Submission on the amendments to Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’ Court Rules

Socio-Economic Rights Institute of South Africa (SERI)

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1. Introduction

On 11 December 2015, the Rules Board for Courts of Law (the Rules Board) published an invitation for interested parties to comment on proposed amendments to Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’ Court Rules. These Rules regulate the sale in execution of immovable property in the higher courts and magistrates’ courts respectively.

The latest invitation to comment comes in the wake of a previous call to comment published by the Rules Board on 17 January 2014, which specifically proposed amendments to Rule 46(12) of the Uniform Rules of Court and Rule 43(10) of the Magistrates’ Court Rules. The initial call for comment sought to amend the abovementioned sub-rules to provide for a court, while exercising its judicial oversight function when ordering execution against primary residential immovable property of a judgment debtor, to set a reserve price at which bidding must begin at sales in execution. At present, the Rules provide for the sale in execution of immovable property “without reserve”. The Socio-Economic Rights Institute of South Africa (SERI) submitted written comments to the initial call for comment in February 2014.

After consideration of the comments received the Rules Board issued the current invitation to comment which proposes more extensive amendments to Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’ Court Rules, as well as amendments to Form 21 of the First Schedule of the Uniform Rules of Court. In addition, the Rules Board proposes to introduce Form 34A into Annexure 1 of the Magistrates’ Courts’ Rules.

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1 Rules Board for Courts of Law “Invitation to Comment on Amendments to Uniform Rule 46, Form 21 and Magistrates’ Courts’ Rule 43 and Proposed Magistrates’ Courts’ Form 34A” (11 December 2015).
3 The current construction of Rule 46(12) of the Uniform Rules of Court reads: “Subject to the provisions of subrule (5), the sale shall be without reserve and upon the conditions stipulated under subrule (8), and the property shall be sold to the highest bidder.”
4 The current construction of Rule 43(1) of the Magistrates’ Court Rules reads: “A sale in execution of immovable property shall be by public auction without reserve and the property shall, subject to the provisions of section 66(2) of the Act and to the other conditions of sale, be sold to the highest bidder.”
7 Form 21 of the First Schedule of the Uniform Rules of Court sets out the standardised conditions of sale in execution of immovable property for use in the higher courts.
8 The proposed Form 34A introduces a set of standardised conditions of sale in execution of immovable property for use in the magistrates’ courts which are virtually identical to Form 21 of the First Schedule of the Uniform Rules of Court.
The Socio-Economic Rights Institute of South Africa (SERI) has read and considered the proposed amendments and makes this submission to the Rules Board in accordance with the invitation to submit written comments. SERI's submission provides background to the organisation and its work, briefly makes some general comments on trends emerging from SERI's work relating to sales in execution and provides more detailed comments on the proposed amendments of the Rules. The submission also provides recommendations for the Rules Board and concluding comments.

2. The Socio-Economic Rights Institute (SERI)

SERI is a registered non-profit organisation and public interest law clinic that provides professional, dedicated and expert socio-economic rights assistance to individuals, communities and social movements in South Africa. SERI conducts applied legal research, litigates in the public interest, facilitates civil society mobilisation and coordination, and conducts popular education and training. SERI's core work relates to the advancement and protection of access to socio-economic rights in socio-economically marginalised (poor) communities.

SERI's primary thematic focus areas are urban housing, access to basic services and informal settlement upgrading, informal trade, and the advancement of political space for organisation, expression, participation and articulation.

SERI has the following aims:

• To advance the currency of human rights and particularly socio-economic rights in South Africa.
• To promote the fulfilment of socio-economic rights by vulnerable communities in South Africa.
• To assist poor and marginalised groups to realise an adequate standard of living.
• To contribute to public governance through empowering local communities to understand their rights, government processes and to effectively engage in such processes, thereby holding government accountable.⁹

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⁹ For more on SERI visit the SERI website: https://www.seri-sa.org.
In recent years SERI has become increasingly involved in legal, research and advocacy work around sales in execution of immovable property, where such property is a person’s home. SERI has been involved in a series of important court cases related to the sale in execution of immovable property, where such property is a person’s home. These include:

• **ABSA Bank v Lekuku (‘Lekuku’)** foreclosure applications - amicus curiae - South Gauteng High Court
• **ABSA v Mkhize and Others (‘Mkhize’)** amicus curiae - default judgment - National Credit Act - interpretation of Sebola judgment - Supreme Court of Appeal
• **Gundwana v Steko Development CC and Others (‘Gundwana’)** eviction - sale in execution - constitutionality of a Rule of Court - Constitutional Court
• **Kubyana v Standard Bank Ltd (‘Kubyana’)** amicus curiae - Sebola interpretation - Constitutional Court
• **Mbatha v Nedbank and Others (‘Mbatha’)** sale-in-execution - rescission application - South Gauteng High Court
• **Nomsa Nkata v First Rand Bank and Others (‘Nkata’)** amicus curiae - sale-in-execution - National Credit Act - Constitutional Court
• **Sebola and Another v Standard Bank and Another (‘Sebola’)** sale-in-execution - notice - National Credit Act - Constitutional Court
• **Thwala and Another v First National Bank and Others (‘Thwala’)** sale-in-execution - eviction - rescission application - North Gauteng High Court
• **Todd v First Rand Bank Ltd and Others (‘Todd’)** invalid sale-in-execution - Uniform Rule 46(7)(e) of the Uniform Rules of Court - Supreme Court of Appeal
• **State v Lehlongwa (‘Lehlongwa’)** trespass - eviction - house sold-in-execution - Soweto - Trespass Act - Protea Magistrate’s Court

In addition to its legal work on sale in executions, SERI has conducted research on sales in execution. In May 2013, SERI (together with the Legal Resources Centre (LRC)) published a research report on the propensity of sales in execution of primary residential immovable property and the impact such sales have on poor households, at the behest of the Constitutional Court (this research report will be discussed in more detail in section 3 below):

• **Report to the Constitutional Court in the Matter of Mzimela and Others and Nedbank Ltd and Others (May 2013).**
3. General observations on sales in execution

Some general comments pertaining to sales in execution of primary residential immovable property, and the impact of such sales on poor or low-income households, warrant mentioning.\(^{10}\)

Initially, it should be noted that the right to execute against property is crucial to the proper functioning of the credit and banking system.\(^{11}\) This right plays an important role in the judicial enforcement of credit agreements and is consequently essential to commercial stability.\(^{12}\) However, it has become increasingly apparent from various court judgments in recent years that the processes regulating the sale in execution of immovable property are open to potential abuse.\(^{13}\)

The sale of a very poor person’s home for a trifling amount is an abuse of the rules of court and the common law which permits execution against property to recover debt.\(^{14}\) In the South African context of deep poverty and gross structural inequality, execution against a person’s home may have an impact disproportionate to the interest a creditor has in recovering a debt. This is of particular concern in relation to poor households or households who have benefited in terms of state-subsidised housing programmes. The forced sale of, and eventual eviction from, their homes will often cause or exacerbate the socio-economic hardships of these debtors.\(^{15}\) To beneficiaries of state-subsidised housing, the sale in execution of their home would have an even harsher impact due to the fact that the National Housing Code prescribes that previous beneficiaries of state-subsidised housing (who lose their home) would be ineligible for further housing assistance in terms of the national housing programmes.\(^{16}\)

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\(^{10}\) While some of the observations mentioned in this section were raised in SERI’s initial submission on the amendment of Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’s Court Rules, these comments - along with additional novel comments - are repeated here since the amendments proposed by the Rules Board extend beyond the scope of those initially proposed during the initial call for comment.

\(^{11}\) S Wilson, J Dugard and M Clark “Conflict Management in an Era of Urbanisation: Twenty Years of Housing Rights in the South African Constitutional Court” (2015) 31(3) South African Journal on Human Rights 493. See also Gundwana para 54; Firststrand Bank Ltd v Folscher 2011 (4) SA 314 (GNP) (Folscher) para 39.

\(^{12}\) Folscher para 39.

\(^{13}\) See, for example, Absa Bank v Ntsane 2007 (3) SA 554 (T) (Ntsane); Jaftha v Schoeman and Others; Van Rooyen v Scholtz and Others 2005 (2) SA 140 (CC) (Jaftha).


\(^{16}\) See the DHS “Technical and General Guidelines” Part A of Part 3 Vol 2 of the National Housing Code (2009) 109-114 for the generic qualifying criteria. See also Jaftha para 12, where the Constitutional Court specifically highlighted this severe consequence. It should be mentioned that the various national housing subsidy programmes occasionally have specific eligibility criteria over and above the generic qualifying criteria. This means that some household who lost their homes in
Furthermore, in instances where the primary residential property of a judgment debtor is sold in execution pursuant to a mortgage bond agreement, section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) arguably precludes a court from ordering the provision of alternative accommodation when such judgment debtor would be rendered homeless due to an eviction.\(^\text{17}\) This means that poor households rendered homeless due to the sale of their mortgaged home would have to rely on social housing rental arrangements, which are highly over-subscribed and unaffordable for low-income earners.\(^\text{18}\) It is thus clear that, unless properly controlled, the processes regulating sale in execution could act as additional mechanisms through which poor people can be unfairly deprived of access to adequate housing.

Research conducted by SERI and the LRC at the behest of the Constitutional Court, also suggests three discernible trends that seem to be present in sales in execution for primary residential immovable property in recent years.

The first, mentioned in our initial submission to the Rules Board, is that there has been an alarming increase in the sales in execution of the homes of debtors for amounts substantially less than their value.\(^\text{19}\) Subsequent to these procurements, the new owners regularly sold the properties for considerably more than the initial purchase price making what could only be

\(^\text{17}\) Section 4(7) of the PIE Act reads:

“If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.” (Emphasis added).

Although it is possible to argue that courts could still consider the provision of alternative accommodation to mortgage bond debtors rendered homeless due to an eviction in light of Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC), there has been no case law to unequivocally confirm this principle as yet.


\(^\text{19}\) See SERI and LRC Report to the Constitutional Court in the Matter of Mzimela and Others and Nedbank Ltd and Others (May 2013) 28-29 (available on the SERI website: http://www.seri-sa.org/images/Mzimela_Report_Final.pdf). The report considered the cases of 46 applicants, who collectively refer to themselves as the “Forgotten Poor Black Citizens of South Africa”, and approached the Constitutional Court with an application for direct access. The applicants sought an order from the Court setting aside a number of court orders from lower courts. Many of the cases that the applicants sought to have set aside related to sales in execution of their primary residential property. The applicants declined the suggestion to obtain legal representation and, in order to further its understanding of the matter, the Court requested SERI and the LRC to conduct an initial investigation into the application and compile a report of the findings. At core, the majority of the matters the applicants sought to bring under appeal point very strongly to potentially far-reaching systemic failures in the process of evictions and executions concerning residential property.

See also Jaftha para 12, where the Constitutional Court highlighted a similar finding in relation to the increase in sales in execution of state-subsidised housing in Prince Albert. Although these cases are not necessarily indicative of a definitive trend, they clearly point to a concerning development in relation to sales in executions.
considered a healthy profit in the process.\textsuperscript{20} This concerning development indicates that the failure to set reserve prices for the sale in execution of primary residential property of debtors has been exploited by creditors and new buyers alike. In many cases, this has led to debtors losing the only access to adequate housing they were able to realise for themselves. With their primary residential properties sold for a fraction of the value, judgment debtors are also frequently unable to leverage the full value of their assets to settle their debt. Debtors are therefore often left in considerable outstanding debt which may drive debtors further into debt or lead to debtors being blacklisted.\textsuperscript{21}

The second research finding that deserves mentioning is the apparent increase in the number of judgment debtors that proceed to make additional payments towards their credit agreement or arrears after the judgment creditor has already been awarded a warrant of execution for the sale of their immovable property to satisfy a judgment debt.\textsuperscript{22} In most instances these additional payments are made at the advice of the judgment creditor by desperate judgment debtors in a final attempt to stave off a sale in execution. In one case mentioned in the research report a judgment creditor (a banking institution) told a judgment debtor to continue making regular mortgage payments and “forget” about the execution order, despite the fact that this was during the exact period that the judgment creditor was seeking an execution order against the judgment debtor.\textsuperscript{23} These actions arguably create the impression that a judgment creditor has abandoned the execution process and reinstituted the credit agreement. However, if a judgment debtor fails to make monthly payments, the judgment creditor immediately executes against the home of the judgment debtor without following the traditional procedural requirements. It has also become increasingly common for judgment creditors in this position to execute for the full judgment debt despite the payments made by the judgment debtor. Although the proposed amendments to Rule 46(14)(a) of the Uniform Rules of Court\textsuperscript{24} and Rule 43(15)(a) of the Magistrates’ Court Rules\textsuperscript{25} attempt to address this concerning

\textsuperscript{20} SERI and LRC Report to the Constitutional Court in the Matter of Mzimela and Others and Nedbank Ltd and Others (May 2013) 28-29.
\textsuperscript{21} Being blacklisted denies a debtor’s further access to credit and severely hampers his or her capacity to meaningfully participate in economic activities. This may have a devastating effect on low income earners.
\textsuperscript{22} SERI and LRC Report to the Constitutional Court in the Matter of Mzimela and Others and Nedbank Ltd and Others (May 2013) 8.
\textsuperscript{23} SERI and LRC Report to the Constitutional Court in the Matter of Mzimela and Others and Nedbank Ltd and Others (May 2013) 8.
\textsuperscript{24} Rule 46(14)(a) of the Uniform Rules of Court reads:
“After conclusion of the sale, but before preparation by the sheriff of a plan of distribution, the execution creditor or his or her attorney must provide the sheriff with a certificate of all money paid by the judgment debtor to the execution creditor or his or her attorney after the issue of the writ of execution.”
\textsuperscript{25} Rule 43(15)(a) of the Magistrates’ Courts Rules is identical to Rule 46(14)(a) of the Uniform Rules of Court quoted in n 24 above (with the exception of the word “writ” which is substituted with the synonym “warrant”).
development, SERI argues in the following section that the proposed amendments do not go far enough.

The final trend that can be drawn from the research report is what appears to be a systemic failure in the processes that provide for the issuing and receiving of notices of pending and ongoing legal proceedings. The group of applicants that formed the subjects of the research report almost uniformly claimed that they had no notice that proceedings had been instituted against them, while the available sheriffs’ returns suggested otherwise. As a result of lack of notice many of these applicants did not oppose the sale in execution process. However, as the report notes,

“it cannot lightly be inferred that the failure of the applicants to attend court is the result of their negligence or dishonesty rather than some systemic failure in the service of process issued out of the High Courts and Magistrates’ Courts. It is, in our view, unlikely that all of the applicants would have had notice of the proceedings brought against them but then intentionally sat back and allowed the processes of execution and eviction to proceed, only now to claim – either in a rescission application before lower courts or in this application – that they had been unaware of the proceedings all along.”

With these comments in mind, SERI sets out its comments to the proposed amendments to Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’ Courts Rules in the following section.

4. Response to the proposed amendments

The Rules Board proposes a number of strategically targeted textual amendments to Rule 46 of the Uniform Rules of Court. While these are more extensive than the proposed amendments suggested in the initial call for comment, the changes pertain predominantly to the determination of the conditions of sale, the procedure related to the sheriff’s preparation of a distribution plan after the conclusion of a sale, and reserve prices. Each of these

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26 SERI and LRC Report to the Constitutional Court in the Matter of Mzimela and Others and Nedbank Ltd and Others (May 2013) 1 and 28.
27 SERI and LRC Report to the Constitutional Court in the Matter of Mzimela and Others and Nedbank Ltd and Others (May 2013) 28.
28 SERI and LRC Report to the Constitutional Court in the Matter of Mzimela and Others and Nedbank Ltd and Others (May 2013) 28.
29 See the amended Rule 46(8) of the Uniform Rules of Court proposed by the Rules Board. Subsection 8 is the subsection most substantially altered by the Rules Board.
30 See the amended Rule 46(14) of the Uniform Rules of Court proposed by the Rules Board.
31 See the amended Rule 46(12), read with Rule 46(8), of the Uniform Rules of Court proposed by the Rules Board.
The proposed amendments will be dealt with below. The amendments proposed to Form 21 are relatively minor.

Perhaps the most significant amendments proposed by the Rules Board are those pertaining to Rule 43 of the Magistrates' Court Rules. This is due to the fact that the Rules Board seeks, through the proposed amendments to Rule 43 of the Magistrates' Court Rules, to adopt a set of rules of procedure for the sale in execution of immovable property into the magistrates’ courts that is *identical* to the rules laid out in the amended Rule 46 of the Uniforms Rules of Court (barring certain phrases which are used exclusively in the respective courts). In addition, the Rules Board proposes to introduce Form 34A into Annexure 1 of the Magistrates' Courts' Rules (which is virtually identical to Form 21 of the First Schedule of the Uniform Rules of Court). This move is clearly to ensure that the Rules, as applied in the higher courts and magistrates’ courts, are standardised.

Over all, SERI is in favour of the Rules Board’s proposed amendments which would provide judgment debtors with increased opportunities to participate in the various stages of the sale in execution process subject to the comments set out below.

*Conditions of Sale*

The Rules Board’s proposed amendments to Rule 46(8) of the Uniform Rules of Court and Rule 43(8) of the Magistrates' Court Rules provide for a new set of rules regulating the power of the execution creditor in preparing the conditions of sale for the pending sale in execution of immovable property. There are three key features to this subsection:

- Rule 46(8)(v) of the Uniform Rules of Court and Rule 43(8)(v) of the Magistrates’ Court, that provide that sale in executions by public auction should comply with the law related to auctions as set out in the Consumer Protection Act 68 of 2008 and its Regulations.
- Rule 46(8)(ii) of the Uniform Rules of Court and Rule 43(8)(ii) of the Magistrates’ Court Rules explicitly state that the conditions of sale must include any terms of conditions ordered by a court.
- Rule 46(8)(iii) of the Uniform Rules of Court and Rule 43(8)(iii) of the Magistrates’ Court Rules provides that “any interested party” may, within the stipulated period of not less than 25 days prior to the sale, “confer” with the sheriff to amend or submit further conditions for the sale.
• Rule 46(8)(d) of the Uniform Rules of Court and Rule 43(8)(d) of the Magistrates’ Court Rules allows “any interested party” to, within the stipulated period of not less than 10 days prior to the sale and upon 24 hours’ notice to all affected parties, apply to a court to modify the conditions of sale.

SERI recognises that the introduction of these provisions would secure more opportunities for “any interested party”, which would include the judgment debtor,\textsuperscript{32} to negotiate for amendments or modifications to the conditions of sale. However, SERI has a number of concerns related to this sub-rule.

Although the amended Rule 46(8)(ii) of the Uniform Rules of Court and Rule 43(8)(ii) of the Magistrates’ Court Rules afford the judgment debtor an opportunity to request the modification or amendment of the conditions of sale by “conferring” with the sheriff, the Rules fail to provide any guidance to the sheriff on what to make of such conference. It is unclear whether the sheriff has the discretion to reject the request for modification wholesale or whether he or she is compelled to incorporate such request in part or accept it in full. The amended Rules also fail to provide objective guidelines to constrain or direct the exercise of any discretionary powers granted to the sheriff in terms of this sub-rule. The inherent vagueness of this provision will undoubtedly lead to significant confusion during its implementation and has the potential to spawn considerable litigation on the meaning of these procedural provisions, a consequences that the Rules Board would, no doubt, prefer to avoid.

For these reasons, SERI strongly recommends that Rule 46(8) of the Uniform Rules of Court and Rule 43(8) of the Magistrates’ Court Rules be amended to include a provision explicitly granting the sheriff a discretion to modify or amend the conditions of sale in instances where reasonable suggestions are made by the judgment debtor or any other interested party during the conference provided for in Rule 46(8)(ii) of the Uniform Rules of Court and Rule 43(8)(ii) of the Magistrates’ Court Rules. This formulation would have two key advantages: First, granting the sheriff a discretion to modify the conditions of sale if reasonable suggestions for modification are made sets an objective standard according to which the sheriff’s determination can be accessed, and, second, the reasonableness standard is a flexible one which would allow for the interests of the various parties to be balances appropriately to ensure that neither is at a significant disadvantage.

\textsuperscript{32} Chasfre Investments (Pty) Ltd v Majavie 1971 (1) SA 219 (C) at 222G.
SERI further submits that the Rules should be amended to make provision for the sheriff to provide reasons justifying his or her decision to reject a request to modify the conditions of sale. The party seeking such modification, SERI submits, should later be allowed to rely on the sheriff’s reasons when launching the application to court envisioned in Rule 46(8)(d) of the Uniform Rules of Court and Rule 43(8)(d) of the Magistrates’ Court Rules.

**Setting of reserve prices**

The initial call for comment issued by the Rules Board proposed that the Rules be amended to provide for courts, in their exercise of judicial supervision, to set reserve prices for the sale in execution of immovable property if such property constituted the debtor’s primary residential property or home. Despite the fact that this was the stated goal of the process for the amendment of the Rules, it seems, from the proposed amendments published for comment, that the Rules Board elected to pursue any alternative in order to avoid the inclusion of a provision allowing for the setting of reserve prices through judicial processes. In other words, the Rules Board has sought to tweak the existing regime governing the setting of reserve prices in sales in execution without taking a definitive stance on when it would be appropriate for judicially determined or mandatory reserve prices to be set.

Although the amendment of Rule 46(12) of the Uniform Rules of Court and the amendments of the Rules relating to the preparation of the conditions of sale provide judgment debtors with more opportunities to influence the possible determination of a reserve price for their homes set, SERI believes that these mechanisms are insufficient. The primary reason why SERI believes that these provision are insufficient is that they do not fundamentally alter the existing processes regulating the setting of reserve prices when conducting sales in execution of immovable property and, therefore, remain open to the same procedural abuses that the current process is open to. In particular, the sale in execution of a poor judgment debtor’s home would still be able to take place without reserve which could result in a sale in execution of immovable property at a price that falls substantially below the market value or the existing debt - an outcome which would benefit neither the judgment debtor nor the execution creditor.

For this reason SERI recommends that the Rules Board amend the Rules to require courts to set mandatory reserve prices in sales in execution where the immovable property is a person’s home. Anything short of this would leave the sale in execution process open to the same potential abuse as it is currently open to.
SERI further recommends that the amended Rules should provide that, when a court sets a reserve price on primary residential property of a debtor, the court make such determination having due regard to the market value of such property or, in the alternative, set such reserve price at a certain percentage of the market value of such property or the outstanding debt on the property. Such provision would ensure that the interests of impoverished debtors are adequately protected while ensuring that the properties sold in execution remain desirable to potential buyers.

While the Rules Board may fear that the adoption of the provisions outlined would result in an ineffective execution process in terms of which execution creditors would struggle to recoup their money, SERI submits that the failure to adopt such a provision may be equally, if not more, likely to lead to the exact consequences the Rules Board seeks to avoid. This is due to the fact that a liquidity crisis is equally, if not more, likely to occur as a result of mortgages being sold at marginal values that bear no relationship to a mortgagor’s ability to pay or to the value that could actually be realised if the property was sold on the open market. Providing for the judicial determination of reserve prices in sales in execution of primary residential immovable property would have the opposite effect as this would ensure that a certain minimum amount is realised before the property in question is sold in execution. This would increase the likelihood of the execution creditor recouping a more significant portion of their money and a judgment debtor satisfying a larger portion of the debt owed. Of course this would not be feasible if reserve prices were set above or in line with the market value of the property, but that is not what we propose. Instead SERI proposes that reserve prices be set at a percentage of the assessed market value of the property or the outstanding debt on the property.

It is submitted that the amendment of the Rules in line with these comments would go a long way to ensuring that judgment debtors receive at least some of the benefit of the equity in the property when it is sold.

*Procedure related to the sheriff’s preparation of a distribution plan*

As mentioned above in section 3 SERI welcomes the inclusion, in Rule 46(14)(a) of the Uniform Rules of Court and Rule 43(15)(a) of the Magistrates’ Court Rules, of the procedural requirement that the execution creditor must provide the sheriff with a certificate detailing the payments made by the judgment debtor consequent to the court’s granting of a warrant of execution. It is submitted that this inclusion is a progressive development of the Rules
governing sales in execution. However, SERI is concerned that the amendments proposed by
the Rules Board do not go far enough.

This is due to the fact that the execution creditor is only required to produce a certificate
detailing payments by the judgment debtor after the conclusion of the sale in execution. It is
submitted that a similar provision requiring an execution creditor to produce a certificate of
payments made by the judgment debtor before the sale in execution would contribute
significantly to the prevention of the abuse of the sale in execution process. Such a
construction would ensure that the sheriff pay an additional monitoring role to ensure that sale
in execution are not enforced to recover trifling amounts.

SERI further submits that the Rules should provide judgment debtors with an opportunity to
rebut or dispute the information provided by the execution creditor, if such judgment debtor
believes that the information provided by the execution creditor is incorrect.

5. Conclusion

It is submitted that the amendment of Rule 46 of the Uniform Rules of Court and Rule 43 of
the Magistrates’ Court Rules, as well as Form 21 of the First Schedule of the Uniform Rules
of Court and Form 34A of Annexure 1 of the Magistrates’ Court Rules introduces potentially
progressive developments into the processes governing the sale in execution of immovable
property, where such immovable property is also a person’s primary residence or home.

However, the proposed Rules, as amended, still suffer from a number of serious problems
that should urgently be addressed by the Rules Board. In particular, the sub-rules regulating
the preparation by the execution creditor of the conditions of sale, the preparation by the sheriff
of the distribution plan, and the setting of reserve prices require further amendment. SERI
urges the Rule Board to include the amendments proposed in this submission.

SERI submits that the amendment of the proposed Rule 46 of the Uniform Rules of Court and
Rule 43 of the Magistrates’ Court Rules along the lines set out in this submission would go a
long way to guarding against the more severe abuses the current system of executions is
open to and provide sufficient protection to the interests and right of access to adequate
housing of impoverished debtors.