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

Case Number: 19782/2012

In the matter between:

ABSA BANK LIMITED

Applicant

and

LUVUYO CREADNER KEBENI

First Respondent

THANDIWE KEBENI

Second Respondent

and

Case Number: 19782/2012

In the matter between:

LUVUYO CREADNER KEBENI

First Applicant

THANDIWE KEBENI

Second Applicant

and

RULES BOARD FOR COURTS OF LAW

First Respondent

**MINISTER OF CONSTITUTIONAL DEVELOPMENT
AND CORRECTIONAL SERVICES**

Second Respondent

ABSA BANK LIMITED

Third Respondent

SHERIFF OF GOODWOOD AREA 1

Fourth Respondent

JUDGMENT ELECTRONICALLY DELIVERED ON 28 MAY 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] There are three applications before this Court which have been consolidated¹: (a) the applicant's ("*Absa's*") application for rescission of paragraph 2 of a summary judgment order granted on 25 February 2014 ("*the rescission application*"); Absa's application in terms of Rule 46A, issued on 9 May 2023 ("*the Rule 46A application*"), in which Absa seeks a fresh order declaring the respondents' immovable property specially executable; and an application by Mr and Mrs Kebeni in terms of Uniform Rule 16A in which they seek various orders, including a declaration that Rule 46A unconstitutional, unlawful and invalid ("*the Rule 16A application*"). Whilst the parties are cited differently in the Rule 16A application, Mr and Mrs Kebeni, who are respondents in the first two applications and applicants in the third, are referred to as "the respondents" throughout, for convenience and consistency.

B. RELEVANT FACTS

¹ Per Directive of my brother, Erasmus J, dated 26 January 2024.

[2] The background facts cases are common cause. On 25 February 2014 Schippers J, as he then was, granted summary judgment against the respondents as follows:

“The Court grants summary judgment:

1. Against [respondents] jointly and severally, the one paying the other to be absolved for:
 - 1.1 Payment of the sum of R516 603.22...
 - 1.2 Interest on the abovementioned amount at the rate of 8,50% p.a. calculated daily and capitalised monthly with effect from 18 September 2012 to date of final payment.
 - 1.3 Costs of suit on a scale as between attorney and client.
2. Erf 1[...] Goodwood, situate in the City of Cape Town [(*“the property”*)]...is declared specially executable.
3. The [respondents] are granted leave to defend [Absa’s] claim for interest in the sum of R16 333.63...”

[3] Between 2015 and 2020 Absa sought to execute the order by attaching the property, and arranged dates for sale on no fewer than 8 different occasions. At every turn, the sale was opposed by the respondents, who launched various court applications, including applications for leave to appeal to the Supreme Court of Appeal (SCA) and the Constitutional Court, both of which were dismissed with costs. The respondents also launched rescission applications, a contempt application and an application to stay the execution, all without success.

[4] On 29 September 2020, the respondents brought the Rule 16A application. Amongst other things, they challenged firstly, the then-Rule 46(12), which was applicable when the 2014 judgment was granted, on the basis that it did not provide for a reserve price, and secondly, the new Rule 46A which came into effect in 2017, on the basis that it did not apply retrospectively.

[5] In response to the Rule 16A application, Absa formally abandoned paragraph 2 of the 2014 Order. The notice of abandonment was preceded by a ‘with prejudice’

letter dated 5 November 2020 from Absa's attorneys to the respondents, which stated as follows in relevant part:

- "4. [T]he effect of paragraph 2 of the [2014] Order was to declare the property at issue specially executable under the Rule 46 (12) of the Uniform Rules of Court, as the Rules stood prior to their amendment in 2017 ("the old Rules")
5. In your present application you argue essentially that:
 - 5.1 Rule 46(12) is unconstitutional because the old Rules do not require a reserve price to be set on property to be executed.
 - 5.2 This is not cured by Rule 46A since it does not have retrospective effect as per *Williams*² and Rule 46A is unconstitutional on account of its failure to operate retrospectively; and
 - 5.3 It would be impermissible and unconstitutional for our client to sell the immovable property without a reserve price.
6. Our client has considered the merits of your present application and does not agree with it.
7. However, as a practical matter to avoid unnecessary litigation and costs - particularly given the lengthy and costly history of this matter - our client has elected to abandon paragraph 2 of the [2014] Order and will not rely on it. In this regard, we understand that a notice of abandonment in respect of paragraph 2 will be served on you shortly by Absa's attorneys of record...

² *Williams and Another v Standard Bank of South Africa Ltd and Another* [2019] ZAGPPHC 364.

8. The abandonment of paragraph 2 of the Order is without prejudice to paragraph 1 of the order, which our client does not abandon and which remains in force.
9. As a result of our client's abandonment of paragraph 2 of the order we note that your present application is moot:
 - 9.1 our client no longer has any order in its favour declaring the property specially executable in terms of the old Rules; and
 - 9.2 execution processes in respect of the property will now need to take place in terms of and comply with the new rules, including Rule 46A and its requirements in relation to a reserve price.
10. In the circumstances, we invite you to withdraw the present application before the Honourable Court without further delay - with each party to pay their own costs..."

[6] While the respondents accepted the abandonment, they did not withdraw their Rule 16A application, stating that the abandonment did not deal with other issues raised in their Rule 16A application, namely the application of sections 129(3), 101, read with 103(5) of the National Credit Act, and the interest rate applicable.

[7] On 19 December 2022 Absa launched an application for rescission of paragraph 2 of the 2014 Order, and on about 9 May 2023, Absa launched the present proceedings to declare the property specially executable in terms of Rule 46A.

[8] It is customary for our courts, whenever it is possible, to decide any case, civil or criminal, without reaching a constitutional issue.³ For reasons that will become evident, I am of the view that this is such a case, and I accordingly resume by

³ *S v Mhlungu and Others* 1995 (7) BCLR 793 (CC) at para 59. *Zantsi v Council of State, Ciskei and Others* 1995 (10) BCLR 1424 (CC) at para 5.

determining the application brought in terms of Rule 46A and the rescission application.

C. RULE 46A & RESCISSION APPLICATIONS

[9] The respondents oppose the Rule 46A application broadly on four bases. First, that the executability of the property is *res judicata*. Second, based on the authority of *Williams*⁴, Rule 46A does not operate retrospectively. Third, that Absa has failed to comply with Rule 46(5) by providing a recent valuation of the property, the local authority valuation of the property, and the amounts owing to the local authority as rates and other dues. Fourth, the respondents contend that their rights in terms of Section 26 of the Constitution would be infringed should the property be declared executable.

[10] In answer to the *res judicata* defence, Absa states, firstly, that the respondents accepted the abandonment of the execution order and are therefore precluded from raising the defence of *res judicata*; second, in any event, the circumstances of the case warrant the relaxation of *res judicata*; and third, and in the alternative, should the Court uphold the *res judicata* defence, Absa seeks a rescission of the execution order.

[11] The issue of whether the executability of the property is *res judicata*, revolves around the legal significance of Absa's abandonment. In terms of Uniform Rule 41(2)

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“(2) Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of subrule (1) relating to costs shall mutatis mutandis apply in the case of a notice delivered in terms of this subrule.”

⁴ *Williams & Another v Standard Bank of South Africa Limited & Another* (2019) ZAWCHC 364 (3 May 2019).

[12] In *Body Corporate*⁵, default judgment had been granted in favour of the plaintiff against the defendant for payment of the sum of R123 101.60, together with interest and costs. It later transpired that the default judgment had been erroneously granted without a notice of bar having been served on the defendant, and as a result, the plaintiff elected to abandon the judgment in terms of Rule 41(2). The plaintiff in that case argued, firstly, that once the provisions of Uniform Rule 41 were invoked, the judgment no longer had any legal effect and therefore could not sustain a plea of *res judicata*, and secondly, that the abandonment had the effect of setting aside or rescinding the judgment. The court considered these arguments and stated as follows:

"I do not agree with the plaintiff's second contention that the invocation of Rule 41(2) had the effect of setting aside or rescinding the judgment and therefore such judgment could not sustain a plea of res judicata. It is settled law that parties to a judgment cannot unilaterally or by consent cancel a judgment. A judgment stands until either rescinded or set aside by a court of appeal.

*The grant of a judgment, whether by default or otherwise, has important legal consequences. It stands until set aside by a court of competent jurisdiction, and until that is done it must be obeyed even if the court order was incorrectly granted (see *Clipsal Australia (Pty) Limited v GAP Distributors* 2010 (2) SA 289 (SCA) paras 21 and 22 and the reference therein to the decisions of *Kotze v Kotze* 1953 (2) SA 184 (C) at 187f-g; *Culverwell V Beira* 1992 (4) SA 490 (W) at 494a-e; *Bezhuidenhout v Patensie Citrus Beherend Bpk* 2001 (2) SA 224 (E) at 228f to 230 a. See also in this regard *Motala supra*.*

The act of abandonment is of a unilateral nature and operates ex nunc and not ex tunc. It precludes the party who has abandoned its rights under the judgment from enforcing the judgment but the judgment still remains in existence with all its intended legal consequences. The opposite party need not accept such abandonment. It was open to the defendant to accept the

⁵ *Body Corporate of 22 West Road South v Ergold Property* 8 CC 2014 JDR 2258 (GJ) at page 6.

abandonment, which it did not do in the present case. Had the defendant accepted the abandonment it would have been precluded from raising a plea of res judicata.

On my reading of the rules they do not equate an abandonment with a rescission or setting aside of the judgment. Rule 41 must be juxtaposed with Rule 42. The latter rule deals with rescissions, which are conceptually different.”

[13] In *Fondse*⁶, a case similar to the present, the bank appellant had loaned money to the defendants against the security of a mortgage bond. When the defendants failed to pay, the bank launched action proceedings which were defended. Ultimately, the bank obtained summary judgment, against which the defendants applied for leave to appeal. At the leave to appeal stage the bank abandoned the judgment on the basis of the *Sebola*⁷ judgment, which was issued by the Constitutional Court after the granting of the summary judgment. Upon reading that judgment the bank appreciated that it was non-compliant with Section 129 of the NCA. It subsequently withdrew the action, and instituted fresh proceedings for the identical indebtedness. In the answering affidavit, the defendant, who were now represented by an executor, raised *res judicata* as a defence to the bank’s claim, and the defence was upheld in the court *a quo*.

[14] On appeal, the central issue was whether the bank’s abandonment of its judgment and institution of fresh proceedings under the peculiar facts of that case constituted proper grounds upon which to relax the application of *res judicata*. The issue was decided, ultimately, upon application of the fact-specific exercise espoused in *Molaudzi*.

[15] In *Molaudzi*⁸ the Constitutional Court considered the scope of *res judicata* and confirmed that its rationale was to give effect to the finality of judgments. However, the Court acknowledged that the rigid application of the doctrine may cause injustice,

⁶ *Firststrand Bank Ltd t/a First National Bank v Fondse and Another* (A5027/2016) [2017] ZAGPJHC 184 (23 June 2017).

⁷ *Sebola & Another v Standard Bank of South Africa Limited & Another* 2012 (5) SA 142 (CC).

⁸ *Molaudzi v The State* 2012 (2) SACR 341 (CC).

and it considered the circumstances under which it may be relaxed, stating as follows:

“[32] Since res judicata is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures.

[33] This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. This Court held in South African Broadcasting Corp Ltd:

“The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction.”

[34] The power in section 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos. In addition, a court cannot use this power to assume jurisdiction that it does not otherwise have.”

[16] At paragraph 37, the Constitutional Court continued:

“...legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are

allowed to stand merely for the sake of rigidly adhering to the principle of res judicata.”

D. DISCUSSION

[17] It is important to emphasise that a judgment was already issued in 2014 in this matter, after consideration of the evidential material before the court. That judgment remains final and binding on the parties, especially since neither the SCA nor the Constitutional Court granted leave to appeal to the respondents.

[18] Absa contends that the respondents should be precluded from relying on *res judicata* on the basis that they acceded to the abandonment. At the same time, it relies on *Ergold Property* as authority for the proposition that an abandonment does not have the effect of setting aside a decision. The significance of that authority is that, regardless of whether the parties agreed to such abandonment, the legal position is that the judgment stands until set aside. Parties to a judgment cannot unilaterally or by consent cancel a judgment. A judgment stands until either rescinded or set aside by a court appeal.⁹

[19] As support for its position, Absa relies on a comment that was made in *Ergold* to the effect that if the defendant had accepted the plaintiff's abandonment in that case, it would have been precluded from raising a plea of *res judicata*. However, this comment, which was made in *obiter*, appears to be at odds with the *ratio* of the judgment on this issue. The *ratio* includes a finding that the act abandonment is unilateral in nature which the opposite party need not accept.

[20] Rather, as the case law illustrates, the question of whether *res judicata* necessarily follows upon an abandonment of a judgment depends upon the facts,¹⁰ and the particular facts of this case are determinative of this issue. According to the common cause facts, the respondents in this case merely noted Absa's abandonment, which was Absa's election. There has been no suggestion that their response went as far as to agree to a subsequent institution of proceedings. There is

⁹ *Ergold Property* p6.

¹⁰ See *Fondse* paras [33] - [48]. *Prinsloo NO v Goldex 15 (Pty) Ltd & Another*.

no basis to conclude that the respondents would relinquish their rights to oppose the special execution of their property in circumstances where they had opposed such proceedings on so many occasions, including to the SCA and the Constitutional Court. It would be naive to read the respondents' response to the abandonment in that light in the context of the background that had ensued between the parties up to that point. The parties had been embroiled in litigation for some six years by the date of Absa's partial abandonment.

[21] Instead, the respondents declined to withdraw their 16A application, which was the intended aim of Absa's abandonment, and pointed to certain other issues that were not addressed to their satisfaction by the abandonment. Thus, on the facts I am unable to conclude that the respondents accepted the abandonment such that they are precluded from raising *res judicata*.

[22] The next question is whether *res judicata* should be relaxed in the circumstances of this case, and based on both *Molaudzi* and *Fondse*, I am of the view that there are grounds to relax its application in this case. Important in that regard is the context of the letter dated 5 November 2020 which preceded the notice of abandonment. It stated in clear terms that the abandonment was only in respect of paragraph 2 of the court order. Thus, the respondents were not released from indebtedness.

[23] As regards the special execution of the property which was the subject of the abandoned order, the letter similarly made clear that, although that order was being abandoned, "*execution processes in respect of the property will now need to take place in terms of and comply with the new rules, including rule 46 A and its requirements in relation to a reserve price*". There can accordingly be no question of a waiver of Absa's right to claim the indebtedness of the respondents, or of its right to rely on its security in terms of the mortgage bonds. The contents of the letter expressly contradict any such intention.

[24] Absa's letter expressly stated the abandonment was for practical reasons, to avoid further unnecessary litigation and costs. Though the litigation mentioned in paragraph 7 of the letter was not specified, it is clear from what preceded it, namely

the summary of the respondents' case in terms of Rule 16A at paragraph 5, that the reference to 'unnecessary litigation' was a reference to the Rule 16A application. That this was so was confirmed by the respondents' response which focused on what they considered to be outstanding from the Rule 16A application following Absa's abandonment.

[25] That being the case, it must be accepted that the purpose of the abandonment was the practical resolution of unnecessary litigation which would result from the respondents' challenge of the fact that the execution was to occur without a reserve price. There is no indication that the summary judgment would have been overturned on that basis because it was legally granted at a time when Rule 46 had not yet been amended, and executions lawfully took place without a reserve price. Yet that decision was now facing a constitutional attack in the form of the respondents' Rule 16A application.

[26] It is clear from the letter and the context that the choices faced by Absa at the time were, to either undergo yet another prolonged litigation exercise which would probably take some years to resolve given that it raised constitutional matters, or to abandon that part of the order as it did, which was a shorter route. Whatever one may say about Absa's decision-making regarding those options, the undeniable observation is that in both options it sought to retain for itself the right of executing the property, which had been granted by the summary judgment. Although both options involved a delay in the special execution, the latter option of abandoning paragraph 2 was a quicker route.

[27] Absa may be criticised for its failure to realise that the abandonment would not amount to setting aside paragraph 2 of the 2014 order, especially given that it has throughout being legally represented, unlike the respondents. Regardless of Absa's folly, for which it has provided explanation, the legal reality is that paragraph 2 retains its legal force. If the strict application of the legal principle of *res judicata* is not relaxed and the rescission application is unsuccessful, the applicant would have no other legal recourse to enforce its rights of security in relation to the mortgage bonds. The applicant would be left unsuited.

[28] As Absa observes, if *res judicata* is not relaxed in this case that will have an unfair result in that the application of the doctrine would result in respondents' property being released from Absa's right of security. The respondents would be left with unencumbered property, and Absa unable to rely on its security to satisfy the judgment debt, which has remained unsatisfied since February 2014. Manifestly, this would be grossly unfair.

[29] I have also not found any evidence of abuse of court processes, as alleged by the respondents in this regard, given that the intention to proceed with the special execution was made clear in the letter of 5 November 2020 which preceded the abandonment. That is what is being done now by Absa, and no such abuse was raised by the respondents when they were notified of such intentions at the time of the abandonment.

[30] The fact that the abandonment of paragraph 2 was motivated by seeking to avoid or to settle the Rule 16A application is not reason to conclude it was to abuse court processes. Far from it. Our courts have consistently commended and encouraged parties in litigation to curtail and not unnecessarily prolong court processes. That approach accords itself well with the duty to ensure expeditious resolution of disputes, as well as the proper administration of justice.

[31] Rather, it is the respondents who have simultaneously adopted positions which are at odds with each other. The respondents oppose, not only the Rule 46A application, but also the rescission application, which is sought in the alternative. Then, in their opposition to the Rule 46A application, they contend that Absa is bound by the decision of *Williams* where it was held that the Rule does not operate retrospectively to execution orders granted prior the coming into effect of rule 46A. The effect of this opposition is that the old Rule 46(12) must apply, in terms of which the special execution will take place without the setting of a reserve price, the very thing that they claim is unconstitutional in their Rule 16A application. Yet, in this Rule 46A application, in their reliance on *res judicata* they contend that the 2014 Order remains extant.

[32] It is no wonder that the Court was persuaded that all the matters between the parties should be consolidated. It is in the interests of the proper administration of justice to avoid a situation which might result in judgments which are at variance with each other, especially those concerning the same facts and between the same parties. As the courts have repeatedly stated, litigation is not a game of scoring technical points,¹¹ or of playing hide and seek¹².

[33] The fact that the respondents have launched an application in terms of Rule 16A to challenge the constitutionality of the old Rule is a relevant factor when considering whether the application of *res judicata* should be relaxed in the circumstances of this case. Also relevant is the fact that there is now a new Rule (46A) which caters for the respondents' quest to have a reserve price set if execution is to take place. This displays why it is in the interests of justice in the circumstances of this case to relax the application of *res judicata*. Another relevant factor is that the respondents were made aware at the time of abandoning paragraph 2 of the Court Order that Absa still intended pursuing the special execution, in terms of Rule 46A. Thus, the Rule 46A application was not unforeseen.

[34] Given that the nett effect of the abandonment is that paragraph 2 of the Court Order remains extant, the relaxation of *res judicata* will not take away any litigation rights of the respondents as contemplated in section 34 Constitution, or tilt the scales in Absa's favour, since Absa will not thereby benefit from anything that it has not already been granted in the form of the court order. By contrast, if the relaxation of *res judicata* is not permitted, Absa's rights in terms of section 34 will be frustrated and it will be left in limbo and without recourse because it has the benefit of a court order which it can no longer execute because it abandoned it even though it expressly reserved a right to seek that remedy although in terms of the amended Rule.

[35] For all these reasons, I am satisfied that the application of *res judicata* should be relaxed.

¹¹ *Cadac (Pty) Ltd v Weber-Stephen Products Co & others* [2010] ZASCA 105 at para 10; *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at [120].

¹² *MB v CSARS* [2022] ZATC 2 (8 April 2022) at paras [1] and [60].

[36] What remains is the respondents' challenge that Absa failed to comply with Rule 46A(5), which provides as follows:

“(5) Every application shall be supported by the following documents, where applicable, evidencing:

- (a) the market value of the immovable property;*
- (b) the local authority valuation of the immovable property;*
- (c) the amounts owing on mortgage bonds registered over the immovable property;*
- (d) the amount owing to the local authority as rates and other dues;*
- (e) the amounts owing to a body corporate as levies; and*
- (f) any other factor which may be necessary to enable the court to give effect to subrule (8):*

Provided that the court may call for any other document which it considers necessary.”

[37] The respondents state that Absa has failed to comply with Rule 46(5) by to providing a recent valuation of the property, the local authority valuation of the property, and the amounts owing to the local authority as rates and other dues. However, there is no merit to this allegation since those documents were indeed attached to the founding affidavit in the Rule 46A application, as follows: a municipal valuation certificate dated 16 January 2023 indicates that, as at that date, the property was valued at R1 800 000; a market-related valuation dated 1 November 2022 indicates a valuation amount of R1 650 000; a municipal account dated 23 February 2023 indicates the amounts owing to the municipality for rates, taxes and other dues amounted to R37 610,43. Contrary to what is stated in the answering affidavit these attachments and valuations attached to the founding affidavit were not older than a year old prior to the launch of the proceedings which was 9 May 2023, and were in fact very close to the date of deposing to the founding affidavit of 28 March 2023. I have also not found any evidence for the contention of the respondents that the market value of the property is R2 400 000,00. No such proof is provided. I accordingly find no merit in the challenge on the basis of Rule 46A(5).

[38] As for the respondents' challenge that the execution will infringe their rights in terms of section 26 of the Constitution, this challenge is based on an averment that there are alternative means by which the judgment debt can be satisfied. However, since the summary judgment order of 25 February 2014, the judgment debt remains outstanding, despite protracted ongoing negotiations between the parties. The respondents have had more than enough time, in excess of a decade, to settle their indebtedness, and their failure to do so indicates that they are unable to do so. Furthermore, the evidence indicates that the respondents own a number of properties, and are both gainfully employed and can accordingly afford alternative accommodation. There is no evidence that the execution would leave the respondents homeless.

[39] It has been held in by a full bench of this Division¹³ that the benefits of setting a reserve price in most instances outweigh any prejudice which may arise in doing so, and that it is only in exceptional circumstances that they should exercise its discretion not to set a reserve price. In calculating the reserve price in a manner that preserves as much value of the property as possible, I consider it appropriate to take the average between the proven market value and the municipal value minus the outstanding rates and taxes, which amounts to approximately R 1 687,389.00¹⁴.

[40] The result of all the above is that there is no need to consider the rescission application, which was only brought in the event that the *res judicata* defence would be upheld. Next to consider is the application in terms of Rule 16A.

E. RULE 16A APPLICATION

[41] As I have already mentioned, the respondents launched the constitutional challenge in terms of Rule 16A on 29 September 2020. They seek determination of the following issues:

¹³*Standard Bank of South Africa Ltd v Hendricks and another and related cases* 2019 (2) SA 620 (WCC) paras 57-63. See also *Absa Bank Ltd v Mokebe and related cases* 2018 (6) SA 492 (GJ).

¹⁴ $(R1\ 800\ 000 + R1\ 650\ 000) \div 2 = R1\ 725\ 000 - R37\ 610,43 = R\ 1\ 687\ 389,57$.

- "1. *Whether Rule 46(12) of the Uniform Rules of Courts, to the extent that it continues to operate and provide that... the sale shall be without reserve and upon the conditions stipulated under subrule (8), and the property shall be sold to the highest bidder, notwithstanding the coming into effect of Rule 46A on the 22 December 2017, which enjoins the courts to set a reserve price, is unconstitutional, unlawful and invalid.*
2. *Whether Rule 46A of the Uniform Rules of Courts, to the extent that it has no retrospective effect, unreasonably, unjustifiably and unfairly excludes and discriminate against the judgment debtors whose immovable properties have not been sold in sale in execution as at its commencement on 22 December 2017, irrespective of the date on which the judgment and order were granted, is unconstitutional, unlawful and invalid.*
- ...
7. *The applicants pray that:*
 - a. *It is declared that Rule 46(12) is unconstitutional, unlawful and invalid to the extent of its inconsistency with the Constitution.*
 - b. *It is declared that Rule 46A is unconstitutional, unlawful and invalid to the extent of its inconsistency with the Constitution."*

[42] In a nutshell, the respondents contend that former Rule 46(12) is unconstitutional because it allowed for the sale of residential property in execution without the court setting a reserve price; and Rule 46A, which allows a court to determine a reserve price, is unconstitutional because it does not operate retrospectively.

[43] It will be immediately apparent that the determination of these issues has become moot, as argued by Absa and the Rules Board for Courts of Law (*"the Rules Board"*) and the Minister of Constitutional Development and Correctional Services (*"the Minister"*). This is because, firstly as demonstrated above in this judgment the dispute between the respondents and Absa is capable of adequate resolution without determining the constitutional issues raised. Our courts have consistently

held that as a general principle, where it is possible to decide any case without reaching a constitutional issue, that is the course which should be followed.¹⁵

[44] In practical terms the matter has been adjudicated by application of the amended Rule 46A, and a reserve price has been set. There is accordingly no need for a court to determine whether or not it is unconstitutional for Rule 46(12) to allow for execution without setting a reserve price. Neither is there any need to determine whether Rule 46A applies retrospectively. To the extent that the constitutional case is based on the respondents' quest to have a reserve price set in the event that a special execution is to be ordered, that has in fact been determined above, and the Rule 46A application is academic.

[45] In any event as already discussed, ABSA abandoned any reliance on former Rule 46(12) on 20 November 2020 and instead sought to execute on the property in terms of current Rule 46A. Despite being made aware of the abandonment as early as 5 November 2020, the respondents have pressed ahead with the Rule 46A application, including the specific attack against Rule 46(12). But there is no longer a live controversy between the parties relating to the application of the old Rule 46(12). Were an order to be handed down in relation to the old Rule 46(12) it would have no practical impact on the respondents and ABSA. As a result, the matter is moot. It is trite that Courts should avoid "*deciding points that are merely abstract, academic or hypothetical*".¹⁶

[46] Faced with this difficulty, the respondents implore this Court to exercise its discretion to decide the constitutionality of the old Rule 46(12) despite the issue being moot. The Constitutional Court has explained that, in limited circumstances where a live dispute has fallen away, a court has a discretion whether or not to hear the matter depending on what the interests of justice require, as follows:

¹⁵ *S v Mhlungu and Others* 1995 (7) BCLR 793 (CC) at para 59; *Zantsi v Council of State, Ciskei and Others* 1995 (10) BCLR 1424 (CC) at para 5; *Luitingh v Minister of Defence* 1996 (4) BCLR 581 (CC); *Albutt* at paras 82 – 83.

¹⁶ *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC), at paras 16-18. *JT Publishing (Pty) Ltd and another v Minister of Safety and Security and others* 1997 3 SA 514 (CC), at para 15. *NCGLE v Minister of Home Affairs* 2000 2 SA 1 (CC), at para 21, see footnote 18.

*“A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument. advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.”*¹⁷

[47] In *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC)*¹⁸, the Constitutional Court set out that the factors relevant in determining the interests of justice in this context, as follows:

- “(a) whether any order which it may make will have some practical effect either on the parties or on others;*
- (b) the nature and extent of the practical effect that any possible order might have;*
- (c) the importance of the issue;*
- (d) the complexity of the issue;*
- (e) the fullness or otherwise of the arguments advanced; and*
- (f) resolving the disputes between different courts.”*

[48] In this regard, the respondents argue that the issues they raise have much wider implications and affect the general public beyond the dispute between the parties, and are therefore not moot. The Rules Board disputes this allegation, and points to the fact that, even after the filing of the Rule 16A notice, not a single person or organisation has expressed any interest in the matter. This, they state, is not surprising given that the former Rule 46(12) was repealed more than seven years ago and is clearly not of application to any other person or application pending before a court. Both the Minister and the Rules Board state that they are not aware of any matters currently pending before courts which still implicate Rule 46(12).

¹⁷ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), at para 11.

¹⁸ *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC)* 2020 (6) BCLR 748 (CC) at para 50.

[49] The respondents have not been able to point with any certainty to one case in which ABSA applies the old Rule 46(12). All that they can attest to is their belief that ABSA is still applying the old Rule 46(12), based on sales listed in two *Government Gazettes*, which were in any event, not attached to the replying affidavit. One of those gazettes, *Government Gazette* No. 45949, does not include any sales in execution relating to ABSA, and makes no mention of “*Biang*” or “*Unique Auto Finance*” or “*Irene Nthabiseng*” or “*Catherine Leahy*” which are referred to by the respondents. The second of the two, *Government Gazette* No. 45996, mentions ABSA’s sales in execution relating to “*Bhim*” and “*Calitz*” but the sale relating to “*Calitz*” does not involve residential property. And there is no evidence regarding the specific circumstances of *Bhim*. It is not for this Court to speculate in this regard.¹⁹ The net effect of the respondents’ references is that they do not rise to the level of a wider, general impact of Rule 46(12) which needs to be safeguarded by a judgment of this Court. They have failed to establish any such need in the papers.

[50] In any event, the respondents have refrained from setting out their own personal circumstances or to establish factually that their rights have been infringed or are even threatened. Instead, they plead legal conclusions, which merely assert that their rights to equality, dignity, adequate housing and not to be arbitrarily deprived of property will be infringed. At most, the applicants provide two hypothetical examples of court judgments where properties sold in execution without a reserve price were sold for significantly less than their market value.

[51] The Rule 16A application has accordingly been shown to be moot and academic, and it has not been shown to be in the interests of justice to determine the issues raised in it.

[52] There is also to consider the undue delay in filing the Rule 16A application, for which there remains no explanation or condonation application. In this regard it is relevant that the Court Order which is the subject of the application was granted on 25 February 2014, the new Rule 46A was brought into effect on 17 December 2017,

¹⁹ *Legal Aid South Africa v Magidiwana*, para 18.

and the constitutionality challenge was instituted on 29 September 2020. The founding affidavit in the Rule 16A is silent regarding the reasons for the lengthy delay. In court, Mr Kebeni stated from the bar that it is clear that the parties have been embroiled in litigation since the granting of the summary judgment. That, however, does not suffice. Condonation is not there for the asking.

[53] It has been held that a failure to bring a review within a reasonable time may cause prejudice to the other parties, which has an effect on the public interest considerations in the finality of administrative decisions and the exercise of administrative functions.²⁰ As a result, courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. Where there is no factual basis upon which a court can exercise its discretion to condone a lengthy delay the appropriate remedy is that the matter should be dismissed.²¹

[54] The facts of this case demonstrate that this is not just a matter of elevating form over substance. In the explanatory affidavit filed by the Minister and Rules Board, they set out the prejudice caused by the respondents' delayed challenge to the Uniform Rules. They explain that each Rules Board is appointed for a five-year term, and that a considerable period has elapsed since Rule 46 was amended in 2017. And despite diligent search they were not able to source all the relevant information and documentation required in order to fully explain the amendment process and that a considerable gap exists for the period between 2006 and 2010.

[55] For all these reasons, the Rule 16A application must be dismissed on account of its mootness and the undue delay in launching it. There is furthermore no reason why costs should not follow the result. In terms of the mortgage loan agreement and mortgage bonds attached to the particulars of claim in the action, costs are to be paid on an attorney and client scale.

F. ORDER

²⁰ *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA).

²¹ Hoexter and Penfold (Eds) *Administrative Law in South Africa*, (Third Edition, 2021), p 35.

[56] In all the circumstances, the following order is granted:

1. The Rule 46A application is granted and the respondents' property is declared executable, subject to a reserve price of R1,687,389.00.
2. The application in terms of Rule 16A is dismissed.
3. The respondents are to pay the costs of the Rule 46A, rescission application and Rule 16A application on an attorney and client scale.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant : Adv J.W. Jonker
Instructed by : J.C. Fourie
Fourie Basson & Veldtman

For the respondents : Mr. and Mrs. Kebeni (in person)

For the applicants : Mr. and Mrs. Kebeni (in person)

For the first and second respondent : Adv M. Vassen
Instructed by : N. Mahlaba
State Attorney

For the third respondent : Adv K. Williams
Instructed by : P. Mohanlall
Webber Wentzel