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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number:107538 /2024

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

SIGNATURE

17 April 2026
DATE

In the application between:

ALWYN RAUTENBACH

Applicant

And

ANDREA BONGANI THWALA

1st Respondent

RAND BANK

2nd Respondent

JUDGMENT

INTRODUCTION

- 1] There are two applications before me. The one is an application by the respondent, Mr Thwala, in terms of Rule 42(1)(a) of the Uniform Rules of Court, read with common law principles, for the rescission of an order granted by Mokose, J on 25 February 2025, and the other is an application by the applicant to have the immovable property, known as 4[...] G[...] F[...] Street, Silver Lakes Golf Estate, Willow Acres, Pretoria, (hereinafter referred to as the Silver Lakes property) declared specifically executable. I will refer to Rautenbach as the applicant and Thwala as the respondent.
- 2] On behalf of Mr Thwala it is submitted that the rescission application is on the roll for adjudication, whilst it is Mr Rautenbach's case that it is the application to declare the property specifically executable that is on the roll. Since all the affidavits in both matters have already been exchanged, I will deal with both applications simultaneously.
- 3] The order by Mokose J against which the respondent's rescission application is aimed, reads as follows:
 - "1. The first respondent (Thwala) is prohibited from alienating and/or further encumbering the immovable property situated at Erf 8[...], Willow Acres Ext. 3, held by Title Deed T[...] and also known as 4[...] G[...] F[...] Street, Silver Lakes golf Estate, Willow Acres, Pretoria, Gauteng, pending application for the attachment,

execution and sale of the said property in the recovery of the judgment debt granted on 15 September 2023 by the Honourable Magistrate Ngezi in the Magistrates' Court for the District of Tshwane held in Pretoria, under case number 27073/2016, interest thereon and litigation costs incurred in relation thereto.

2. The third respondent is ordered to register a *caveat* against the aforesaid property in the terms said in paragraph 1 above.
3. The respondent is directed to pay the applicant's costs of this application on Scale B."

4] The relief claimed by the applicant is to the following effect:

1. That service of this application on the respondent's attorneys and by email to certain email addresses, be deemed proper service in terms of rule 46A(3)(d).
2. That the Respondent's Silver Lakes immovable property be attached and declared to be specifically executable in satisfaction of all judgments and cost orders granted in favour of the applicant against the respondent.
3. That the non-provision of the documents referred to in Rule 46A(5) be condoned.
4. That the respondent be ordered to pay the costs of the application on the scale as between attorney and client.

5] The relief sought in the application to declare the property specially executable effectively supersedes paragraph 1 of Mokose J's order and incorporates the

substance of paragraph 2. What remains for determination in relation to that order is therefore confined to the issue of costs.

- 6] I will therefore deal with the application to declare the property executable and thereafter with the rescission application.

FACTUAL BACKGROUND

- 7] The applicant and the respondent each owns immovable property adjacent to each other and their dispute about their boundary wall is the cause of this litigation war.
- 8] It is undisputed that the respondent, a medical doctor, has been residing in Ottawa Canada for a considerable time and he has no moveable assets in South Africa. His only assets in South Africa are two immovable properties, being the Mbombela property, a townhouse where his mother resides, and the Silver Lakes property, a large house which is the subject of this application.
- 9] In an affidavit by the respondent, he *inter alia* stated that:

“I am an adult male, South African, and employed as a Medical Doctor in the North America, Canada, and my current place of abode is that North American country, Canada and my currently residing at No.7[...] S[...]L[...] Pky, Winnipeg, Manitoba, R3P2V1, Canada in the North America.”

RELEVANT PROCEDURAL BACKGROUND

- 10] On 11 March 2020, the applicant obtained a default judgment against the respondent in the Magistrates' Court for the amount of R148 655. 56 with interest

at the rate of 10.5% per annum calculated from 29 June 2015, being the date of demand, to date of payment.

- 11] Due to the respondent's failure to pay the judgment debt, execution proceedings against his movables situated in Pretoria, were instituted, but without any success.
- 12] The applicant then approached the Mbombela High Court for an execution order against a property of the respondent in Mbombela.
- 13] The applicant unsuccessfully attempted to levy execution against the respondent's movables at the Mbombela property, because the property was vacant.
- 14] In 2021, the respondent's debt to the applicant amounted to R 367 110.64 and on 12 April 2021, the applicant applied for and obtained an order in the Mbombela High court, to have the respondent's immovable property in Mbombela declared executable.
- 15] Before a sale in execution of the property could take place, the respondent, approximately 19 months after the order was granted in the Magistrates Court on 11 March 2020, applied for the rescission of the Magistrates Court's order. The Magistrate failed to give reasons and the matter proceeded on trial.
- 16] On 15 September 2023, the Honourable Magistrate Ngezi handed down judgement in the same terms as the previous order granted on 11 March 2020.
- 17] The respondent's current attorneys came on record on 10 May 2024, and an application was issued in this Division to set aside the interdict over the Mbombela property granted in Mbombela High Court. The application was opposed by the applicant and notwithstanding several communications between

the attorneys and attempts to set it down, the respondent apparently did not pursue this application.

- 18] The applicant then again filed an application in the Mbombela High Court to have the Mbombela property be declared specifically executable.
- 19] On 18 July 2024, after service of the latter application, the respondent filed a Notice of Appeal against the judgment of Magistrate Ngezi which was handed down on 15 September 2023, in the Magistrates' Court.
- 20] On 31 July 2024 the attorneys for the applicant filed a notice of irregular proceedings in terms of the Magistrates' Court Rule 60A because the noting of the appeal was outside the 20-day period of Rule 51(3). They contended that the noting of the appeal is an irregular step, being 297 days out of time.
- 21] Due to the Notice of Appeal, the application in the Mbombela High Court was postponed and the respondent was ordered to pay the applicant's costs on an attorney and client scale. The applicant opposed the appeal on several procedural grounds.
- 22] On 20 September 2024, the applicant issued an application for an interdict, to have a caveat registered against the respondent's Silver Lakes property. This application was initially opposed but the notice to oppose was withdrawn on 4 October 2024. On 14 October 2024 an interim interdict in the form of a Rule Nisi, returnable on 27 February 2025, was granted.
- 23] However, since the date of 27 February 2025 was erroneously allocated, the order was amended to reflect the correct return date of 25 February 2025, and the amended order was served on the respondent's attorneys on 10 December 2024.

24] On 19 February 2025 Magistrate Chokoe refused the applicant condonation for the late filing of the Notice of appeal and granted an order setting aside the notice of appeal of 24 July 2024 as an irregular step.

25] On 21 February 2025 the attorneys for the applicant served a notice of intention to amend, on the respondent's attorneys. A supplementary affidavit by the applicant's attorney of record, explaining that since Magistrate Chokoe has set aside the notice of appeal, the original prayer regarding the costs of the application is moot and the respondent should be held liable for the costs of the application, accompanied the notice to amend.

26] In the initial notice of motion, the prayer for costs read as follows:

“2.4. That the costs of the application be costs in the appeal lodged by the respondent except in the event of opposition, in which event the party opposing the application be ordered to pay the costs of the application.”

27] The Respondent did not file any opposing papers and did not appear on the return date on 25 February 2025, and Mokose J granted a final order, which included an order for costs of the application, on an unopposed basis.

28] The respondent's present application for rescission is in respect of this order, on the basis that he was unaware thereof, that the return date had been changed to 25 February 2025 instead of 27 February 2025, and that the applicant only served his notice of intention to amend his notice of motion in respect of the costs of the application, on 21 February 2025.

- 29] On 20 March 2025 the respondent noted an appeal against Magistrate Chokoe's order.
- 30] On 20 May 2025, the respondent launched his application to rescind the order by Mokose J, on the basis that he intended to oppose the amendment regarding costs of the application and was deprived of the opportunity to do so since the notice of intention to amend was only served on 21 February 2025 and the amendment was granted on 25 February 2025 already.
- 31] On 24 June 2025 the applicant served his application to have the Silver Lakes property declared specifically executable.
- 32] On 10 December 2025 the respondent's appeal against the order by Chokoe was upheld. Labuschagne J remarked as follows:

"[16] None of the pleaded grounds of appeal matter. The respondent erred in bringing the application pertaining to the late filing of a notice of appeal in the Magistrates Court. It should have been brought in the High Court as the "court of appeal" referred to in sec 84. On this ground alone the appeal succeeds.

[17] However, the appellant is to blame for not pursuing the inchoate appeal against the judgment of Magistrate Ngesi. The appellant is aware that its failure to apply for condonation for late filing is fatal to the appeal but contends that it can ask for condonation at any time. This proposition will be tested once a condonation application is brought. This court is however mindful that the inaction of the appellant, with an ostensible sense of impunity lies at the core of the dilemma faced by the respondent.

[18] ...

[19] As a mark of disapproval for the appellant's failure to pursue the appeal against the judgment of Magistrate Ngesi, the appellant will not be rewarded with a cost order in his favour in these proceedings."

- 33] On 4 March 2026, a notice of appeal on behalf of the respondent, signed on 16 January 2026, was uploaded to CaseLines. There is no indication that it was served on the applicant's attorneys or issued and served at the High Court. This notice of appeal was not accompanied by any condonation application by the respondent for his failure to timeously pursue his appeal.

DECLARATION OF EXECUTABILITY

- 34] As indicated above, I will deal with the application to have the Silver Lakes property declared specifically executable. The applicant also moves for an order to the effect that service of the application upon Maranti Kgomo Attorneys will be sufficient for purposes of Rule 46A(3)(d).
- 35] The respondent is opposing the application to have the property declared specifically executable on the basis that the matter is subject to an appeal; alleged non-compliance with Rule 46A(5), and failure to join the municipality as a party to the application.

SERVICE

- 36] In terms of Rule 46A(3)(d) every notice of application to declare residential immovable property executable shall be served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.
- 37] It appears from the Notice of Motion in the application to have the Silver Lakes property declared executable, that it was served on, and received by, Maranti

Kgomo Attorneys on behalf of the respondent on 24 June 2025. Provision is also made for service by email to a[...]; l[...]; and m[...].

- 38] It is clear from all the attachments to the applicant's founding affidavit that Maranti Kgomo Attorneys have been acting on behalf of the respondent since at least 10 May 2024 and are still so acting.
- 39] It can safely be accepted that the application to have the Silver Lakes property declared executable, came to the attention of the respondent timeously and properly, because he opposed the application and filed a comprehensive answering affidavit thereto.
- 40] I therefore have no hesitation to find that service of the application upon Maranti Kgomo Attorneys is sufficient for purposes of Rule 46A(3)(d).

NON-JOINDER OF THE MUNICIPALITY

- 41] The respondent claims that the applicant should have joined the local municipality, since the municipality is a creditor in respect of rates and taxes.
- 42] Rule 64A(3)(b) only requires that any party who may be affected by the sale in execution should be notified of an application to declare residential immovable property executable and not be joined as a party to the proceedings. This notice is purely to protect any commercial claims they may have.
- 43] No evidence was adduced to confirm or even allege that the respondent's rates and taxes are in arrears, and the local municipality will in any event, be able to enforce payment of any outstanding amounts before issuing a clearance certificate.

- 44] Consequently, I conclude that the applicant's omission to join the local municipality does not adversely affect the application.

PENDING APPEAL

- 45] The procedure of appeal against a judgment delivered in the magistrate's court is in principle regulated by two sets of rules: Rule 51 of the Magistrates' Courts Rules, and Rule 50 of the Uniform Rules of Court. Rule 51 of the Magistrates' Court Act regulates the noting of an appeal and Rule 50 of the Superior Courts Act regulates the prosecution of an appeal.
- 46] Rule 51(3) of the Magistrates Court Rules *inter alia* provides that an appeal may be noted by the delivery of notice within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor.
- 47] Rule 50(1) of the Uniform Rules of Court provides that an appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.
- 48] In terms of the latest jurisprudence, "prosecution" is interpreted as applying in writing to the registrar, on notice to all other parties, for a date of hearing in the prescribed manner.
- 49] Rule 50(4) of the Uniform Rules of Court *inter alia* provides that the appellant shall, within 40 days after noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal.

50] Rule 50(7) of the Uniform Rules of Court *inter alia* provides that the applicant shall simultaneously with the lodging of the application for a date for the hearing of the appeal referred to in sub-rule (4) lodge with the registrar two copies of the record.

51] In the answering affidavit deposed to on behalf of the respondent, which was uploaded to CaseLines on 6 August 2025, it is *inter alia* stated that:

“In this case there is an appeal which is pending before the Honourable Court and the Applicant has filed (albeit defective) an application on Notice to have the appeal set aside.

Therefore, the issues relating to the cost order cannot be declared to be finally determined if the appeal court will also pronounce on the issue of cost order on appeal and the cost relating to the court aquo when determining the merits of the appeal.” (sic)

52] It is clear that the reference to the “pending appeal” could only be the notice of appeal that was filed on 18 July 2024, because the answering affidavit was deposed to long before the second notice of appeal dated 16 January 2026, was uploaded to CaseLines on 4 March 2026.

53] That notice of appeal was filed 297 days out of time, without an application for condonation, has lapsed because it was not prosecuted within 60 days after the delivery of the notice of appeal, and there was no application for re-instatement or condonation.

54] This notice of appeal was however found to be irregular and set aside by Magistrate Chokoe on 19 February 2025, and the judgement of Magistrate Chokoe was set aside for lack of jurisdiction on appeal by the High Court on 10 December 2025.

- 55] Even if it may be argued that the appeal process was “interrupted” by the setting aside of the notice of appeal by Magistrate Chokoe and the setting aside of Magistrate Chokoe’s judgement by Labuschagne J on 10 December 2025, no attempts were made after the latter judgement to pursue the appeal.
- 56] During argument, it was argued on behalf of the respondent that the (“Second”) notice of appeal dated 16 January 2026 and uploaded on CaseLines on 6 March 2026, should be accepted as a new notice of appeal. However, Mr Maluleka on behalf of the respondent could not explain why this notice was not served on the applicant’s attorneys or why no condonation application was launched.
- 57] Mr Maluleka conceded that the procedural requirements for the noting of an appeal were not complied with but maintained that it should be regarded as a notice of appeal and that there is therefore a pending appeal against the judgment of Magistrate Ngesi, handed down on 15 September 2023.
- 58] Apart from the notice of appeal being the only notice of appeal referred to in the respondent’s answering affidavit, the second notice of appeal is also completely non-compliant and cannot be acknowledged as a pending appeal.
- 59] I therefore find that there is no pending appeal against the judgment of Magistrate Ngesi.

APPLICATION OF RULE 46A

- 60] The origins of Rule 46A may be traced to ***Jaftha v Schoeman & Others; Van Rooyen v Stolz and Others***¹ where the Constitutional Court said:

“Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular, security

¹ (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004)

of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals, and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified.’²

61] It was further held further that where leave to execute against immovable property is concerned, judicial oversight is constitutionally required so that the judicial officer can engage in a balancing process and consider all the relevant circumstances of a case to determine whether there is good cause to order execution against the immovable property concerned.’³

62] In **Gundwana v Steko Development and Others** ⁴ the Constitutional Court reaffirmed Jaftha and extended its purview to cases where the creditor is seeking to execute against a property put up as security in the form of a mortgage bond.⁵

63] In **Petrus Johannes Bestbier and Others v Nedbank Limited**,⁶ the Constitutional Court discussed Rule 46A and stated:

*“[65] Having dealt with how the Courts have protected the right enshrined in section 26, and the advent of rule 46A, I will now look closely at the language used in the rule, as well as its interpretation and applicability. In the analysis of who qualifies as an affected person, the applicable provisions of rule 46A should be considered. In **Democratic***

² At [29]

³ At [42] – [45],[55]

⁴ Gundwana v Steko Development and Others 2011(3) SA 608 (CC)

⁵ At [49]

⁶ [2024] ZACC 2

Alliance v Speaker of the National Assembly,⁷ this Court reiterated the proposition that—

“context’ does not mean only ‘parts of a legislative provision which immediately precede and follow the particular passage under examination’; it ‘includes the entire enactment in which the word or words in contention appear.’”

Rule 46A(1)

[66] Rule 46A(1) provides that the rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. Rule 46A (1) therefore applies “whenever”, meaning in all instances, where there is an execution against residential immovable property and the execution is at the instance of an execution creditor. Further, the property against which execution is sought must be the residential immovable property of a judgment debtor. Therefore, the phrase, “residential immovable property of a judgment debtor” can and should be interpreted to mean immovable residential property “belonging to” or “owned by” the judgment debtor. At this stage of the enquiry, the question is whether the immovable property which the judgment debtor “owns” is “residential immovable property”. Whether this is the nature of the property depends, in my view, on the physical characteristics of the property coupled with its actual use.

[67] Therefore, the focus of the text in rule 46A(1) is on the following:

- (a) It states the circumstances in which the rule applies. These are whenever there is an execution at the instance of a judgment creditor against a judgment debtor; and

⁷ [2016] ZACC 8; 2016(3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at par.27

- (b) *It further identifies the type of property to which the rule applies and stipulates that it is the residential immovable property of the judgment debtor.*

Rule 46A(2)

[68] *Rule 46A(2) deals with the factors that a court considering an application under this rule must take into account. Rule 46A(2)(a)(i) and (ii) provide that the court must establish whether the immovable property which the execution creditor intends to execute against is the “primary residence of the judgment debtor” and that, if this is so, it must consider alternative means of satisfying the debt, by the judgment debtor, other than execution against the judgment debtor’s primary residence.*

[69] *Rule 46A(2)(b) is peremptory. It specifically prohibits a court from authorising execution against immovable property that is the primary residence of the judgment debtor, unless it has considered all relevant factors. After the court has considered all the relevant factors, it can then determine whether execution against such property is warranted. This narrowed focus of rule 46A(2) is understandable when one keeps in mind the purpose of the rule; that is, to entrench the section 26 rights to adequate housing. Put differently, if property is the primary residence of the judgment debtor, rule 46A(2) requires that the court must exercise caution before it declares it executable.*

Rule 46A(3)(b)

[70] *Rule 46A(3)(b) requires that every application to declare residential immovable property executable shall be 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.

[71] The language used in rule 46A(3)(b) is peremptory. It states that the application shall be 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). It also contains a proviso that grants the court a discretion to order service on any other party it deems necessary. Rule 46(5)(a) provides that, subject to rule 46A and any order made by the court, no immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless the execution creditor has caused notice of the intended sale to be served upon: preferent creditors; the local authority, if the property is rated; and the body corporate, if the property is a sectional title unit.

[72] There is good reason why notice should be given to the parties stipulated in rule 46(5)(a). It is because they may potentially have a claim against the immovable property. Their specific mention was made because they have a direct and substantial interest in a forced sale. Service upon these entities is as a result of legal requirements, and their interest in foreclosures has not been disputed.

[73] The entities listed in rule 46(5)(a) also have a common denominator. None of them is given notice on the basis of a potential infringement of their section 26 rights. Their interest is purely commercial and is clearly not the kind of interest that occupied this Court's mind when it decided Jaftha and Gundwana. Preferent creditors are entitled to the proceeds of estate assets in preference over other creditors. The local authority is entitled to insist that its property rates be paid before the property is transferred to the prospective buyer and may refuse to issue a rates clearance certificate. The body corporate may also require that its

levies be paid before the property is transferred. While rule 46A is applicable to all residential immovable property, its purpose is to protect the right to adequate housing. It does not extend to the protection against the execution of residential property that does not result in the infringement of this right, except with regard to those entities listed in rule 46(5).

[74] From the above analysis, the following is clear; there are three categories of immovable property with which the Uniform Rules 46 and 46A deal with in relation to execution. There is “immovable property” in general, which is dealt with in rule 46. This includes but is not limited to residential immovable property. Then there is “residential immovable property”, to which rule 46A applies. This is a subcategory of “immovable property”. Rule 46A adds additional provisions which apply when one is dealing with residential immovable property. Finally, there is immovable property which is the “primary residence of the judgment debtor”. This is a sub-subcategory of the subcategory “residential immovable property”. Only some parts of rule 46A apply to this sub-subcategory of “primary residence” property.

[75] As stated above, whether property can be classified as “residential immovable property”, is determined by the characteristics and actual use of the property. It does not matter that the judgment debtor is not herself occupying the property. It also does not matter that the judgment debtor is a trust. If a trust owns a residential house, it is “residential immovable property”, if the beneficiaries reside in it, even though the trust itself as a legal entity cannot reside in the property. Among the provisions which apply to all “residential immovable property” is rule 46A(3)(b), which requires notice to be given to persons who may be “affected” by the sale and execution. And that is the provision which is the focus of the present case. The importance of judicial oversight over all residential immovable

property, and not only primary residential immovable property is that it would be risky to leave it to the judgment creditor to determine whether the property is used as primary residence without this question being ventilated or determined by a court.

[76] Certain parts of rule 46A apply only to residential immovable property which is the “primary residence” of the judgment debtor. These provisions are rule 46A(2)(a)(i), 46A(2)(b) and 46A(8)(d). In essence, these are the provisions which require the court not to order execution against a primary residence of the judgment debtor unless there is no other satisfactory means of satisfying the judgment debt.”

And further:

“[81] It must be borne in mind that rule 46A applies not only to executions against “primary residential immovable property” but to residential immovable property of a judgment debtor. The factor pertaining to primary residence is just one of the factors a court must consider. The text is clear that the rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. When applying rule 46A(2)(a)(i), one of the factors that the court must consider is whether the residential immovable property is used as the primary residence of the judgment debtor.”

64] Considering the provisions of Rule 46A and the principles reiterated in the **Bestbier-matter**, it must be decided whether the Silver Lakes property is the respondent’s “primary residential immovable property”.

65] It is important that although rule 46A is applicable to all residential immovable property, its purpose is to protect the right to adequate housing and that it does not extend to the protection against the execution of residential property that

does not result in the infringement of this right, except with regard to those entities listed in rule 46(5).

- 66] The importance hereof is that the provisions of rule 46A(2)(a)(i), 46A(2)(b) and 46A(8)(d), which require the court not to order execution against a primary residence of the judgment debtor unless there is no other satisfactory means of satisfying the judgment debt, apply only to residential immovable property which is the “primary residence” of the judgment debtor.
- 67] I must therefore establish whether the Silver Lakes property is the primary residence of the respondent.
- 68] Despite the respondent’s claim that it is his primary residence, it is undisputed that he has been residing in Canada, since at least 2024 and that the property has been vacant for some time, most probably since 2020.
- 69] It is not disputed that the respondent bought the Silver Lakes property in June 2008 for the sum of R 2 350 000.00.
- 70] The respondent owns two immovable properties, one of which is worth more than R6 000 000.00 with no outstanding bond debt and he does not appear to be a person who is in dire need of the protection of the right to adequate housing and security of tenure afforded by Section 26 of the Constitution.
- 71] In the premises, I find that the Silver Lakes property is not the respondent’s primary residential immovable property and that rules 46A(2)(a)(i), 46A(2)(b) and 46(8)(d) therefore do not apply in this instance.
- 72] It was argued on behalf of the respondent that the applicant failed to comply with the provisions of Rule 46A(5), in that he did not provide the court with a proper valuation report by a qualified assessor, he failed to provide a municipal rates

statement indicating outstanding debt to the local authority, and did not provide an adequate calculation of a reserve price as required by Rule 46A(9).

73] Rule 46A(5) 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;
- (f) and any other factor which may be necessary to enable the court to give effect to sub-rule (8):

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

74] The applicant conceded that he did not comply with all the provisions of rule 46A and requested this Court, in terms of Rule 46A(8)(c), to condone his failure to comply with the provisions of Rule 46A(5).

75] Rule 46A(8) *inter alia* provides that:

“(8) A court considering an application under this rule may—

- (a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;
- (b)
- (c) on good cause shown, condone—

- (i) failure to provide any document referred to in sub-rule (5);
 - (ii) or delivery of an affidavit outside the period prescribed in sub-rule (6)(d);
- (d)

- 76] On behalf of the applicant, it was submitted that the amount owing to the local authorities could not be determined, but that it was established from the Silver Lakes Homeowner's Association that the respondent's levies were up to date and that the Homeowner's Association has not been requested by the City of Tshwane to enforce any disconnection of the electricity supply, confirming the impression that the local authorities' bill is paid to date.
- 77] The applicant relies on the Municipal valuation of R6 650 000.00 (done in 2022) as reflected in the Lexis WinDeed document, obtained on 19 June 2025, according whereeto, the estimated value of the property is R7 660 000.00 (Expected High); R5 420 000.00 (Estimated value) and R3 840 000.00 (Expected Low) for purposes of a valuation of the Silver Lakes property.
- 78] The respondent did not dispute the figures presented by the applicant and did not provide any information in his answering affidavit to support a conclusion that he is owning any monies on the property or that he is in financial destitute.
- 79] In this regard, Rule 46A(6)(b) provides that a respondent shall admit or deny the allegations made by the applicant in the applicant's founding affidavit; and set out the reasons for opposing the application and the grounds on which the application is opposed.
- 80] For present purposes, I consider the information required by Rule 46A(5) which has been placed before me to be sufficient to reach a conclusion on the

executability of the property and grant condonation for the applicant's failure to place all the documents referred to in Rule 46A(5) before me.

- 81] The respondent also alleged that the applicant did not provide an adequate calculation of a reserve price as required by Rule 46A(9).
- 82] Rule 46A(9)(a) provides that in an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set and subrule (b) prescribes the aspects which the court shall take into account in deciding whether to set a reserve price and the amount at which the reserve is to be set.
- 83] I considered the applicant's claim that the respondent was indebted to him in the amount of R1 348 619.12 on 23 June 2025 and, accepting that all the cost orders have not been taxed yet, and that the estimated R50 000.00 in respect of the appeal matter before Magistrate Chokoe, will be deducted, I am satisfied that the respondent is indebted to the applicant in the amount of at the least, more than one Million Rand.
- 84] I consider the information required by Rule 46A(9)(b), which has been placed before me to be sufficient to consider whether a reserve price is to be set and I am of the view that a reserve price of R5,4 million, ought to be set in order to safeguard the Respondent's interests in the immovable property.

RESCISSION APPLICATION

- 85] I will now deal with the respondent's application for the rescission of the order granted by Mokose, J on 25 February 2025, in so far as it may be necessary.
- 86] As I have indicated before, if the relief sought by the applicant is granted, paragraph 1 of Mokose J's order would effectively be superseded, and the

substance of paragraph 2 thereof will be incorporated. What remains for determination in relation to that order is therefore confined to the issue of costs.

- 87] The essence of Mokose J's order, which the respondent now prays to be rescinded was to the effect that the respondent was prohibited from alienating and/or further encumbering the Silver Lakes Property and that the Registrar must register a caveat against the property. It is important to note that the respondent withdrew his opposition to the granting of this relief at the time.
- 88] If I grant the respondent's application to declare the property executable, the rescission of Mokose J's order that the respondent may not alienate the property and that the Registrar must register a caveat against the property, will serve no purpose and effectively becomes moot.
- 89] It is trite that a court will not determine issues that are moot or academic. Where a judgment will have no practical effect or result, the court will, as a general rule, decline to entertain the matter. ⁸
- 90] In so far as the cost order granted by Mokose J may be relevant, I will deal with the rescission application in general.
- 91] The respondent submits that the order should be set aside because it was granted in absentia of the Applicant; the Respondent has circumvented the Rules relating to the amendment of a pleading and the Order was erroneously granted in the absence of the Applicant.
- 92] Rule 42(1)(a) provides that the court may, in addition to any other powers it may have *mero motu* or upon the application of any party affected, rescind or vary an

⁸ National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (2000 (2) SA 1 (CC)), 2000(1) BCLR 39 (CC)

order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

- 93] The enquiry under Rule 42(1)(a) is confined to whether the order was erroneously granted in the absence of a party, in the sense that there existed a procedural or legal impediment to the granting of the order at the time — not whether the judgment was correct on the merits. In **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd**,⁹ it was held:

“[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.”

- 94] The errors relied upon by the Respondent are that:

1. The applicant sought the relief without complying with Rule 28 of the Uniform Rules, and
2. The Court granted the Order whilst the Respondent (applicant *in casu*) has not complied with the set down period as stated in the Notice of

⁹ [2007] SCA 85 (RSA), (1 June 2007) at para 27

Motion and failed to comply with Rule 28(2) of the Uniform Rules which prescribes the procedure to be followed in the amendment of pleading.

3. The 1st Respondent failed to notify the Applicant that a new court hearing date for the matter had been obtained so to give the Applicant, who was in fact the 1st Respondent in the main action ample time to prepare for his opposition.

AMENDMENTS

- 95] Rule 28 prescribes the procedure to be followed in the amendment of a pleading and Rule 28(1) provides that any party desiring to amend a pleading or document filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- 96] The rule draws a distinction between applications to amend before the hearing (sub-rule (1)) and those during the hearing but before judgment (sub-rule (10)).
- 97] In this regard, Rule 28(10) provides that the court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.
- 98] I am aware thereof that the applicant, in his notice of intention to amend stated that the respondent has 10 days to object against the amendment and that he probably intended to effect the amendment in terms of under subrules (1) to (9) but I am of the view that the Court retains a wide discretion under Rule 28(10) to grant leave to amend at any stage before judgment, notwithstanding non-compliance with the preceding subrules, provided that such amendment is bona fide and does not cause prejudice that cannot be cured by an appropriate costs order or postponement.

99] Rule 28(10) gives the Court a wide, residual discretion:

“The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document...”

100] In my view, the phrase *“notwithstanding anything to the contrary in this rule”* means that the Court’s power is not excluded merely because the Rule 28(1) procedure was invoked or imperfectly followed. The Court can regularise, condone, or permit an amendment even if the procedural route under subrules (1)–(9) has not been strictly complied with.

101] The alleged irregularity does not constitute the kind of error contemplated in Rule 42(1)(a), namely an error which, had the Court been aware of it at the time, would have precluded the granting of the order.¹⁰

102] It cannot be said that the Court was not aware of the initial notice of amendment which granted the respondent a period of 10 days, at the time of granting the amendment.

103] In the circumstances, I am satisfied that the amendment was lawfully granted at the time. The failure to effect the amendment strictly in accordance with subrules (1) to (9) does not constitute an error as contemplated in Rule 42(1)(a).

104] The respondent’s remedy, if any, laid in an appeal against the granting of the judgment or order, and not in a rescission application as presently pursued.

FAILURE TO COMPLY WITH SET DOWN PERIOD IN NOTICE OF MOTION

¹⁰Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) at 510D–G and Colyn v Tiger Food Industries Ltd 2003 (6) SA 1 (SCA) para 6

105] Save to remark that the period of 10 days mentioned in the applicant's notice of intention to amend did not change or affect the return date, I have already dealt with the purported "error" relating to the 10-day period.

106] The respondent in any event withdrew his opposition to the granting of the essence of the relief and only filed an objection to the proposed amendment and not to the application as a whole.

NEW COURT HEARING DATE

107] The Respondent further submits that the order was erroneously granted because the applicant failed to notify him that a new court hearing date for the matter had been obtained.

108] The deponent to the founding affidavit, Ms Maranti Yvonne Kgomo, puts it as follows:

"It come as a shock to me that the 1st Respondent has through misrepresentation and against the backdrop of return date of 27 February 2025 as per a rule nisi ordered on 15 October 2024 and same was filed by the 1st Respondent with the Applicant on 16 October 2024, misled the Honourable Court to obtain a judgement order in the absence of the Applicant and/or his Legal Counsel, even with the knowledge that the matter stands to be opposed."

109] Having regard to the papers before me, these allegations are far from correct.

110] In the answering affidavit, deposed to by Mr Daniel Jakobus Basson, he explains that the court initially granted the interim order with return date 27 February 2025 on an unopposed basis, but that the date of 27 February 2025 was erroneously

allocated as a return date and the Judge, who granted the order on 14 October 2024, in December 2024, amended the return date to 25 February 2025.

111] He further states that the notice of set down indicating that the return date had been amended to 25 February 2025 was served on the applicant on 10 December 2024 and on the same date the amended court order indicating the new return date of 25 February 2025 was served on the applicant's attorneys. He further caused an email with the amended court order to be sent to the available email addresses of the applicant personally.

112] On 24 February 2025, the Registrar for Mokose J, the Judge hearing the application, sent out an email with the link for the matter to be heard virtually. This email was also sent to the attorney Maranti Yvonne Kgomo as can be seen from the email list.

113] These submissions are supported by the exhibits attached to his affidavit.

1. Annexure “E” - Court order of 14 October 2024 indicating return date of 25 February 2025 – Receipt acknowledged by Maranti Kgomo attorneys on 10 December 2024.
2. Annexure “F” – Notice of set down of the return date on 25 February 2025 – Receipt acknowledged by Maranti Kgomo attorneys on 10 December 2024.
3. Annexure “H” - Email with the link for the matter to be heard virtually sent out by the Registrar of the Judge hearing the application to the attorney Maranti Yvonne Kgomo on 24 February 2025.

114] In the premises it is evident that the applicant did not “fail to notify the respondent that a new court hearing date for the matter had been obtained”. On the contrary, it is evident that the respondent was well aware of the “new” date.

115] I therefore find that there was no irregularity or “error” relating to the “new court date” as alleged by the respondent.

116] In the premises, I find that the respondent has not made out a case for the rescission of the Order granted by Mokose, J on 25 February 2025, and that the application must be dismissed.

COSTS

117] I can see no reason why costs should not follow the event and I am prepared to award costs, including the cost of two counsel, where so employed, against the respondent on Scale B.

ORDER:

118] In the premises, I make the following order:

1. It is declared that service of this application on the respondent’s attorneys Maranti Kgomo Attorneys, and by email to:

a[...];

l[...]; and

m[...];

is deemed to be proper service in terms of Rule 46A(3)(d).

2. It is declared that the respondent’s immovable property described hereunder is subject to attachment and is declared to be specifically executable in satisfaction of all judgments and costs orders granted in favour of the applicant against the respondent, whether in the High Court (in both this Division and the Mpumalanga Division) or the Magistrates Court for the Magisterial District of Tshwane Central:

Property Type: Freehold Erf Number: 9[...]

Portion: Willow Acres Ext 3

Township: Willow Acres

Municipality: Tshwane

Province: Gauteng

Address: Erf 9[...], Willow Acres Ext 3

(also known as 4[...] G[...] F[...] Street, Silver Lakes Golf Estate, Willow Acres, Pretoria)

Title Deed: T[...]

3. The reserve price is determined at R5,400,000.00, (Five million Four Hundred Thousand Rand).
4. The non-provision of all the documents referred to in Rule 46A(5) is condoned;
5. The respondent is ordered to pay the costs of the application including the cost of two counsel, where so employed, on Scale B;
6. The Rescission application is dismissed with costs, including the cost of two counsel, where so employed, on Scale B.

**ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 April 2026.

APPEARANCES

For the applicant: TP Krüger SC
C D'Alton

Instructed by : Bares & Basson Attorneys

For the respondents: MPT Maluleke
Instructed by: Maranti Kgomo Attorneys

Date of hearing: 9 March 2026

Date of Judgement: 17 April 2026