

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



CASE NO: 21247/2018

In the matter between:

MORULA RESOURCES CC

First Applicant/First Respondent *a quo*

TSHIRELETSO HAROLD DIRA

Second Applicant/Second Respondent *a quo*

and

NATIONAL URBAN RECONSTRUCTION &

HOUSING AGENCY NPC

Respondent/ Applicant *a quo*

J U D G M E N T

(Application for Leave to Appeal)

MAIER-FRAWLEY J:

1. The applicants (first and second respondents' respectively *a quo*) seek leave to appeal the judgment and order granted by me on 16 November 2020 ('the

judgment’) in terms of which, amongst others: (i) two immovable properties owned by Morula Resources CC (judgment debtor) were declared to be specially executable; (ii) the issuing of a writ of execution in respect of the properties was authorized; and (iii) the sale in execution of each of the properties was made subject to a reserve price, in the respective amounts stipulated in paragraph 4 of the order.

2. For convenience, the parties will be referred to as they were referred to in the main application: Morula Resources CC was the first respondent, whilst Mr Harold Dira Tshireletso was the second respondent. Although they are the applicants in the application for leave to appeal, they will be referred to collectively as ‘the respondents’ or individually as first and second respondents in this judgment as dictated by the context. National Urban Reconstruction & Housing Agency NPC will, for convenience, be referred to as ‘the execution creditor’ herein.

3. The judgment found that the provisions of Rule 46A of the Uniform Rules of Court were not applicable to the matter in circumstances where execution was sought only as against the immovable properties owned by a juristic person such as the first respondent-judgment debtor, based on the authority of *Folscher*,¹ as further discussed and applied in the unreported decision of *Investec*.² As was reaffirmed by the Constitutional Court in *Garvas*,³ ‘Following previous decisions constitutes not only compliance with the doctrine of judicial precedent but also accords with the principles of judicial discipline and accountability.’

¹ *Firststrand Bank Ltd v Folscher and another, and Similar Matters* 2011 (4) SA 314 (GNP), para 32, a decision of the Full Court of this division to which I am bound.

² *Investec Bank Limited v Fraser N.O. and Another* (33437/2019) [2020] ZAGPJHC 107 (6 May 2020), an unreported decision of Lapan AJ in this division, with whose reasoning I respectfully agreed in the judgment or at least could not conclude was wrong.

³ *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 114, where the court reaffirmed what had earlier been said in *Ex parte Minister of Safety and Security: In re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para 57 concerning the application of the doctrine of *stare decisis* (Doctrine of Judicial precedent).

4. The judgment was challenged on two grounds, namely, that the court erred in:

(1) Not ordering that a sworn valuation in support of the market value of the Immovable Properties must be placed before the Honourable Court under oath, as provided for by Rule 46A(5)(a) of the Uniform Rules of Court, in order to enable the Honourable Court to determine a reserve price for the sale in execution of the immovable properties; and

(2) Not ordering that certain parties with a vested interest in the proceedings be joined to the proceedings and/or notified thereof. To this end, the Court did not order that the Registrar of Deeds and the bondholder that registered a mortgage bond over the immovable properties, namely the Standard Bank of South Africa Limited, be joined to and/or notified of the proceedings.

5. At the hearing of the application for leave to appeal and in heads of argument filed on their behalf, reliance on the second ground of appeal was expressly abandoned by the respondents.

6. As indicated in the judgment, one of the two properties owned by Morula Resources CC (the Sagewood property) was occupied by the second applicant (Mr Harold Dira Tshireletso) and his family at the time the main application was heard. Such occupation however only commenced sometime after service of the main application upon the respondents *a quo*.

7. I was informed at the hearing of the present application that the respondents do not take issue with the fact that the Kingfisher property, being the other property owned by the close corporation, was declared specially executable and is therefore

subject to a sale in execution in satisfaction of the first respondent's existing indebtedness to the execution creditor.

Respondents' contentions

8. Leave is sought to appeal the order of executability granted only in respect of the Sagewood property on the basis that, so it was contended, Rule 45A was applicable, given that Mr Tshireletso, who was occupying that property as his primary residence, remained a judgment debtor, albeit that execution was not sought against any immovable property owned by him and that the close corporations, as principal debtor, was first being excused by the execution creditor. Therefore, so the argument developed, on the authority of *Mokebe*,⁴ the court ought to have insisted on a sworn valuation being placed before it of the market value of the Sagewood property in order to arrive at a forced sale value for purposes of determining a reserve price at a future sale in execution.

9. Reliance was placed on the case of *Nedbank*,⁵ where Ramapuputla AJ placed emphasis on the fact that the property sought to be declared executable was used as a dwelling or shelter for humans, rather than on the identity of the judgment debtor, in circumstances where one of the trustees of a property owning Trust was occupying the Trust's property. Ramapuputla AJ concluded that '*it is immaterial whether the judgment debtor is a juristic person or a natural person. The trustees in their official capacity do not have to be the judgment debtors for Rule 46A to be applicable...*'

10. Counsel for the respondents submitted that there are conflicting judgments on the applicability of Rule 46A (given the differing views expressed in the *Nedbank*

⁴ *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ), a Full Court decision in this division, sitting in Pretoria.

⁵ *Nedbank v Trustees for the time being of the Mthunzi Mdwaba Family Trust and Others* (7901/2017) ZAGPPHC 336 (9 July 2019). An unreported decision of Ramapuputla AJ given in the Gauteng Division, Pretoria.

and *Investec* cases) so that it is necessary for higher courts to pronounce on the issue. The peculiar facts of the present matter, so it was submitted, also offer a compelling reason why the appeal should be heard. Leave to appeal is accordingly sought in terms of 's17(1)(a)(ii) of the Supreme Court Act, 10 of 2013'⁶ .

Discussion

11. Counsel for the execution creditor argued that in terms of s 17 of the Superior Courts Act, 10 of 2013, an application for leave to appeal can only be granted where the presiding judge is of the opinion that either the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard, including whether or not there are conflicting judgments on the matter under consideration. In neither instance, have the respondents met the threshold standard entitling them to be granted leave to appeal.

12. Section 17 of the Superior Courts Act, 10 of 2013, ('the Act') provides for the following test to be applied in applications for leave to appeal:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) ..."

13. The use of the word 'would' in section 17 (1)(a)(i) of the Superior Courts has been held to denote '*a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.*'⁷ Such approach has been

⁶ The reference to 'Supreme Court Act' was probably an error.

⁷ *The Mont Chevaux Trust (IT 2012/28) and Tina Goosen and 18 Others* Case No. LCC 14R/2004, at para [6].

held to be correct in this division in *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*.⁸ To this may be added, further cautionary notes sounded by the Supreme Court of Appeal in dealing with appeals: In *S v Smith*,⁹ it was stated that in deciding whether there is a reasonable prospect of success on appeal, there must be 'a sound, rational basis for the conclusion that there are prospects of success on appeal.' In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*,¹⁰ the SCA cautioned that the 'need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. ...'

14. The respondents argue that a sworn valuation ought to have been required by the court before it could determine a reserve price apropos the future sale in execution of the Sagewood property.

15. The respondents rely on the fact that the Sagewood property is occupied by Mr. Tshireletso as his primary residence for their submission that Rule 46A was applicable to the enquiry pertaining to the executability of the Sagewood property. The court considered the contention out of an abundance of caution based, however, on the cursory argument proffered at the hearing of the main application that the ambit of Rule 46A ought to be extended to cater for an occupant such as Mr Tshireletso. I did so, notwithstanding that no case in support of such an argument had in fact been made out in the answering affidavit and no reasons had been

⁸ (19577/09) [2016] ZAGPPHC 489 (24 June 2016) para [25], a decision of the Full Court, which subsequently been approved by the Supreme court of Appeal in *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016), at para 2, where the following was said: "An appellant, on the other hand, faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959. (See *Van Wyk v S*, *Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para [14].)"

⁹ 2012 (1) SACR 567 (SCA) para 7.

¹⁰ 2013 (6) SA 520 SCA at para [24].

advanced in oral argument for why the facts of the matter warranted a departure from established case law on the subject.

16. The respondents appear to accept that Rule 46A does not apply to juristic persons, given the authoritative pronouncements by superior courts on the inapplicability of the provisions of Rule 46A to properties against which execution is sought, which are owned by judgment debtors comprising juristic persons.¹¹

17. The plain meaning of the express provisions Rules 46A(1) and (2) clearly underscores that which was stated in *Folscher*.¹² The sub-rules provide for the establishment of two jurisdictional facts, first, that the executor creditor seeks execution against the residential immovable property of a judgment debtor and, second, that the property sought to be executed against is the primary residence of that judgment debtor. The Sagewood property is not the immovable property of Mr. Tshireletso, regardless of whether or not he is a notional judgment debtor. Execution is not sought to be levied against his immovable property in satisfaction of the judgment debt. This should be considered in conjunction with what was stated in paragraph 4 of my judgment..

18. In the present application, the applicants rely on pronouncements made in the *Nedbank* case for their submission that a higher court needs to consider an extension of the ambit of Rule 46A. The court in *Investec*¹³ concluded that the

¹¹ See: *Folscher*, cited in fn 1 above, where the Full Court held that the term 'judgment debtor' refers to an individual person and not a juristic person. At par 31 of that judgment, it was held that '*It is therefore the primary residence owned by a person [judgment debtor] that falls within the purview of the rule.*' (own emphasis). See too: *Investec* (cited in fn 2 above).

¹² *Id Folscher*, par 31.

¹³ *Investec*, (cited in fn 2 above). At paras 69 to 71 of *Investec*, the following was said:

"The Nedbank judgment is in conflict with the judgments in *Jaftha*, *Gundwana*, *Mokebe* and *Folscher*, all of which considered that the constitutional protections are afforded to judgment debtors who are individuals and natural persons in danger of losing their homes and where it was held, specifically by

Nedbank decision was ‘clearly wrong’ for *inter alia*, reasons outlined in paras 63 to 71 of that judgment and which reasons I cannot respectfully fault.

19. The respondents have not sought to appeal the following findings or conclusions in the judgment:

19.1. That there were no other proportionate means to exact payment of the judgment debt, other than through execution levied against the immovable properties of the close corporation (first respondent);

19.2. That on the facts, the second respondent (Mr. Tshireletso) did not fit the demographic of an indigent, vulnerable or poor debtor;

19.3. That it had not been established by the respondents that an infringement of Mr Tshireletso’s constitutionally protected right to *adequate* housing had been infringed or would be infringed by execution against the immovable property of the close corporation; and

19.4. The finding that execution was justifiable in the circumstances alluded to in the judgment.

20. In my view, the respondents have failed to persuade me that there is a measure of certainty that another court will come to a different conclusion and find

the Full Bench constituted in *Mokebe* and *Folscher*, that these protections are not available to legal entities or trusts.

Where the shareholder or trustee is not the beneficial owner of the property, no enquiry can be made into his/her personal circumstances when considering execution of a judgment debt obtained against a company or a trust of which they are a shareholder or trustee, respectively. In those circumstances, insisting on compliance with the provisions of rule 46A will be wholly misplaced as it would be aimed at protecting a right which the occupant of the property does not have as he/she is not the judgment debtor.

Such an interpretation could have the unintended consequence of a company or a trust allowing any individual to occupy its property with a view to avoiding or delaying execution against its property. The execution creditor will then be required to take the steps set out in rule 46A to safeguard the interests of the occupant who is not the judgment debtor and whose rights in terms of section 26 of the Constitution are not implicated. These are the implications of the decision in *Nedbank* and it is in conflict with the earlier judgments of higher authority which considered the *persona* of the judgment debtor to be an essential component in matters involving execution against the judgment debtor’s property.”

that the application should have been accompanied by a sworn valuation despite the fact that the judgment debtor whose property was sought to be declared executable is a juristic entity which does not enjoy the protection or application of Rule 46A. Nor am I persuaded that there are compelling reasons, based on the facts of the matter at hand or on pronouncements made in the *Nedbank* case that are in any event in conflict with binding pronouncements made by higher courts in *Foscher* and *Mokebe*¹⁴ that the appeal be heard. In the result, the application for leave to appeal must fail.

21. As the successful party, the applicant is entitled to the costs of the application. I have not been alerted to any facts or circumstances that would justify a departure from the general rule that costs follow the result.

22. Accordingly, the following order is granted:

ORDER

1. The application for leave to appeal is dismissed with costs.

**A MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG.**

¹⁴ *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another* (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 485; 2018 (6) SA 492 (GJ) (12 September 2018)

Delivered: This judgement is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 February 2021.

Date of virtual hearing: 5 February 2021

Judgment delivered: 10 February 2021

APPEARANCES:

Counsel for Applicant: Ms KA Wilson

Attorneys for Applicant: DMO Attorneys

Counsel for Respondent: Mr C. Rip

Attorneys for Respondent: Morne Coetzee Attorneys