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

Case No. 12654/18

In the matter between:

NEDBANK LIMITED

Plaintiff

and

PETRUS JOHANNES BESTBIER

First Defendant

(identity number: [...])
(both in his personal capacity and in his
representative capacity as Trustee of
the Goede Hoop Trust, IT1333/94)

HANLIE BESTBIER N.O.

Second Defendant

CAREL BRINK BESTBIER N.O.

Third Defendant

FRANS STEFANUS BOTES N.O.

Fourth Defendant

and

HENDRIK MARIUS SCHOLTZ

Intervening Party

JUDGMENT DELIVERED ELECTRONICALLY ON 17 SEPTEMBER 2020

KUSEVITSKY, J

Introduction

[1] This is an application for a money judgment, together with an order declaring a property, which belongs to a trust and which operates as a commercial wine farm and cellar in the Stellenbosch area of the Western Cape (“the Farm”), to be specially executable.

[2] The Defendants are the trustees of the Goede Hoop Trust (“the Trust”). The Trust is the registered owner of the farm known as Goede Hoop. The Defendants do not dispute that they are indebted to the Plaintiff. In fact, they entered into a settlement agreement with the Plaintiff where they expressly consented to the farm being declared executable and undertook to pay the Plaintiff, failing which the Defendants consented to judgment, including an order declaring the farm executable in the event that they were unable to sell the farm timeously.

[3] The Defendants failed to make payment in terms of their undertaking in the settlement agreement; failed to sell the farm and refused to honour their consent to have the property declared executable. Instead, the Defendants *inter alia* now contend, that the farm is the primary residence of the First and Second Defendant’s, and is also home to twelve other families who permanently work and reside on the farm. As a result, the Defendants contend, that the Plaintiff has failed to comply with the prescripts of Rule 46A read with Practice Directive 33¹, which non-compliance they say is fatal to the Plaintiff’s application.

¹ Consolidated Practice Notes, Western Cape High Court, Cape Town

Background

[4] The Trust conducts a winery business on Goede Hoop. Over the years, the Defendants obtained substantial financial assistance from the Plaintiff in the form of an overdraft facility and loans, which were secured by way of nine mortgage bonds registered over the farm.

[5] Defendants failed to comply with their repayment obligations and the Plaintiff consequently called up the balance of the amounts owing to it. Plaintiff issued summons against the Trust and the First Defendant in his personal capacity, for the amounts of R 5 529 477.36 together with interest at a rate of 12.50% per annum and R 3 034 966.88 together with interest at a rate of 11% per annum, together with costs. The Plaintiff also sought an order that Portion 2 (a portion of portion 1) of the Farm [...], No.[...], Division Stellenbosch, Western Cape Province, be declared specially executable and that the property be sold in execution at a reserve price of not less than R 21 000 000.00.

[6] The Defendants entered appearances to defend, which was met with an application for summary judgment. The Defendants opposed the application on various grounds. According to the Defendants, the application was initially set down on 11 September 2018 when it was postponed for hearing on 13 September 2018.

[7] On the eve of the application however, this matter, together with other matters concerning money judgments and executions, were postponed pending the decision

in the matter of *ABSA Bank v Mokebe*². The summary judgment application was subsequently postponed to 21 February 2019.

[8] On 21 February 2019, the Plaintiff and the Defendants reached a settlement agreement, which is the agreement upon which the present application for default judgment is based (“the settlement agreement”). The settlement agreement was reduced to writing and signed by the parties on 29 March 2019.

[9] It is common cause that the Defendants failed to adhere to the settlement agreement. On 30 September 2019, the Plaintiff launched this application for default judgment in terms of Rule 31(1)(c) of the Rules of Court³, based on the settlement agreement. They also seek to have the farm declared specially executable. It is this matter that is now before me for adjudication.⁴

[10] In pursuance of its application, the Plaintiff accepts that in applications to have immovable property declared executable, a plaintiff must comply with this court’s practice direction 33A when the property is or appears to be, a defendant’s primary home. They argue however that the provisions of Practice Directive 33A are not applicable to this application, because the property is a commercial wine farm which belongs to the Trust.

² 2018 (6) SA 492 (GJ)

³ **“31 Judgment on confession and by default and rescission of judgments**

(1) (a) ...

(b) ...

(c) Such confession shall then be furnished to the plaintiff, whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to such confession.

⁴ I was advised that the issue regarding the Intervening Applicant has been resolved. The matter was also further delayed because of the COVID-19 pandemic which delayed the hearing of the matter.

[11] They further contend that the municipal valuation of the farm is approximately R21 million and on the Defendants' version, the market value thereof is about R40 million under normal marketing conditions; and worth R35 million on a "*fire sale*". It is also apparent that the Trust owns movable equipment, which comprises machinery and stock in trade, amounting to approximately R5 million.

[12] In the opposing affidavit, Ms Bestbier on behalf of the Defendants and who is also the daughter of the First and Second Defendants, indicated that the farm was initially purchased by her great grand-father in 1929 and stated that their family have been residing at and running a farming enterprise on Goede Hoop ever since. Her mother and father have resided in the main house since 1992 and there are twelve smaller cottages where the farm's permanent workers and their families reside, many of whom have been working and living on the farm for nearly as long as her family. She states that in view of the fact that the First and Second Defendants have resided on the property for over 25 years, they have no alternative residence.

[13] Plaintiff however contends that this belated argument is contrived, given the fact that the Defendants were at all times legally represented by Ms Bestbier, in her capacity as attorney of record for the Defendants, during the settlement negotiations leading up to the settlement agreement. According to the Plaintiff, the Defendants were apprised of their rights in terms of the provisions of Section 26(1) of the Constitution, 1996⁵ and consented to the property being declared executable in the event of them defaulting the terms of the Settlement agreement. They further argue that given the farm's actual valuation of between R35 million and R40 million and the reserve price which is set at R21 million, that there would be more than enough

⁵ Which accords to everyone the right to have access to *adequate* housing and Sections 26(3) in terms of which no person may be evicted from his/her residence without a court order. ("My emphasis")

residue left after the debt owed to the Plaintiff has been extinguished, to purchase alternative accommodation.

Is Rule 46A applicable?

[14] Rule 46A of the Uniform Rules of Court reads as follows:

“46A Execution against residential immovable property

- (1) *This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.*
- (2) (a) *A court considering an application under this rule must —*
 - (i) *establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and*
 - (ii) *consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence.*
- (b) *A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.*
- (c) ...
- (3) *Every notice of application to declare residential immovable property executable shall be —*
 - (a) *substantially in accordance with Form 2A of Schedule 1;*
 - (b) *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;*
 - (c) *supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and*
 - (d) *served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.*
- (4) (a) *The applicant shall in the notice of application —*

- (i) *state the date on which the application is to be heard;*
 - (ii) *inform every respondent cited therein that if the respondent intends to oppose the application or make submissions to the court, the respondent must do so on affidavit within 10 days of service of the application and appear in court on the date on which the application is to be heard;*
 - (iii) *appoint a physical address within 15 kilometres of the office of the registrar at which the applicant will accept service of all documents in these proceedings; and*
 - (iv) *state the applicant's postal, facsimile or electronic mail address where available.*
- (b) ...
- (5) *Every application shall be supported by the following documents, where applicable, evidencing:*
- (a) *the market value of the immovable property;*
 - (b) *the local authority valuation of the immovable property;*
 - (c) *the amounts owing on mortgage bonds registered over the immovable property;*
 - (d) *the amount owing to the local authority as rates and other dues;*
 - (e) *the amounts owing to a body corporate as levies; and*
 - (f) *any other factor which may be necessary to enable the court to give effect to subrule (8):*

Provided that the court may call for any other document which it considers necessary."
 ("my emphasis")

[15] The provisions of Practice Directive 33A deals with "*Foreclosure (and executions when property is, or appears to be, the defendant's primary home.)*" It goes on to add that "*This Directive must be read in conjunction with the amended rule 46A (which amendment came into operation on 22 December 2017).*" ('my emphasis'). On a proper construction, it is therefore clear that the two directives are conjoined and that the corollary position would be, that this directive would not be triggered if Rule 46A is not applicable.

[16] Plaintiff argues that the aim of Rule 46A, which has its genesis in *Jafta*⁶, is a safeguard for people who need it the most. In this instance, they argued that the farm operates in the business of a wine farm with distilleries. The people on the farm are necessary for the operations of the farm. They further questioned what would have happened to the workers if the Trust *had* sold the farm, as they had intended to. They argue that the Defendants' belated reliance on Rule 46A is an abuse of process and an attempt to escape liability of an admitted debt. They merely ask that the settlement agreement be enforced as there are adequate legislative safeguards in place for the occupants of the farm.

[17] The Defendants on the other hand argue that irrespective of the status of the Defendants, there should still be judicial oversight in all cases where property serves to be declared executable, including that belonging to trusts. They further argued that in terms of the settlement agreement, it seemed as though the Trust waived its right to Rule 46A. They say that if there was a waiver, such waiver could only be applicable to the parties of the waiver, which are the trustees – and could not be extended to the workers. Although they conceded that it was a commercial enterprise, the rights of the occupants of the property could not be trumped by the waiver. There still had to be judicial oversight.

[18] In terms of the commentary of Rule 46A⁷ under the definition section of '*residential immovable property*', Rule 46A does not apply when an execution creditor seeks to execute against immovable property of a judgment debtor that does not perform the function of a form of dwelling or shelter for humans (e.g. commercial immovable property) or that is occupied by juristic persons or legal entities, other

⁶ *Jafta v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)

⁷ Erasmus, *Superior Court Practice*, Volume 2, D1-632Q

than humans (e.g. trusts) for use other than a dwelling. In the event of an execution creditor seeking to execute against such immovable property, Rule 46 applies.

[19] There is however a qualification. If immovable property is merely *nominally* registered in the name of a legal person or trust, but used as a dwelling by the shareholder (s) or the trustees/trust beneficiaries, the property falls within the ambit of rule 46A in the event that the legal person or the trustees in their official capacity are the judgment debtors and the judgment creditor wants to execute against the property.

[20] Recent judgments handed down on this point have been conflicting in their approach. I will deal with some of these in due course. In some cases, courts have found that Rule 46A were not applicable to trusts, whilst others have found that it was. In as much as this could possibly be construed as a *lucuna* in the application of Rule 46A, this anomaly could easily be rectified if one were to adopt the approach that is used in the National Credit Act⁸ (“the NCA”), to determine whether or not a trust is a juristic person for purposes of Rule 46A. I propose this, mindful of the role of the Rules Board in restating existing law and regulating procedure that applies to that law⁹, but also given the call by the National Credit Regulator for the harmonization between Rule 46A and certain provisions of the NCA.¹⁰ One of the main aims of the NCA is to primarily protect the consumer, who in some, if not most cases are the marginalised people who have historically been the most economically vulnerable, predisposed to unethical money lenders. The genesis of Rule 46A has the same tenor. The NCA defines ‘consumers’ to include all natural persons and some juristic persons were generally excluded from the ambit of the NCA. The NCA

⁸ Act 35 of 2005

⁹ *United reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463F-G

¹⁰ *Standard Bank v Hendricks* 2019 (2) SA 620 at 641F-G

however recognized that in certain instances, parties entered into small or intermediate agreements where the consumer was a trust. In terms of the NCA, a trust may in some instances, in terms of the definition of '*juristic person*', be regarded as a juristic person and in other instances, as a natural person.¹¹

[21] A distinction is made between types of agreements entered into where the consumer is a juristic person such as a trust. Thus where a trust has two or less trustees, it is considered (for purposes of the NCA) as a natural person. Where the asset value or annual turnover equals or exceeds R 1 million and there are more than two trustees, it is considered a large juristic person and the NCA does not apply. Furthermore, the constitutionality of this exclusion was confirmed.¹² The Constitutional court in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd*¹³ also held that section 4(1)(a)(i) of the NCA (which exempts agreements with juristic persons with an asset value or annual turnover above the threshold from the ambit of the NCA.) "*evinces a conscious legislative choice not to protect this type of consumer under the Act.*"¹⁴

[22] There is no doubt that such a distinction and clear parameters of exclusion as to when juristic persons are deemed a 'natural person' for purposes of debt enforcement in the NCA, creates certainty amongst contracting parties and ultimately

¹¹ See section 1. A juristic person for purposes of the Act, includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if

(a) there are three or more individual trustees, or
(b) the trustee itself is a juristic person,
but does not include a *stokvel*.

¹² The constitutionality of the exclusion of juristic persons from the ambit of the National Credit Act was challenged in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd 2010 (1) SA 627 (C)* and *Standard Bank of South Africa Ltd v Hunkydory 188 (Pty) Ltd 2010 (1) SA 634 (WCC)* on the basis that the distinction between juristic persons and natural persons in the NCA violates the right to juristic persons to equality. Both the Supreme Court of Appeal and Constitutional Court refused the Defendants leave to appeal, having concluded that the matter bears no prospect of success.

¹³ [2015] ZACC 5

¹⁴ At para 37

judgment and execution creditors when these types of agreements require enforcement. Parties know whether the NCA would be applicable, as there are various other procedural formalities which flow from such applicability, such as compliance with section 129 and the like, which entails certain procedures to be adopted prior to debt enforcement.¹⁵ In my view, the same considerations applicable to trusts in the NCA could apply to rule 46A. I can see no reason why such an approach could not be incorporated and adopted into Rule 46A when assessing whether or not a trust would bring itself within the realm of rule 46A. This would also bring it in line in instances where there is a nominal registration of a *primary residence* in the vehicle of a trust. This would certainly create certainty amongst practitioners and judgment creditors alike. It would also, in my view, give effect to the purpose of Rule 46A and the very essence of the protection mechanisms that it seeks to enforce.

[23] In *casu*, the Goede Hoop Trust has four trustees and a movable asset value, on its own version of R5 million. The value of the farm as a going concern is in excess of R 30 million. On the above construction, it would therefore not be considered a 'natural person' and be afforded the protections that is reserved exclusively for 'natural persons'. The immovable property of the Trust, as a juristic entity and in its capacity as judgment debtor, would be dealt with in terms of Rule 46. Rule 46A and consequently Practice Directive 33A, would therefore find no application.

[24] Even if the above approach does not find favour, I am not persuaded that Rule 46 A and Practice Directive 33A applies in this instance. As the present position

¹⁵ and compliance with Practice Directive 33 of the Western Cape Practice Directions

stands, it cannot be doubted that Rule 46A is aimed at the protection of individuals and the *residential* immovable property of a judgment debtor. Further indicators that this is the case¹⁶ is the reference to the judgments as contained in *Standard Bank of South Africa v Saunderson and Others*¹⁷, *Nedbank Ltd v Jessa and Another* 2012 (6) SA 166 (WCC) and *Standard Bank of South Africa v Dawood*¹⁸. All refer to individuals as opposed to legal entities.

[25] The Constitutional Court in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) stated the importance of the right of access to adequate housing, in the following terms (in para [29]):

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

[26] The protection that it seeks to evince is clear. As I’ve indicated earlier, there are distinguishing authorities on this point. In *Investec v Fraser & Ors NNO*¹⁹, an applicant sought an order declaring certain immovable property owned by the Tricour Property Trust, to be declared specially executable as a precursor to satisfying a money judgment granted against the Trust, as surety in the amount of R 13 242 075.26 plus interest and costs. The first respondent opposed the application stating that she resided on the property with her two adult children, alleging that it was her

¹⁶ And this list is not exhaustive

¹⁷ 2006 (2) SA 264 (SCA) (2006 (9) BCLR 1022; [2006] 2 All SA 382

¹⁸ 2012 (6) SA 166 (WCC)

¹⁹ ZAGPJHC/Case No. 33437/2019

primary residence and since the applicant failed to comply with rule 46A of the Uniform Rules of Court, that the application was defective.

Lapan AJ's judgment in that matter dealt with primarily two issues. The first was the reliance by the respondents (as in this case) on the decision of *Nedbank v The Trustees for the Time being of the Mthunzi Mdaba Family Trust*, which found that a trust is not a juristic person for purposes of Rule 46A. The court reasoned as follows:

"[47] As the court held in *Saunderson*, when judgment is given against a debtor and the debtor fails to satisfy the judgment debt, the process for recovery of the judgment debt is by execution against "the judgment debtor's belongings". Execution does not proceed against the belongings of a third party who did not incur any liability for the judgment debt in respect of which execution is sought.

[48] When rule 46(1)(a)(ii) was amended, pursuant to GN R 981 of 19 November 2010, with effect from 24 December 2010, the following proviso was added -

"where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."

[49] Following upon this amendment and the decision in *Gundwana*, on 11 April 2011, the full bench was constituted in *Folscher* to determine, *inter alia*, what the "*relevant circumstances*" are that require consideration before issuing a warrant of execution in terms of the amended rule 46(1)(a)(ii)."

[27] The court, in *Folscher*, considered the meaning of the terms "*primary residence*" and "*judgment debtor*" in the amended rule. Upon review of various dictionary definitions, the court accepted the following definitions of the term "*primary residence*":²⁰

[50.1] a person's primary residence is the dwelling where they usually live, typically a house or an apartment, and a person can only have one primary residence at any given point in time;

²⁰ Investec v Fraser supra at para 50

[50.2] a “home” means the place where one lives; the fixed residence of a family or household; a dwelling house... the physical structure within which one lives, such as a house or apartment”; and

[50.3] “housing” means “shelter” or “lodging”.

The term “primary residence” was held to be the same concept as “the home of a person” in the amended rule 46(1)(a)(ii). The court held that the term “judgment debtor” as understood, for instance, in cases like *Saunderson*, refers to “an individual, a person” and, importantly, the court concluded that:

“It is therefore the primary residence owned by a person that falls within the purview of the rule.”

[53] Relevant for present purposes, the court held that:

“Immovable property owned by a company, a close corporation or a trust, of which the member, shareholder or beneficiary is the beneficial owner, is not protected by the amended rule requiring judicial oversight by way of an order of court authorising a writ of execution, even if the immovable property is the shareholder’s, member’s or beneficiary’s only residence.” (“my emphasis”)

[28] The court concluded that this *dictum* put it beyond doubt that if the judgment debtor is not a natural person, the constitutional considerations and protections are not available to such a judgment debtor and the right to access adequate housing in section 26 of the Constitution is not implicated. The court found that in that case, the provisions of rule 46A are not applicable as the property sought to be executed against, is registered in the name of the Trust and it is irrelevant that the trustee and her children reside on the property and consider it their home. The court further confirmed, that since the Trust, being the judgment debtor, is not a natural person, the constitutional safeguards are not available to it where execution is sought against its immovable property²¹.

²¹ See Fraser at para 55

[29] The court also criticized the anomaly that the effect of the *Mthunzi* judgment created²². This is so because although the property is registered in the name of the trustee in his official capacity, consideration is given to the trustee's personal circumstances should he/she happen to reside on the trust's property. The court stated that it is illogical to grant a money judgment in a personal action against a trust, as the judgment debtor, and then, upon seeking to execute against the trust's belongings, in particular its immovable property, to have regard to the personal circumstances of the trustee who resides on the property. Such an interpretation conflates the role of the trustee when acting in his personal capacity with his role as a representative of the trust.²³

[30] The court also reiterated that Rule 46A provisions encapsulate the protections afforded to indigent persons in danger of losing their homes and which protections are necessary to give effect to section 26 of the Constitution.

[31] In another recent decision, *Assetline South Africa (Pty) Ltd v Manhattan Delux Properties (Pty) Ltd and Others*²⁴, a defence was raised by the respondents that Assetline, a company, failed to comply with the requirements of Rule 46 and Rule 46A. In the answering affidavit, Mr. Denenga, the deponent on behalf of Manhattan, stated that to his knowledge, the property that was sought to be declared specially executable, was the primary home of one Mr. Matienga. Keightley J stated that even if the property was Mr. Matienga's primary home, it was not *his* property, it was the property of Manhattan, a juristic person.²⁵ Whilst the court did not pronounce on the

²² In *Mtunzi*, the court held that the legal *persona* of the judgment debtor was of no significance and that the trustees in their official capacity did not have to be judgment debtors for Rule 46 A to be applicable

²³ Fraser at para 65

²⁴ (30996/19) [2020] ZAGPJHC 97 (10 May 2020)

²⁵ Para 14

legal position, it did find that because the loan was advanced to Manhattan for purposes of a business venture – and not to provide funding to purchase the property – that the Rule 46A defence was without merit.

Notice to ‘any party who may be affected’ defence

[32] The next defence raised is that consideration should be given to the twelve farm workers who live and work on the farm and that notice should be given to them. The Defendants contend that the fact that the property is owned by a Trust does not matter. They state that the trustees, the trust beneficiary and the farm workers who have resided on the farm for decades fall within the category of ‘affected persons’ envisioned by Rule 46A as well as Practice Directive 33A. They relied on *Nedbank v The Trustees for the time being of the Mthunzi Mdwaba family Trust*²⁶ which held that a trust is not a juristic person for purposes of the Rule 46A enquiry. The court in para [10] of that judgment referred to the judgment of the Supreme Court of appeal in *Land and Agricultural Bank of South Africa v Parker*,²⁷ where the following was said:

*“Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act”*²⁸.

²⁶ 2019 JDR 1398 (GP)

²⁷ [2004] 4 ALL SA 261 (SCA)

²⁸ at [10]; See also *Commissioner for Inland Revenue v MacNellies’s Estate* 1961 (3) SA 833 (A) 840D-H; *Commissioner for Inland Revenue v Friedman* NO 1993 (1) SA 353 (A) 370E-I

[33] They argue that the court in *Mthunzi* held that if immovable property is merely nominally held in the name of a trust, but used as a dwelling by the trustee or trust beneficiaries, the property falls within the ambit of Rule 46A, in the event that the trustees in their official capacity are the judgment debtors and the judgment creditor wants to execute against the property. The property will still fall within the ambit of Rule 46A even if the trustees in their official capacity are not the judgment debtors. The fact that the trustees in their official capacity are the judgment debtors only signifies commitment towards payment of the debt by the trustee.²⁹ They further relied on *First Rand v Mgedesi* 2019 JDR 2252 (MN) where they stated that a similar view was adopted where it was held that Rule 46A (3) requires a substantial application which conforms with Form 2A of Schedule 1 to be served on the tenant.

[34] The Defendants submit that on a proper construction of the judgments dealing with judicial oversight, that where a creditor seeks to execute against residential property, that such oversight extends to all persons who reside on the property as their primary residence. To suggest otherwise would be to negate the aim and purpose of such protection, which is to protect the right to adequate housing and security of tenure. In the present case it is not disputed that persons other than two of the trustees have the farm as their primary residence, namely a beneficiary of the trust and a number of families of farm workers who have resided on the farm for decades. They contend that in any event, it is apparent that the legislature when it drafted Rule 46A, had provided for service on other parties than only the judgment debtor.³⁰ Rule 33A too envisages that parties other than the judgment debtor may be affected³¹.

²⁹ At [18]

³⁰ See for instance Rule 46A(3)b

³¹ See for instance Rule 33A affidavit, paras 4.21 and 4.24

[35] Rule 46A envisages notice to ‘any other party who may be affected by the sale in execution’, other than the judgment debtor. In *FirstRand Bank Limited v Mgedesi and Another*³², Brauckmann AJ in the context of the question of joinder, was of the view that an occupier has the sole interest of occupation. That interest is not related to the subject matter of the proceedings to have immovable property declared specially executable.³³ In any event, an occupier enjoys separate, but comprehensive legislative protection in the form of *inter alia* the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 commonly known as the PIE Act and the Extension of Security of Tenure Act 62 of 1997 (“ESTA”).

[36] Brauckmann AJ further held that in any event, a tenant does not have any rights that will be adversely affected that is not already properly protected in law. He stated that in the context of joinder, the interest which an occupier may have in occupying the property does not constitute an interest requiring joinder.

[37] I am of the view that similarly, the occupiers of the farm in the form of the workers have adequate legal protection afforded to them under Section 26 of the Constitution. Just as they do not have a legal interest requiring joinder in proceedings relating to executability, they do not have a legal interest which would warrant their intervention at this stage of the proceedings between the Plaintiff and the Defendants. Thus the argument that the Trust could not have bound the affected parties to the Settlement agreement, and thus waived any rights that they might have had, is misplaced. As is the common practice, in the event that the property is sold at auction, the new owners of the property will be compelled to comply with the provisions of the PIE Act before the occupiers may be evicted. As stated in

³² Case No. 727/2016

³³ At para 12

Mgedesi, although a basic human right to have access to adequate housing is protected in the Constitution, it does not provide the tenant or occupier in this case, with a direct and substantial interest in the dispute between the parties. The *lis* between the Applicant and the First Respondent is simply to have the property that the tenant occupies declared specially executable, and to sell the property at a sale in execution in order to enable the Applicant to recover money due to it by the First Respondent.³⁴

[38] I however respectfully disagree with that court's reasoning that because a sale in execution will, or may affect the rights to accommodation, that the tenant has or might have in terms of Section 26 of the Constitution, that such process must be served on the tenant or in this case, the occupier. In my view, the occupier, does not, *at this stage* have a legal interest in the proceedings which would warrant notice of the proceedings on them. This, in my view would merely serve to cause more delay in the finalisation of the proceedings and to delay a judgment and the realization of a plaintiff's security in order to satisfy the Defendants indebtedness to it.

Judicial oversight

[39] It was further contended that the aim the judicial oversight provided for in Rule 46A read with Practice Directive 33A is aimed at protecting a constitutional right. This contention is of course correct. The Constitution of South Africa provides for justiciable socio-economic rights. The right to access to adequate housing is one of the rights guaranteed in the Bill of Rights in section 26 of the Constitution.

³⁴ *Mgedesi* para 16

[40] As correctly stated, the Constitutional Court in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) stated the importance of the right of access to adequate housing, in the following terms (in para [29]):

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

[41] Further reliance was sought in *ABSA Bank v Mokebe*³⁵ where the Johannesburg full court held that the right to adequate housing is a fundamental human right enshrined in the Bill of Rights of our Constitution.³⁶ Consequently, orders to levy execution against property which are primary residences are required to be in harmony with the Constitution, which applies to all law. The full court confirmed the constitutional principle enshrined in section 172(1)(b) of the Constitution, which empowers courts with a broad discretion when deciding a constitutional matter within its power, to grant just and equitable relief.³⁷

³⁵ See footnote 1

³⁶ Section 26 of the Constitution: ‘**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’

³⁷ *Mokebe*, supra, para 31

[42] The aforementioned dicta of the *Mokebe* case was confirmed in this division in *Standard Bank of SA Ltd v Hendricks*³⁸ where the full court remarked as follows (at para [1]):

“Section 26(1) of the Constitution Act 108 of 1996 guarantees the right of access to adequate housing, with the Constitutional Court having recognised in Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others (Jaftha) that '(r)elative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience'. Section 26(3) is clear that no one is to be evicted from one's home 'without an order of court made after considering all the relevant circumstances'.”

[43] What is apparent in these relied upon cases, is that the protection that is afforded is the importance of 'adequate housing'. This means that judicial oversight is for the protection of the most vulnerable in our society and where the court's ensure that evicted persons are not left on the side of the road without shelter. In my view, it could never have been envisioned that defendants who would have a surplus of approximately R 15 million after the Trust debt has been expunged, could claim that their right to adequate housing has been infringed.

[44] The Defendants also relied on *Mkhize v Umvoti Municipality and Others*³⁹ where the Supreme Court of appeal commented as follows in this regard:

“[24] We detect no ambiguity in the order in Jaftha. In that case and later in Gundwana the Constitutional Court made it clear that in all cases of execution against immovable property judicial oversight is required. Confusion was caused by a multitude of judgments seeking to come to terms with Jaftha. Determining whether s

³⁸ 2019(2) SA 620 (WCC)

³⁹ 2012 (1) SA 1 (SCA) paragraphs 24-26

26(1) rights are implicated is a fact-based enquiry. In *Gundwana Froneman J* said the following:

"Some preceding enquiry is necessary to determine whether the facts of a particular matter are of the Jaftha-kind."

...

[25] ...

[26] The object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated. In the main a number of cases grappling with Jaftha sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight? We are unable to understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. To not undertake such an enquiry would in fact render the procedure unconstitutional. Following that simple principle would have avoided the confusion caused by a number of judgments."

[45] In *Hendricks*⁴⁰ the full court stated that while the Constitution requires judicial oversight over orders of execution made against immovable property which is the primary residence of the judgment debtor, the manner and extent to which this oversight has occurred has received different treatment in our courts. This led to the promulgation of Uniform Rule 46A, which came into effect on 22 December 2017.

[46] This however does not mean that a judgment creditor's right should be unduly curtailed by the claim of a Rule 46A defence. In *Absa v Mokebe*⁴¹, the court referred to the authors of Wille, who stated thus:

'The right of the mortgagee or pledgee is to retain his hold over the secured property until his debt is paid and, if the mortgagor or pledgor is in default, to have the property sold and obtain payment of his debt out of the proceeds of sale.'

⁴⁰ Supra, at para [2]

⁴¹ 2018 (6) SA 492 at para 1

[47] The Defendants argue that judicial oversight is required in all instances where properties are declared executable. In my view, the issue of judicial oversight is separate and distinct from the procedural requisite of complying with Rule 46A and Practice note 33. Rule 46A is only triggered when a property is the primary residence of a debtor. The mere fact that Rule 46A is not triggered does not mean that there is no judicial oversight. Rule 46 deals with execution against immovable property other than the residential property of a judgment debtor. In *Mkhize v Umvoti Municipality and Others*⁴², Navsa and Snyders JA stated:

[24] We detect no ambiguity in the order in *Jaftha*. In that case and later in *Gundwana* the Constitutional Court made it clear that in all cases of execution against immovable property judicial oversight is required. Confusion was caused by a multitude of judgments seeking to come to terms with *Jaftha*. Determining whether s 26(1) rights are implicated is a fact based enquiry. In *Gundwana* Froneman J said the following:

‘Some preceding enquiry is necessary to determine whether the facts of a particular matter are of the *Jaftha*-kind.

Only once that enquiry has been undertaken can the question asked by Wallis J, in the latter part of the quotation in para 23 above, be answered. The principle as described in our opening paragraph has already clearly been established in *Jaftha*.’

[25] It is clear from *Gundwana* that insisting on judicial scrutiny in every case should hold no terrors. The level of enquiry will vary from case to case and will always be dependent on the circumstances. As was pointed out in *Gundwana* the rule established in *Jaftha* ‘caution[s] courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes’.

[26] The object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated. In the main a number of cases grappling with *Jaftha* sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight?. We are unable to understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. To not undertake such an

⁴² supra at paras 24-26

enquiry would in fact render the procedure unconstitutional. Following that simple principle would have avoided the confusion caused by a number of judgments.

[48] It is clear that judicial oversight is required when all immovable property is sought to be declared executable. The nature of the property and the nature of the debtor will ascertain whether or not Rule 46A will be triggered. In this matter, it is clear that the facts peculiar in this instance are not akin to a '*Jafta*-kind' scenario. It is also apparent that the First and Second Defendants are also not poor or indigent that the risk of losing their homes situated on a commercial enterprise would render them homeless. To impute such protection would make a mockery of the very purpose that guided the reasoning behind the *Gundwana* and *Jafta* judgments. Most certainly, the section 26(1) rights of the judgment debtors would not be offended. This is because the protection afforded in section 26(1), is the protection afforded to ones dignity to have *adequate* housing and the States obligation to provide such access to adequate housing. Thus to suggest that a person's rights in terms of section 26 will be infringed, because he or she will no longer be able to live on property valued at over R 40 million is disingenuous and a flagrant disregard for the protection of those that it is meant to serve. Furthermore, the use of the employees who reside on the farm as an excuse to escape liability and the consequences of defaulting on several loans advanced to the judgment debtor and the subsequent Settlement agreement, is opportunistic and unfortunate. As I have stated earlier, there are adequate legislative protections available to those who may be able to claim such a right, but it would be premature to entertain these considerations at this juncture in these proceedings.

The Settlement Agreement

[49] Our courts have always protected the integrity and sanctity of contract. In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*⁴³, the Supreme Court of Appeal reaffirmed the doctrine of *pacta sunt servanda* and found that it was impermissible to infuse principles of *Ubuntu* and good faith in matters of contract. In that case, it was a material term of a lease agreement that should the respondent fail to pay the rental on due date, then the appellant would be entitled to cancel the lease and retake possession of the property. The court *a quo*, although it had accepted that the lessee had breached the agreement by failing to make payment of the rental on due date, declined to grant an eviction order. The court reasoned that granting an eviction order would be manifestly unreasonable, unfair and offend public policy. It concluded that the common law principle, *pacta servanda sunt*, should be developed by importing or infusing the principles of *ubuntu* and fairness in the law of contract.

[50] In *Mohamed* the court restated that the privy and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. Self-autonomy or the ability to regulate one's own affairs, even to one's detriment is the very essence of freedom and a vital part of dignity.⁴⁴

[51] In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13, Theron J stated the following:

"[83] the first is the principle that "[p]ublic policy demands that contracts freely and consciously entered into must be honoured". This Court has emphasised that the principle of *pacta sunt servanda* gives effect to the "central constitutional values of freedom and dignity."

⁴³ (183/17) [2017] ZASCA 176 (1 December 2017)

⁴⁴ See *Mohamed's Leisure Holding* at paras 23 and 25

It has further recognised that *in general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* is thus not a relic of our pre-constitutional common law. It continues to play in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.

[84] Moreover, contractual relations are the bedrock of economic activity and our economic development is independent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed". ("my emphasis")

[52] The parties entered into a Settlement Agreement, freely and voluntarily, wherein the judgement debt was admitted and an agreement was made to declare the farm executable in the event of a default. Public policy requires the Defendants to honour its obligations that have been agreed to with the Plaintiff.

[53] As I have stated before, the defence raised by the Defendants that they could not waive the rights of the occupants when they signed the Settlement Agreement, is misguided.

[54] The rights of the Plaintiff can never be ousted by the rights of persons who have no legal interest in the matter; who are not party to the proceedings and more importantly, who enjoy comprehensive legislative and constitutional protection in their own right. It can also never be so that the doctrine of notice should be extended to persons who may claim personal rights, (where no such legal rights exists) to the detriment and prejudice of a judgment creditor.

Execution against movables

[55] It is trite that subject to rule 46(1)(a), no writ of execution against the immovable property of any judgment debtor shall be issued unless a return has been made of any process issued against the movable property of the judgment debtor

from which it appears that the said person has insufficient movable property to satisfy the writ.

[56] According to the opposing affidavit, the Defendants are opposed to having the movable assets attached and sold. They state that the movables, which consist of machinery and stock, both bulk and bottled wine which is used in the operation of the winery business, would preclude the First Defendant from operating the business, which would affect any possible investment in the business. They also aver that having recently valued the movable assets, stock and machinery, they estimate the total value to be in the region of R 5 million and this means that even if Plaintiff were to be allowed to proceed with execution against the movables, the Trust's indebtedness would not be settled in its entirety and it will still require the sale of the immovable property. It would therefore not make commercial sense for the Plaintiff to proceed against the movable property and diminish the value of the business as a going concern.

[57] After a conspectus of the relevant facts, I am of the view that Rule 46A and Practice Directive 33A finds no application in this matter. I am also satisfied that on the evidence, this is not an instance where the 'primary residence' of the First and Second Defendants is 'nominally' registered in the name of the Trust, as for all intents and purposes, the Trust and its property, is a well-oiled commercial enterprise. I am also satisfied that no section 26 rights will be infringed upon the granting of this order. The Plaintiff is entitled to its judgment and to have the property declared specially executable.

[58] I accordingly make the following order:

1. Default judgment is granted in terms of Rule 31(1)(c):

1.1 Against the First, Second Third and the Fourth Defendants, in their representative capacities as Trustees of the De Goede Hoop Trust, IT1333/94 and against the First Defendant in his personal capacity, the one paying the other to be absolved for:

1.1.1 Payment of the amount of R5 529 477.36 plus interest at 12.50% per annum, calculated daily and capitalised monthly from 1 September 2019 to date of payment, both days inclusive;

1.1.2 Payment of the amount of R3 034 966.88 plus interest at 11% per annum, calculated daily and capitalised monthly from 1 September 2019 to date of final payment, both days inclusive;

1.1.3 Payment of costs on attorney and client scale taxed or agreed.

1.2 Against First, Second, Third and Fourth Defendants in their representative capacities as Trustees of the Goede Hoop Trust. IT1333/1994:

1.2.1 That Portion 2 (a portion of portion 1) of the Farm [...] Nr. [...], Division Stellenbosch, Western Cape Province, held by Deed of Transfer Number T49155/1996 ('the property') bonded to the Plaintiff under bond numbers B44576/1996; B52086/1998, B50589/2001, B62331/2004, B60779/2008, B28099/2009, B29250/2013, B3479/2014 and B9582/2017 be declared specially executable;

1.2.2 That the property be sold in execution at a reserve price not less than R21 000 000;

1.2.3 Payment of costs on an attorney and client scale as taxed or agreed.

KUSEVITSKY, J

JUDGE OF THE WESTERN CAPE HIGH COURT

Counsel for Appellant/Plaintiff: Advocate CW Kruger

Instructed by Van Der Spuy Attorneys

Counsel for Respondents/Defendants: Advocate Jan Hendrik Roux SC

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