IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

Case Number: 36700/2016

In the matter between:

GIVEN JUA NKWANE Applicant

and

KELEBOGILE YVONNE NKWANE First Respondent

MPHEKELELI CLEMENT MAUBANE Second Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED Third Respondent

REGISTRAR OF DEEDS SOUTH AFRICA Fourth Respondent

THE SHERIFF OF ODI (GA RANKUWA) NORTH WEST Fifth Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT Sixth Respondent

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION Applicant for *Amicus Curiae*

JUDGMENT

POTTERILL J

[1] In this matter the applicant [Nkwane] is applying that the Court set aside the sale in execution of Erf [...] Zone 9, Ga-Rankuwa Unit 9 Township, North West [the property] which took place on 28 October 2015. Ancillary to this order sought, the Registrar of Deeds of South Africa must be directed to cancel and revive the registration of the property currently registered in the name of M C Maubane. The court is also requested to declare and remedy Rule 46(12) of the Uniform Rules of Court [the Rules] as far as it is inconsistent with sections 25(1) and/or section 26(1) of the Constitution of the Republic of South Africa Act, 1996, in that it requires the sale of a person's home to be conducted without a reserve price.

[2] The third respondent [Standard Bank] opposed this application.

[3] The South African Human Rights Commission [SAHRC] was admitted as *Amicus Curiae* and Adv Sikhakhane made submissions on its behalf.

[4] The Rules Board for Courts of Law [Rules Board], although not a party to the proceedings was, as is required, served with a Rule 10A notice. The Rules Board abides the decision of the Court, but nonetheless on behalf of the Sixth Respondent filed an affidavit setting out the imminent amendment of Rule 46A, the very bone of contention, before Court. The Rule has in the meantime been amended.

[5] The crux of the matter is the constitutionality of Rule 46(12) of the Rules. All the parties before court are in agreement that despite the imminent amendment to rule 46(12) it did not render the matter before court moot simply because the applicant and those in a similar position to him will only get relief from this application, if granted.

The common cause factual background

[6.1] Nkwane and his now divorced wife on 2 September 2011 obtained a home loan from Standard Bank in the amount of R380 000 pursuant to them purchasing the property jointly and severally. Standard Bank granted the loan after an affordability assessment was done.

[6.2] On 8 November 2011 a continual covering mortgage bond was registered over the property.

[6.3] On 25 February 2012 Nkwane defaulted on his monthly instalment payable to Standard Bank. A pattern of default and /or payment of amounts lesser that the required repayment amount continued. As a result Standard Bank called Nkwane on 18 September 2012 to enquire about his default and it was informed that he was having financial difficulties due to his divorce. Nkwane then on 26 September 2012 paid more than that's month instalment, but insufficient to bring the arrears up to date. Nkwane however failed to make any payment towards the loan the next month, October 2012. The instalments for the months November and December 2012 were underpaid and no payments were received for January, February and March 2013.

[6.4] Nkwane in January 2013 applied for debt review, but nothing came of this application.

[6.5] On 15 March 2013 Nkwane applied to Standard Bank for rehabilitation. If rehabilitation is granted then it would entitle Nkwane to pay significantly less than the monthly instalment which was ordinarily due for the specified period of time. This application was granted on 7 June 2013; Nkwane could pay less than half of his

normal monthly instalment for the period of 6 months from June to November 2013. The period and amount was in accordance with Nkwane's express wishes conveyed to an employee of Standard Bank, Agnes Silas.

[6.6] Not only pending the rehabilitation application was Nkwane's instalment for April 2013 underpaid and no instalment paid for May 2013, but by November 2013 Nkwane had defaulted on his reduced instalments in terms of the rehabilitation application.

[6.7] On 20 December 2013 Nkwane requested a further rehabilitation programme but this was against Standard Bank's policy to within a 12 month period grant two applications and the application was denied.

[6.8] Despite promises to Standard Bank Nkwane's default or underpayment continued. On 30 July 2014 Nkwane informed Standard Bank that due to the 2-year separation from his wife he could not afford the instalments and he wanted to sell the house. Alicia Wilson an employee of Standard Bank informed Nkwane that he must utilise the Bank's EasySell Department [EasySell] that would assist him in marketing and selling the house. Nkwane however never signed the EasySell mandate.

[6.9] The woes of non- or underpayment of the instalment continued. On 9 October 2014 Nkwane informed Standard Bank that his wife refused to sign the EasySell mandate and therefor EasySell could not assist.

[6.10] The account was referred to the Bank's attorneys. They attempted to secure payment from Nkwane, but except for R2000 nothing was forthcoming. The

attorneys then proceeded with the sending of a section 129 notice in terms of the National Credit Act, 34 of 2005 [the Act].

[6.11] In March 2015 summons was issued and served on Nkwane.

[6.12] Default judgment was granted against Nkwane and his wife on 17 April 2015.

[6.13] On 30 April 2015 a warrant of execution was served.

[6.14] On 18 May 2015 Nkwane called Standard Bank to inform it that he and his wife were divorcing and he could not afford to pay the instalments due.

[6.15] The attorneys for Standard Bank attempted to assist Nkwane to sell the house via EasySell or privately, but no sale transpired.

[6.16] The sale of execution was to take place on 5 August 2015. Standard Bank cancelled the sale because of a Voluntary Surrender Notice published in the Government Gazette pertaining to Nkwane and his wife. No voluntary surrender application proceeded.

[6.17] A new notice for the sale of execution was served and the sale in execution of the property was set down for 28 October 2015. Without setting out all the detail, there is no doubt, that the attorneys for Standard Bank and Standard Bank itself had between the period 5 August 2015 and 27 October 2015 by means of telephone calls, again providing an EasySell mandate and reminders, attempted to assist Nkwane in avoiding a sale in execution.

[6.18] At the sale in execution the property was sold for R40 000. The property was sold without a reserve price. The insurable value of the house prior to the sale of the property was R492 470.00.

Analysis of the facts

[7] This is not the story of Standard Bank being the big, bad and powerful financial institution versus the small, bona fide individual. In recovering the debt Standard Bank went out of their way to assist Nkwane, by *inter alia* more than halving the instalments payable and offering to assist in marketing and selling the property out of hand; not by means of a sale in execution. The default of payments started shortly after the loan was granted and the loan certainly cannot be branded as reckless credit.

[8] Nkwane did not sell the house out of hand because his wife refused to sign the mandate to do so. It is generally accepted that a voluntary sale will realise more than a forced sale. It was also the separation and divorce that caused Nkwane his inability to pay the instalments. If the same institution, now representing Nkwane, could have assisted Nkwane in obtaining an order compelling Nkwane's wife to sign the mandate it would have removed the thorn from the flesh and I venture to say that this matter would not have proceeded to court.

[9] Having said that, it is like a blow to the stomach absorbing that a house worth R470 000 was sold for R40 000 to settle a debt of R370 000; but is this process substantially and procedurally unconstitutional?

The ***Mouton*** and ***Bartezky*** matters

[10] After this application was launched two judgments spoke on this very issue. On 14 July 2017 the Gauteng Local Division of the High Court in the matter of ***Mouton v ABSA,*** **Case number 17922/2014** ***and Haylock v ABSA*** **Case number 24820/2015** [the ***Mouton*** matter] found that Rule 46(12) did not constitute an unjustifiable limitation on the debtor's right to adequate housing. In ***Bartezky and Another v Standard Bank of South Africa Limited and Others*** **[2017] ZAWCHC 9 of 16 February 2017** [the ***Bartezky***-matter] the Court found that neither rule 46 in general, nor sub-rule 46(12) in particular, permits arbitrary deprivation of property, whether substantially or procedurally.

The relevant rule

[11] Rule 46(12) at the time read as follows:

> *"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."*

[12] Rule 46(12) as amended reads:

> *"Subject to the provisions of Rule 46A and subrule (5) hereof –*
>
> *(a) the sale shall be **[without reserved and]** conducted upon the conditions stipulated under subrule (8); and*
>
> *(b) the immovable property shall be sold to the highest bidder."*

Is there evidence to sustain the argument that a reserve price will obtain a higher sale price at a sale of execution?

[13] For the applicant the reversal of arbitrary deprivation of property lies in the setting of a reserve price for a property at a sale of execution. In the affidavit for the applicant no evidence is set out to sustain the argument that a reserve price will yield a higher price at a sale in execution. Notionally that may be so, but with no evidence to support this contention and with evidence to the contrary in the answering affidavit the ***Plascon Evans***[1] principle shall prevail and I will accept the evidence of Standard Bank. The evidence of Standard Bank is that the relatively low prices produced at a sale in execution reflect the very nature of a sale in execution; a forced sale. A forced sale takes place regardless of economic circumstances or whether the property market is a *"sellers or buyers' market"*. There is an uncertainty linked to forced sales because they are often cancelled at the last minute due to applications to stay the execution, or last minute arrangements between the debtor

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

and the financial institution. Buyers shy away from forced sales because the conditions of sale render the buyer liable for outstanding rates and taxes, even though now for a limited period of time.[2] A buyer might be faced with the prospect of drawn-out and expensive eviction proceedings of people occupying the property. Although perhaps opinion evidence of the Bank, the same submissions were made and accepted in the ***Mouton***-matter. There is no reason for this court not to accept the logic of the facts set out by the bank.

[14] I must also accept the evidence of Standard Bank that there is a misconception that sales in execution with a mandatory reserve price attract higher purchase prices. *"in the experience of the Bank, the opposite is true. Where sales of property at an auction are subject to a reserve price ... (.....), the effect of this is to diminish interest in the sale and reduce the likelihood of the property being sold at the auction at all.*[3] *Where the property is sought to be sold in execution but no sale results, this causes prejudice to both the execution creditor and the execution debtor ...*[4] ... *An additional challenge is that the property often deteriorates further because the sale date is often months apart. This will reduce the price that the buyers are willing to pay at subsequent sales. The execution debtor and execution will, accordingly, both be financially disadvantaged.*[5] The whole premise of a higher price or reasonable price because of the setting of a reserve price is thus

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[2] *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* (CCT283/16, CCT293/16, CCT294/16) 2017 (6) SA 287 (CC)

[3] Paragraph 28 of answering affidavit

[4] Paragraph 29 of answering affidavit

[5] Paragraph 30 of answering affidavit

contradicted with evidence of a financial institution that deals with execution sales on a daily basis. There are thus no facts to support the notional contention raised. No facts are set out as to what the reserve price must be based on. On this alone the application should be dismissed.

[15] The SAHRC referred the court to international and foreign law for the court to fulfil its duty in terms of section 39(1) of the Constitution. In ***Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others***[6] the Court referred to the International Covenant on Economic, Social and Cultural Rights [ICESCR] wherein the importance of the right of everybody to adequate housing is emphasized and obliges member states to take measures to ensure the realisation of this right. The court also took cognisance of General Comment No 4 of the United Nations Committee on Economic, Social and Cultural Rights wherein the security of tenure is an important and integral part of the right to adequate housing. Based on this international law the commission submitted that sales in execution generally, and more so without a reserve price, threatens the right to access to adequate housing.

[16] The SAHRC also referred the Court to a comparative-law analysis of the law as it applies in foreign jurisdictions. Hungary, England, Wales and Scotland do not have a

[6] 2005 (2) SA 140 (CC) para 23 to 24

mandatory reserve price. In South Korea, France, Ghana and Germany legislation requires a mandatory price.

[17] The SAHRC submitted that Rule 46 violates sections 25 of the Constitution. This is so because Nkwane's right to property is violated because execution without a reserve price results in a deprivation of the debtor's property. In regards to the violation of section 26 the SAHRC submitted that without doubt sales in execution limit the right to access to adequate housing.

[18] Although the thorough piece of work is much appreciated, I cannot find that its submissions has persuaded me that Rule 46, as it stood, did offend sections 25 and 26 of the Constitution. Its submission that like in other jurisdictions the setting of a reserve price should be done by the Legislature is telling.[7] It supports the contention in the ***Bartezky***-matter that a mandatory reserve price is a policy matter that must be left to the Legislature. The SAHRC did not advance any reason as to why Rule 46 constituted arbitrary deprivation. It also refrained from entering the debate as to whether the right to property may in these circumstances be justifiably limited. As for s26 of the Constitution the SAHRC did not independently present evidence that the absence of a mandatory reserve price violates the access to adequate housing; there was no factual basis contrary to Standard Bank's

[7] Paragraph 150

submissions. It was also not shown that the lack of a reserve price is inherently unreasonable.

Does a sale in execution without a mandatory reserve price offend section 25 of the Constitution?

[19] Section 25 reads as follows:

> *"25. Property*
>
> *(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."*

[20] In essence the applicant submitted that the lack of a reserve price as a prerequisite for a sale in execution affects a judgment debtor's right to equity in the property. In a nutshell; one's property being sold not for the real value, but for the forced value constitutes an arbitrary deprivation of one's property contrary to s25 of the Constitution. The remedy sought is however not that the real value be realised, or that it not be a forced sale, but that there be judicial oversight in the execution process affording protection to a judgment debtor. Property was to be seen as either the equity in the property or the outstanding debt still payable after the sale. For this argument reliance was placed on the matter of ***First National Bank of SA Ltd t/a***

Wesbank v Minister of Finance **2002 (4) SA 768 (CC)** para [57]: *"... In a certain sense any interference with the use, enjoyment or exploitation of private property rights involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide genus of interference, "deprivation" would encompass all species thereof and "expropriation" would apply only to a narrower species of interference ..."* Such deprivation would be arbitrary because: *"In its context 'arbitrary', as used in section 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36. This is so because the standard set in section 36 is 'reasonableness' and 'justifiability' whilst the standard set in section 25 is 'arbitrariness'. This distinction must be kept in mind when interpreting and applying the two sections."*[8]

[21] Section 25 does not guarantee a right to property, only a right against arbitrary deprivations. The deprivation of the property, the interference with the use, enjoyment or exploitation finally takes place after a court determined upon consideration of all the relevant circumstances that a creditor is empowered to execute against immovable property and the sheriff is entitled to sell the property. A forced sale with no reserve price is not a deprivation of property, but the method by

[8] *First National Bank t/a Wesbank v Minister of Finance supra* at para [65]

which the sale takes place. The equity in the property is the bank's security for payment of the outstanding debt. If there is still an outstanding amount after the sale it flows from the non-payment of the debt and the deprivation of the property in terms of rules 46(1)(a)(ii) and 46(10), not from the lack of a reserve price.

[22] Even if I should be wrong, and Rule 46(12) does deprive a debtor of his property, then in terms of Rule 46(12) the deprivation of property is not arbitrary. On behalf of the applicant it was argued that the fact that the applicants house was sold for R40 000 at the sale of execution, without a reserve price, while it was worth at the very least R447 700 the insured value, constituted an arbitrary process. This is fortified by the fact that the only purpose in selling the property is to settle the debt, by only realising R40 000 they have not fulfilled their purpose. To determine whether the deprivation was arbitrary Keightley J, in my submission correctly, relying on ***Mkontwana v Nelson Mandela Metropolitan Municipality*** **2005 (1) SA 530 (CC)** at para 45 first enquired whether there is a connection between the purpose of the deprivation and the property or its owner. I agree with her finding that: *"The debt in respect of which execution is effected, is inherently linked to both the debtor/owner and the property … It is difficult to imagine a closer connection between the purpose of the execution on the one hand, which at the most basic level is the recovery of the outstanding debt on the loan, and the owner and property on the other."*[9]

[9] *Mouton v Absa and Haylock v Absa* 17922/2014 and 24820/2015 para [93]

[23] The next question to be answered is whether there is sufficient reason for the deprivation, bearing in mind the nature of the relationship. The argument is that there is no connection between the means and the ends because the bank by selling the property for such a low price does not recover its debt. Banks accept that by the very nature of forced sales banks are going to depress what can be recovered. The purpose thus of the forced sale is to recover what part of the debt can be realised. This procedure with all its constraints, recovering only what it can, is not ideal for the bank or debtor, but is does not render the process irrational. It is rational because it allows for the bondholder to sell with a relatively cheap and expeditious procedure to reduce the debt. I also agree with the finding in the ***Mouton***-matter *"that the judgment debtor's rights in the property were, from the inception, subject to the limitations placed on them by agreement between the debtor/owner and the bank."*[10] and: *"There are compelling socio-economic reasons to facilitate the recovery of debts due by mortgage defaulters. The provision of credit under mortgage loan agreements is essential for extending participation in the housing market. Effective debt recovery permits lenders to extend credit to new entrants in the market ..."*[11] The factor that a reserve price does not necessarily lead to a higher price or a price closer to market value, but in fact reduces the possibility of a sale, also renders the procedure as it stands rational.

[10] *Mouton supra* at para [96]
[11] *Mouton supra* at para [97]

[24] The lack of the setting of a reserve price is equated to arbitrary deprivation of the debtor's right to property. In the *Mouton* judgment the Court was alive to the fact that an alternate means of sale may be more beneficial to both debtor and creditor. *"However, Rules 46(10) and (12) do not preclude this. For example, the Rules do not preclude the marketing of the property by the judgment debtor through an estate agent in order to avoid an ultimate sale by public auction. It is in the interests of both the bank and the judgment debtor to realise as much value in the property as reasonably possibly. These Rules do not force the bank into selling the property through a public auction ..."*

The facts in this matter [Nkwane], substantiates Keightley J's finding that rule 46(12) is no bar to banks accommodating, and indeed attempting, to realise as much value as possible and not blindly resorting to sales in execution with no reserve price.

[25] Upon exercising judicial oversight execution is ordered with no alternative than by means of a sale in execution, the whole premise of selling the property at a market related price just does not come into play; a forced sale *vis-à-vis* a willing selling and buyer. Furthermore the whole premise of attaining a market-related price, or a higher price, by setting a reserve price for a sale in execution is contradicted by the evidence of the bank. For this court to set a mandatory reserve price, with no evidence as to what this reserve price should be based on, as a general principle to prevent arbitrary deprivations would not be exercising the Court's duty judicially.

Should the Rules Board amendment to Rule 46(12) render the above argument wrong?

[26] I think not, because a court is *"rarely concerned with the evaluation of a relationship between means and ends, it is between the means employed to achieve a particular purpose. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others, but only whether the means that is employed, are rationally related to the purpose for which the power was confirmed."*[12] If it is accepted that there is a difference of opinion as to whether there must be a mandatory reserve price or not then *"these difference of opinion are not the kind of issues courts should interfere with too readily. They are mostly instances of legislative facts where courts should not easily interfere with the choices made by legislatures."*[13] It is also noteworthy that the Rules Board has not introduced a mandatory reserve price, but has instead resorted to removing the mandatory sale without reserve when immovable property is sold by means of execution. Sub-rule 46A(8) grants a Court in its discretion to *inter alia* set a reserve price. Rule 46A(9) sets out 9 factors, as well as any other factor, that a court must consider before setting a reserve price. The Rules Board thus did not elevate a reserve price to a mandatory price in contra-distinction to the relief sought in this application. The Rules Board has thus resorted to judicial discretion as to whether a reserve price

[12] *Democratic Alliance v President of Republic of South Africa and Others* 2013 (1) SA 248 (CC) at para 32
[13] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC)

must be set. Perhaps the amended Rule 46(12) is an improvement, but the unamended rule affords an adequate rational connection between ends and means.

Does the rule offend Section 26 of the Constitution?

[27] Rule 26 reads as follows:

> *"26. Housing –*
>
> *(1) Everyone has the right to have access to adequate housing.*
>
> *(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
>
> *(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."*

[28] The submission, so it went, was that Nkwane had lost his right to adequate housing because he was blacklisted and would not be able to apply for credit to enter the housing market again. This would also in general affect a person who utilises a state subsidy who will be disqualified from ever again obtaining other state-aided housing. Standard Bank thus infringed Nkwane's right to adequate housing.[14]

[14] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)

[29] The argument further went that the selling of the house was an infringement of Nkwane's right to access to housing. Although the broad principle of rule 46 is not objectionable, judicial oversight is necessary for the process of the sale in execution also. This is necessary because it could never be fair, balanced or justifiable to sell a house valued at R470 000 for R40 000 to settle a debt of R370 000. The amendment of Rule 46 and 46 (A) by the Rules Board is proof that the rules as they stood were not justifiable and thus unconstitutional.

[30] I start with the *"black-listing"*, this is not a result of the sale of execution without a reserve price, but the fact that the debtor is not paying his debt, and is not a fact this court will consider.

[31] This court has sympathy with Nkwane, but these subjective facts of what the house was valued at or what it was sold for have no bearing; the test is whether the rule is objectively invalid. I cannot find that there is an unreasonable negative impact on the right to housing. As demonstrated by the SAHRC sales in execution take place in all the highlighted jurisdictions, in some a reserve price is set and in some not. The fact that the Rules Board previously did not find a reserve price to be fit and now gives a court a discretion to set a reserve price, does not per se render the first stance unreasonable and accordingly there is no violation of section 26. The judicial oversight required[15] before a property is declared executable adequately protects the

[15] *Gundwana* para 53

right to housing. Once a property is declared to be specially executable, it must be assumed that a court has pronounced that the limitation on the mortgage debtor's right to adequate housing is justified.

[32] This court has no authority to order a mandatory reserve price because such a finding is in fact a policy consideration. Support for this finding is to be found in the submission of the SAHRC and the finding in the ***Bartezky*** matter.

[33] I thus in principle agree with the findings in both the ***Mouton*** and ***Bartezky*** matters. As highlighted by the court in the Mouton-matter, Rule 46(12) only takes effect after a Court has declared a debtor's home to be specially executable. Judicial oversight was thus already exercised to protect a defaulting debtor's right to housing. In ***Gundwana v Steko Developments and Others*** **2011 (3) SA 608 (CC)** at para 54 the Court found that: " *It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."*

[34] The whole process up to execution is regulated by the Act and Uniform Rules of Court with built in safeguards protecting a creditor which Banks have to adhere to before issuing summons and thereafter. The courts have judicial oversight before a property is declared specially executable. In the ***Mouton*** and ***Bartezky***-matters the considerations and steps are highlighted and I need not re-invent the wheel.[16] These safeguards in the process afford a judgment debtor ample opportunity to avoid the sale of a property and/or a sale by means of execution. I cannot find the procedure to be unfair.

Does the rule infringe on the right of access to courts?

[35] I do not find it necessary to address the point raised in the papers, but not developed in argument, that the fact that no reserve price is set infringes a debtor's right to access to the courts. This is simply not true; a debtor has in terms of the process access to a court before the execution is ordered and thereafter.

Remedy

[36] In the application no remedy is proposed and although the submission was that the application was not to protect the kind of debtor reflected in the ***Bartezky*** and ***Mouton*** matters, a blanket declaring of rule 46(12) unconstitutional will do exactly that. A court has a duty when declaring a rule unconstitutional to seriously consider the effect of such order. In this case, extraordinary far-reaching consequences of

[16] Paragraphs 76 and 77 and para 10

setting aside sales in execution, not only affecting the Banks rights, but third parties rights who will lose their ownership of properties, are extreme and a remedy to balance these rights seem unattainable.

[37] I accordingly make the following order:

a. The application is dismissed.

b. No order as to costs.

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S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 36700/16

HEARD ON: 10 October 2017

FOR THE APPLICANT: ADV. A. DE VOS SC

ADV. M. MOROPA

INSTRUCTED BY: Lawyers for Human Rights

FOR THE THIRD RESPONDENT: ADV. S. BUDLENDER

ADV. M. STUBBS

INSTRUCTED BY: Norton Rose Fulbright Inc

FOR THE SIXTH RESPONDENT: No appearance

INSTRUCTED BY: State Attorney, Pretoria

FOR *AMICUS CURIAE*: ADV. M. SIKHAKHANE

INSTRUCTED BY: Legal Resources Centre

DATE OF JUDGMENT: 22 March 2018