paras 93-4.

[47] See for example *FirstRand Bank Ltd t/a FNB v Zwane & Two Other Cases* 2016 (6) SA 400 (GJ) at para 27.

Section 129(*3)* reads: "Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."

Section 129(4)(b) states: "(4) A credit provider may not reinstate or revive a credit agreement after-

(a) the sale of any property pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123."

under section 129(3) of the NCA, has afforded the consumer the right to reinstate credit agreements after acceleration but left intact the credit providers' rights to accelerate a defaulting debtor's repayment of the full outstanding debt owed, when the debt is secured by a mortgage bond over the primary residence, without regard to s 26 of the Constitution.

[50] Absa, in argument appeared to concede that courts retain a general discretion in terms of section 173 of the Constitution to regulate their own processes but this is not 'free-ranging' as it is subject to '*the interests of justice*'. We agree. One such example may be '*bad faith*' on the part of the creditor, as noted by Binns-Ward J in this Division.[48]

[51] We are therefore are of the view that it would not be irrational for the courts to adopt a procedure in terms of which in appropriate circumstances they postpone money judgments arising from home loans which have been granted over the primary residence of the debtor. We take the view that the stated practice of the bank should be adhered to in providing a number of months to debtors to settle outstanding arrears, rather than sanctioning an approach to the court for a 'trifling debt'[49] after a very limited period of time and without appropriate steps being taken to resolve the matter. We consider it impossible to provide a benchmark for arrears justifying an approach to court. While we accept that there have been differing approaches by judges to the issue, this remains a unique enquiry undertaken in the exercise of a court's judicial oversight. To lay down a standard approach will be contrary to the constitutional imperative of judicial oversight in foreclosure matters.

<u>Ad question 6:</u> Whether the court has a discretion, when postponing an application for executability, to afford the mortgagor an opportunity to '…remedy a default in such

[48] See *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) at para 34.
[49] *Jaftha (*above) at para 40.

credit agreement by paying to the credit provider all amounts that are overdue…' under the National Credit Act 34 of 2005.

[52] The banks submitted that affording a debtor the right to remedy a default is not a matter of discretion. This right exists as a matter of law in terms of section 129(3) of the NCA and in line with the Constitutional Court's decision in *Nkata*.[50] It is clear that a proper interpretation of section 129(4)(b) of the NCA demonstrates that debtors are able to reinstate their home loans by purging their arrears right up until the immovable property is sold in execution. Accordingly, granting a money judgment, even if this led to the issuing of a writ of execution and the sale of movable property in satisfaction of the judgment debt, would not deprive a debtor of this right.

[53] What prevents the reinstatement in terms of s 129(4)(b) is only the sale in execution of the immovable property and the realization of the proceeds of such sale.

[54] As to the costs which arise in the reinstatement of a mortgage bond, we are bound by the majority judgment in *Nkata*,[51] that the credit provider's legal and reasonable costs of enforcement would become due and payable '*only when they are reasonable, agreed or taxed, and on due notice to the consumer*'.

[55] The difficulties which arise in postponing an order of special executability have been dealt with above. In this regard, given the factors which are required to be considered by the court at the time that the order is made, we are of the view that the court should not consider postponing the operation of the order as a matter of course.

<u>Ad question 7:</u> Whether the operation of Rule 46A(9) insofar as the setting of a reserve price is concerned purports to amend the substantive law or not.

[56] As was their stance adopted in relation to the *vires* of the rule, the banks approached this issue on the basis that Rule 46A(9) provides a procedural mechanism

[50] *Nkata* (above) at para 59.
[51] *Ibid* at para 80.

through which the court exercises judicial oversight and does not purport to amend the substantive law. We agree. The setting of a reserve price is a matter of procedural law, in that it is concerned with the manner in which the judgment is executed the conduct and procedure of the sale in execution.

<u>Ad question 8:</u> The circumstances under which a court is to set a reserve price and how this is to be determined in terms of the new uniform rule 46A, effective since 22 December 2017.

[57] The banks accept the stance adopted in *Mokebe* regarding the setting of reserve prices, namely that courts should always have regard to the circumstances; that they should generally set a reserve price; and that it will be the exception that courts do not do so. It was noted however that the court is not obliged to set a reserve price but it must consider the factors set out in rule 46A(9)(b) when it makes this determination. This is so since as a matter of substantive law, the court has judicial oversight concerning the declaration of executability of immovable property that is the primary residence of a debtor. Rule 46A(9) provides a mechanism through which the court exercises such judicial oversight and does not amend or add to the substantive law.

[58] The banks expressed a caution however that sales in execution are forced sales which impacts negatively on the price that may be obtained. Furthermore, it was contended that such properties are generally: in a state of disrepair given the execution debtor's inability to maintain the upkeep of the property; burdened with substantial outstanding levies and/or rates and taxes; and occupied, thus requiring the buyer to bear the costs of arranging for vacant occupation. As a result, it was submitted that where the facts show that setting a reserve price would cause prejudice, such as where it might result in the property not being sold the court should exercise its discretion to not set a reserve price.

[59] The banks disagreed with the LLHRF that there is a 'misalignment of incentives' between creditors and consumers insofar as forced sales are concerned. The banks

contended that save for collusion or ulterior purpose, there is in fact an alignment of interests.[52] The LLHRF submitted that Rule 46A(9) requires courts to set a reserve price in most cases and only in exceptional circumstances should it decline to do so. It notes the potential disadvantages that may arise when a reserve price is not set: the property may be sold for a nominal value or less than the arrears in which case the debtor may lose all that they had invested in the property. This loss may impact negatively on their constitutional rights to: access to housing; safety and security; the children's right to basic shelter; and ultimately the right to dignity. On the other hand, there are benefits in setting a reserve price. Doing so prevents or inhibits fraud and collusion intended to keep the sale price low. A reserve price will also account for the misalignment in the incentives between creditor and debtor: Banks seeks to recover the amount owing plus costs and nothing more, any amount in excess of this will only be to the debtor's benefit. Whereas, the debtor seeks to obtain the maximum sale price. Therefore, the bank has no incentive in realising the full value.

[60] Legal Aid submitted that Rule 46A(9)(a) obliges a court to *consider* whether it should set a reserve price and thus that setting a reserve price is not mandatory. It notes that setting a reserve price, counters against the property being sold unconscionably for less than market value. The NCR aligned itself with *Mokebe*, which held that in all matters where execution is granted against the primary residence of a debtor, a reserve price should be set by a Court, save for exceptional circumstances.

[61] The factors to be taken into account by the court in deciding whether to set a reserve price are clearly set out in Rule 46A(9)(b). These include the market value of the property; the amount owing in rates or levies; the mortgage bond amount outstanding; any equity which may be realised between the reserve price and the market value of the property; any reduction of the judgment debtor's indebtedness on the judgment debt; whether the immovable property is occupied, by whom and the circumstances of such

[52] See *Bartezky* (above) at para 13.

occupation; the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold; issues of prejudice; and any other factor which the court considers necessary.

[62] There is no purpose served in setting a reserve price with no evidence as to what that reserve price should be, nor would this amount to the court exercising its duty judicially.[53] In our view there would be benefit in a practice directive being developed which details the manner in which the information is required to be placed before the court to allow the court to have regard to the factors relevant to setting a reserve price, as detailed in the rule.

[63] Our courts have acknowledged that the forced nature of sales in execution necessarily negatively impacts upon the price at which a property can be sold.[54] It is generally accepted that a voluntary sale will realise more than a forced sale.[55] We however share the approach taken by the Court in *Mokebe* that the benefits of setting a reserve price in most instances outweigh any prejudice which may arise in doing so. The experience of Mrs Molokomme indicates as much, in that a reserve price will halt the sale of homes at minimal value to the direct prejudice of the judgment debtor. It appears to us that it is therefore only in exceptional circumstances that the court should exercise its discretion not to set a reserve price.

<u>Ad question 9:</u> And any other issue the judges wish to hear the parties on.

[64] The NCR contended that section 71A of the NCA entitles consumers to the automatic removal of adverse consumer credit information, inclusive of judgment debts, where a consumer has settled its obligations under the credit agreement. Failure to comply with this section, where Banks fail to abandon the judgments, it argued, will result in the debtor experiencing further hardship. The NCR argued for a harmonisation

[53] *Nkwane v Nkwane and Others* [2018] ZAGPPHC 153 ('*Nkwane*') at paras 14 and 25.
[54] *Ibid* at para 14; *Bartezky* (above) at para 13; and *Mouton* (above) at para 99.
[55] *Nkwane* at para 8.

between Rule 46A, section 129 and section 71A of the NCA. It submitted that the consumer's right to re-instatement upon payment of the arrears includes the re-instatement of the consumer's credit profile with registered credit bureauxs.

[65] None of the other parties or *amici curiae* dealt with this in their heads of argument and the issue was not raised in the directive of the Judge President. In the circumstances, this remains an issue in our view for another day.

Conclusion

[66] In respect of each of the applications before the Court, the banks concerned sought that the matters be postponed *sine dies* with no order as to costs, but with the express undertaking that none of the costs incurred in respect of these proceedings would be borne by any of the debtors concerned.

[67] Having considered each of the issues raised by the Judge President, we are of the view that it would be of benefit to have the practice of this Division more closely aligned with that of other Divisions of the High Court when determining applications of this nature. We take the view that it would consequently be benefit if a Practice Directive on foreclosures is implemented in this Division, which is congruent with Rule 46A and the evolving constitutional jurisprudence, to provide for the manner and form in which information should be placed on affidavit before the Court in order that it can exercise its judicial oversight role in foreclosure matters as intended by the Constitutional Court. We propose that a directive, such as that attached marked 'A' together with the draft affidavit referenced in it, be inserted into the Western Cape Practice Directions as 33A, taking substantially the same form as the similar Practice Directive contained in the Gauteng: Johannesburg Practice Manual.[56]

[68] We have no doubt that creating a greater degree of national uniformity between Divisions, as far as is possible, will be advantageous to litigants and this Court. This will,

[56] See Chapter 10.17.

in our view, as was stated in *Camps Bay Ratepayers' and Residents' Association v Harrison*,[57] advance –

> '[c]*ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis."*...[as]… *a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos*.'

Order

[69] In the result, the following order is made:

1. The applications in case numbers 11294/18, 15134/18, 12777/18, 12285/18, 13809/18, 22263/17, 12365/18 are postponed *sine dies*.

2. The practice by the Sheriff of this Court to charge a "danger" or urgency fee for serving process in township areas is found unacceptable. A copy of this judgment is to be brought to the attention of the Sheriff's Board for appropriate steps to be taken to prevent the continuation of this practice.

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ERASMUS J

[57] 2011 (4) SA 42 (CC) at para 28, quoting Hahlo & Kahn *The South African Legal System and its Background* (Juta, Cape Town 1968) at 214 – 15. . See also *Eke v Parsons* 2016 (3) SA 37 (CC).

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DOLAMO J

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SAVAGE J

Appearances:

For Standard Bank: J Babamia and M Mbikwa
Instructed by Edward Nathan Sonnenberg Inc.

For Absa Bank: K Hofmeyr, M Musandlwa and A Armstrong
Instructed by Webber Wentzel

For first *amicus curiae*, the Legal Aid Board: M Calitz

For second *amicus curiae*, the National Credit Regulator: E Mahlangu
Instructed by Mafungo Attorneys

For third *amicus curiae*, the LLHRF: E Webber
Instructed by Legal Resources Centre

'A'

WESTERN CAPE HIGH COURT PRACTICE DIRECTION

33A. FORECLOSURE (AND EXECUTION WHEN PROPERTY IS, OR APPEARS TO BE, THE DEFENDANT'S PRIMARY HOME)

This chapter is applicable to all applications for foreclosure. (The word 'defendant' includes the word 'respondent' and *vice versa*. The word 'debtor' includes the word 'consumer' and refers to a 'judgment debtor').

THIS DIRECTIVE MUST BE READ IN CONJUNCTION WITH THE AMENDED RULE 46A (WHICH AMENDMENT CAME INTO OPERATION ON 22 DECEMBER 2017)

ALL REQUIREMENTS SET OUT IN THIS PRACTICE MANAUAL MUST STILL BE COMPLIED WITH IF THEY ARE IN ADDITION TO AND NOT IN CONFLICT WITH THE AMENDED RULES.

In every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit is required. A *PRO FORMA* AFFIDAVIT DEALING WITH THE REQUIREMENTS IS ATTACHED HERETO. SUCH AFFIDAVIT SHALL ALSO DEAL WITH ALL THE ITEMS REFERRED TO IN AMENDED RULE 46A. ALL REQUIREMENTS SET OUT IN THIS PRACTICE MANAUAL MUST STILL BE COMPLIED WITH IF THEY ARE IN ADDITION TO AND NOT IN CONFLICT WITH THE AMENDED RULES. The affidavit shall be attached to the Notice of Set Down.

1. An order declaring property specially executable shall only be granted by the court if the application has been served on the respondent PERSONALLY, alternatively in a manner as authorised by the Court. If efforts to serve personally prove impossible, the court may authorise service at the place of employment of the respondent, or on a Saturday, or on a person over the age of 16 at the *domicilium citandi*, or in any other way which may bring the matter to the attention of the respondent. Furthermore, all e-mail and/or other correspondence which may be relevant to the respondent being aware of the date of hearing should also be attached. If the property is not the primary residence (for example where served on a tenant, and the respondent no longer resides there) personal service is not required.

2. Where action proceedings have been instituted and the provisions of Rule 31(5) are applicable, the Registrar shall refer the application for the money judgment and the declaration that the property is executable, to open court. The Registrar may not grant the money judgment separately, if the debt is related to a mortgage bond over an immovable property.

3. Note: When arrears are low, and/or the period of non-payment is a few weeks/months, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of 6 months and that notice of set down should again be served. At the adjourned date, an affidavit should be filed, setting out what efforts the Bank has made to effect settlement and/or prevent foreclosure.

   [1] NB: Default judgment should not be granted for the amount and the order for execution only postponed as this will defeat the object of postponing the matter i.e. to allow the consumer to take advice and seek to make arrangements to bring the arrears up to date or purge the default. (See *FirstRand Bank Ltd t/a FNB v Zwane & Two Other Cases* 2016 (6) SA 400 (GJ) at para 27; *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) at para 7; *Absa Bank Ltd v Ntsane 2007 (3) SA 554 (T)*; *FirstRand Bank Ltd v Maleke & Three Similar Cases* 2010 (1) SA 143 (GSJ) and *Absa Bank Limited v Lekuku* 2014 JDR 2137 (GP); [2014] ZAGPJHC 244.) The creditor should not seek and the court (not registrar) should not give any money judgment (either for the accelerated total balance or otherwise) unrelated to an order declaring the property executable; if a money judgment is given and then executed against movables, that precludes the debtor from reinstating the bond by paying the arrears (See NCA s. 129(4)(*b*)).

   [2] The ideal objective of the court's enquiry under R46A (*infra*) must be to establish a payment plan for the arrears, thereby attaining the reinstatement of the arrears, and so nullify the accelerated total balance. (Rule 46A(2)(*a*)(ii)).

4. A certificate of balance and payment history may be handed in at the hearing.

5. If there is a failure to comply with the provisions of s 129 of the NCA, the following order pursuant to s 130(4)(*b*) of the NCA may be issued:

ANNEXURE TO PRACTICE DIRECTION 33A

FORECLOSURE AFFIDAVIT

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No.: 123456

In the matter between:
BANK

Applicant

And
CONSUMER

Respondent

Affidavit pursuant to Chapter 10.17 of the Practice Manual

I, the undersigned,

ATTORNEY

do hereby make oath and say that:

A. I am an adult attorney, duly admitted as such, and practicing as such in partnership under the name and style of XYZ Attorneys of (address). I am the attorney of record for the Applicant in this matter.
B. The facts herein contained are within my own personal knowledge and belief and are true and correct.
C. I have perused the court file under the above case number wherein the applicant seeks, *inter alia*, execution where the property appears to be the primary home of the respondent.

Compliance with Practice Direction 33A of the Practice Directions: Western Cape High Court

1. As per Practice Direction 33A of the Practice Directions: Western Cape High Court I confirm the following:

    1.1 I am satisfied that a proper cause of action has been disclosed and that there is not a mere reliance on a security instrument as is evidenced from page ___ para ___ (and pages ___ where the agreement of loan (and other documents appear));

    1.2 I am satisfied that there is compliance with Rule 18(6) as appears at page ___ para ___; alternatively,

    1.3 I am satisfied that sufficient facts have been disclosed and set out for a proper cause of action as appears at page ___ para ___;

2. Original Documents

    2.1 I have inspected the original documents pertaining to the matter as well as the security documents on which the matter is based and the copies attached to the summons or application, are true copies of the originals. Alternatively;

    2.2 An affidavit from the judgment creditor has been filed setting out the whereabouts of the original documents, which affidavit also sets out the grounds of the deponent's belief that the documents attached are indeed copies of the originals as appears at page ___ para ___. (Delete paragraph if 2.1 is applicable).

3. I am satisfied that the application or summons contains the statements referred to in *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA), *Nedbank Ltd v Jessa* 2012 (6) SA 166 (WCC) and *Standard Bank of SA Ltd v Dawood* 2012 (6) SA 151 (WCC):

    3.1 The defendant's attention is drawn to s 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right, it is incumbent on the defendant to place information supporting that claim before the court. This appears at page ___ para ___;

    3.2 The judgment debtor has been advised that he (or she) is entitled to place information regarding relevant circumstances within the meaning of s 26(3) of the Constitution and rule 46, before the court hearing the matter. This appears at page ___ para ___;

    3.3 The judgment debtor has been advised that in terms of Rule 46A of the Uniform Rules of Court no writ of execution shall be issued against his or her primary residence (home), unless a court having considered all the relevant circumstances, orders execution against such property. This appears at page ___ para ___;

3.4 The judgment debtor has been advised that if he or she objects to his or her home being declared executable, he or she is called upon to place facts and submissions before the court in terms of Rule 46A(6) to enable the court to consider them in terms of rule 46A(8) of the Rules of Court and that a failure to do so may result in an order declaring his/her home specially executable, consequent upon which his/her home may be sold in execution. This appears at page ___ para ___.

4. Furthermore:

4.1 The instalments are R____ per month.

4.2 The arrears outstanding under the bond when the latter was called up are R____ as appears at page ___ para ___;

4.3 The last payment of R___ was made on (date) (as appears at page ___ para ___;

4.4 The debtor's payment record is at page ___ annexure___;

4.5 The amount of the arrears outstanding at the date of the application for default judgment is R____. This appears at page ___ para ___;

4.6 The total amount owing in respect of which execution is sought is R_____ and appears at page ___ para ___;

4.7 The immovable property which is sought to have declared executable was not acquired by means or with the assistance of a State subsidy. This appears at page ___ para ___;

4.8 The immovable property is occupied/not occupied (delete whichever is not applicable). This appears at page ___ para ___;

4.9 The immovable property is utilised for residential purposes/commercial purposes (delete whichever is not applicable). This appears at page ___ para ___;

4.10 The debt which is sought to be enforced was/was not (delete whichever is not applicable) incurred in order to acquire the immovable property sought to be declared executable. This appears at page ___ para ___;

4.11 That the mortgaged property is the debtor's primary residence, appears at page ___ para ___;

4.12 The circumstances under which the debt was incurred are the following (details) and appear at page ___ para ___;

4.13 The relative financial strengths of the creditor and the debtor, are the following (details) and appear at page ___ para ___;

4.14 There is no possibility that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence as appears at page ___ para ___;

4.15 The proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead with a consequent loss of his home, appears at page ___ para ___;

4.16 A Notice ('the Notice') in terms of s 129 of the National Credit Act 34 of 2005 ('the NCA') was sent to the debtor prior to the institution of action on (date), and it appears at page ___ para ___ (if the Notice was sent by someone other than the deponent, a confirmatory affidavit is required from such person);

4.17 The action is founded on an agreement within the meaning of the NCA. The allegation concerning the manner of delivery, which the consumer has chosen for the Notice appears at page ___ para ___ and the Notice was delivered in that manner, as appears at page ___ para ___;

4.18 The *domicilium* address at which delivery of the Notice took place is _____. This appears at page ___ of the affidavit and in the agreement annexure ____ at page ____.

4.19 The debtor's reaction to such Notice was (details) as appears at page ___ para ___;

4.20 The period of time that elapsed between receipt of such Notice and the institution of action is ____ days and appears at page ___ para ___;

4.21 The property is in fact occupied/not occupied (delete whichever is not applicable) by the debtor or by _____ as appears at page ___ para ___;

4.22 Whether the debtor will/will not (delete whichever is not applicable) lose access to housing as a result of execution being levied against his home, appears at page ___ para ___; because _____;

4.23 The creditor has/has not (delete whichever is not applicable) instituted action with an ulterior motive. This appears at page ___ para ___;

4.24 The position of the debtor's dependants and other occupants of the house are the following (detail each occupant's relationship to defendant, gender and age of occupants) as appears at page ___ para ___.

5. Service of the Application

5.1 The process was served PERSONALLY at (address) as appears at page ___ para ___ which address is the *domicilium*/residence/work address (delete whichever is not applicable) of the respondent; or

5.2 The following further attempts were made to draw the respondent's attention to the proceedings as appears from the annexures hereto:

5.2.1 e-mail correspondence with proof of transmission and, if possible, receipt;

5.2.2 telephone calls;

5.2.3 other.

5.3 Service was effected on (date) by (manner) as appears at page ___ para ___ as authorised by the court on (date) as appears at page ___ para ___ (and Annexure___ on page ____).

6. If the Consumer has chosen for the Notice to be posted – Section 129(1) Notice

6.1 The compulsory Notice pursuant to s 129(1) was delivered to the relevant post office. The post office would, in the normal course, have secured delivery of the registered item notification slip, informing the consumer that a registered article was available for collection. This appears at page ___ para ___;

6.2 The post-despatch 'track and trace' printout from the website of the South African Post Office is attached indicating delivery at the consumer's post office situated at _____. This appears at page ___ para ___; or

6.3 The post office reflected on the 'track and trace' report, to which the s 129 Notice was sent, is not the same as the post office or town name to which the s 129 Notice was sent, but there is proof (which appears at page ___ para ___) that the post office reflected on this 'track and trace' report, services the address of the consumer, which appears at page ___ para ___;

6.4 A minimum period of 10 business days of giving the statutory Notice has elapsed before commencement of these legal proceedings. This period is calculated, by having regard to the delivery and service of the process, which took place on (date) as appears at page ___ para ___. The proceedings were launched on (date);

6.5 Alternatively to 6.1–6.4., the Consumer applied for debt review but Notice of termination of the debt review was given to the consumer, the debt counsellor and the National Credit Regulator at least 10 business days after the consumer applied for debt review. The consumer applied for debt review on (date) which appears at page ___ para ___. The Notice of termination was

given on _____ as appears from page ____ para ____ and Annexure ____ on page _____.

6.6 The return of service reflects that the documents on which the judgment creditor relies, were attached to the process which was served and appears at page ___ para ___.

6.7 Clause ___ in the agreement at page ___ provides for a costs order other than a party and party scale.

6.8 The following attempts were made by the applicant to contact the defendant in order to negotiate terms of settlement to prevent foreclosure (detail attempts and respondent's response thereto) as appears from page ____ para ___.

7. In terms of Rule 46A(5)(*a*) to (*e*), the information required is as follows, as appears at paras ____ at page ____:

7.1 The assessed value at the time of the loan was R_____.

7.2 The market value of the property is R___; Annexure ' ' hereto, page____;

7.3 The local authority valuation of the property is R___; Annexure ' ' hereto, page____;

7.4 The amounts owing on mortgage bonds is R___; Annexure ' ' hereto, page____;

7.5 The amounts owing to the local authority for rates and other dues is R___; Annexure ' ' hereto, page____;

7.6 The amounts owing to the body corporate for levies is R___; Annexure ' ' hereto, page____;

7.7 The following are other relevant factors which the court may have regard to in terms of Rule 46A(8), which includes any information relevant to the considerations in Rule 46A(9)(*a*) and (*b*):

8. The property is/is not subject to a claim by a preferent creditor/s, being (insert details). In accordance with Rule 46(5), Service has been effected on the entities referred to in Rule 46(5). The returns of service are annexed hereto as ….. ' ..', '..', '..'. The relevant entities have been informed that within 10 days of (insert date), they are to stipulate a reserve price or to agree to a sale in writing without reserve, as appears from Annexure '..' hereto. The applicant has provided proof of such responses to the sheriff as per Annexure '…' hereto.

9. There has been compliance with Rule 46A(3) and (4) as appears from para ____ page____.

WHEREFORE I pray that it may please this Honourable Court to grant an order in terms of the draft attached to the Notice of set down marked **'Draft Order'**.

_____

DEPONENT

SIGNED and **SWORN TO** before me, at _____ on this ____ day of 20__, by the Deponent who has acknowledged that he/she knows and understands the contents of this Affidavit and he/she has declared that he/she has no objection to taking the oath, and he/she regards the oath as binding on his/her conscience and he/she has uttered the following words: 'I swear that the contents of this Affidavit are true, so help me God'.

_____

COMMISSIONER OF OATHS

FULL NAMES:

ADDRESS:

CAPACITY: