Submission on the proposed amendment of Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’ Court Rules

Socio-Economic Rights Institute of South Africa (SERI)

February 2014

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1. Introduction

On 17 January 2014, 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 Court Rules 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. At present, Rule 46(12) of the Uniform Rules of Court and Rule 43(10) of the Magistrates’ Court Rules provide for the sale in execution of immovable property “without reserve”. The Rules Board proposes amending the abovementioned Rules by providing 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.

The Socio-Economic Rights Institute of South Africa (SERI) has read and considered the proposed amendment to Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’ Court Rules. SERI makes this submission to the Rules Board in accordance with the invitation to submit written comments on the proposed amendments.

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. 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 main focus areas are protecting and fulfilling the right of access to housing,

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2 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.”
3 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.”
5 SERI was registered as a Section 21 Not-For-Profit Company in terms of the South African Companies Act in October 2009. SERI also has Non-Profit-Organization status (NPO registration number: 077-530-NPO).
6 The SERI law clinic is registered as a public interest law centre.
defending and promoting access to basic services, and protecting political space for peaceful 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.7

In recent years SERI has become increasingly involved in legal disputes related to sales in execution of immovable property, where such property is a person’s home.8

3. General observations

At the outset, it is important to note that the right to execute against property is crucial to the proper functioning of the credit and banking system.9 This right plays an important role in the judicial enforcement of credit agreements and is consequently essential to commercial stability.10 However, it has become apparent from various court judgments in recent years that the processes regulating the sale in execution of immovable property are open to potential abuse.11

In this light, 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.12 In the South African context of deep poverty and gross structural inequality,

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7 For more on SERI visit the SERI website: https://www.seri-sa.org.
8 SERI has been involved in a series of cases related to the sale in execution of immovable property. See, for example, Gundwana v Steko Development CC and Others 2011 (3) SA 608 (CC) (Gundwana); Todd v First Rand Bank Ltd and Others, Supreme Court of Appeal, Case No. 497/12 (14 May 2013); ABSA Bank Ltd v Mhkize, Absa Bank Ltd v Chetty, Absa Bank Ltd v Mlipha, Supreme Court of Appeal, Case No. 716/12 (30 September 2013); and Thwala and Another v First National Bank and Others, North Gauteng High Court, Case No. 28787/12 (12 December 2013).
10 Folscher para 39.
11 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).
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. In many cases impoverished households may struggle to settle their debt. To poor households, their homes are their greatest asset, which could cause severe disadvantage if lost. The forced sale of, and eventual eviction from, their homes will often cause or exacerbate the socio-economic hardships of these debtors.\(^{13}\) To beneficiaries of state-subsidised housing, the sale in execution of their home would have an even harsher impact. This is 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.\(^{14}\) 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.\(^{15}\) 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.\(^{16}\) 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 Legal Resources Centre (LRC) at the behest of the Constitutional Court, also suggests that, in recent years, there has been an alarming

\(^{13}\) R Brits “Sale in execution of mortgaged homes may not result in arbitrary deprivation of property” (2013) South African Journal of Human Rights 536.

\(^{14}\) 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 sales in executions may still qualify in terms of programmes such as the Upgrading of Informal Settlements Programme (UISP).

\(^{15}\) 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.

increase in the sales in execution of the homes of debtors for amounts substantially less than their value.\textsuperscript{17} Subsequent to these procurements, the new owners regularly sold the properties for considerably more than the initial purchase price making what could only be considered a healthy profit in the process.\textsuperscript{18} 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{19}

It is for these reasons that SERI would be strongly in favour of the proposed amendments to Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’ Courts Rules.

4. Recommendations

As mentioned above, SERI is strongly in favour of the Rules Board’s proposed amendments which would 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.

However, as the exact wording of the proposed amendments are not included in the invitation for comment, SERI submits that the Rules Board should structure the proposed amendments in a manner that would require courts to set the reserve price for primary residential property in every instance. We thus argue that the amendments should not

\textsuperscript{17} 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.

\textsuperscript{18} 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{19} Being blacklisted severely hampers a debtor’s capacity to participate in economic activities. This may have a devastating effect on low income earners.
provide courts with the discretion to set reserve prices for primary residential property, but should instead make such determinations mandatory.

It is also important to note that the manner of determination of reserve price warrants consideration. Setting reserve prices at substantially less than the value of a debtor’s property would leave the processes of sale in execution open to the same abuse it is currently open to and may render the proposed amendment largely meaningless. If, for example, reserve prices are set simply to recover the debt owed to the creditor, this may cause or exacerbate the socio-economic marginalisation of debtors, as they would be unable to leverage the value of their property against their debt. It is thus suggested 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. 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.

It is submitted that the amendment of Rule 46 of the Uniform Rules of Court and Rule 43 of the Magistrates’ Court Rules along these lines would be a progressive development of the Rules that would guard 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.