



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A162/2021

(1) REPORTABLE: YES, <u>NO</u>	 16/02/2023
(2) OF INTEREST TO OTHER JUDGES: YES, <u>NO</u>	
(3) REVISED	
<u>16-02-2023</u>	<u>PD. PHAHLANE</u>
DATE	SIGNATURE

In the matter between:

NEDBANK LIMITED

APPELLANT

And

THE TRUSTEES FOR THE TIME BEING OF THE
MTHUNZI MDWABA FAMILY TRUST

1ST RESPONDENT

PERRY-MASON MTHUNZI MDWABA

2ND RESPONDENT

PERRY-MASON MTHUNZI MDWABA N.O. IN HIS CAPACITY AS TRUSTEE
OF THE MTHUNZI MDWABA FAMILY TRUST

3RD RESPONDENT

JOY MGI MDWABA N.O. IN HER CAPACITY AS TRUSTEE
OF THE MTHUNZI MDWABA FAMILY TRUST

4TH RESPONDENT

ZUKO MPUMELELO MDWABA N.O. IN HIS CAPACITY AS TRUSTEE
OF THE MTHUNZI MDWABA FAMILY TRUST

5TH RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by her secretary. The date of this judgment is deemed to be 16/02/2023

JUDGMENT

PHAHLANE, J

- [1] This is an appeal against the judgment granted in favour of the respondents by his Lordship Ramapuputla AJ on 9 June 2019. Leave to appeal was granted by the court *a quo* on 3 June 2020.
- [2] At the commencement of the proceedings, the respondent's attorney of record Mr Naiker, informed the court that his instruction was not to oppose the appeal. This was mainly due to the fact that the respondents did not have the financial means to oppose this application. He informed the court that he has however not withdrawn as the attorney of record. Under the circumstances, the court was of the view that he should remain in attendance during the proceedings.
- [3] The issue for determination is whether the provisions of Rule 46A of the Uniform Rules of Court finds application in circumstances where the property sought to be declared executable is registered in the name of a Trust and is the primary residence of the trust beneficiaries.
- [4] It is common cause that the subject property is used as a primary residence of the second respondent and his children. The second respondent is also a trustee of the Mthunzi Mdwaba Trust and signed as a surety for the property in issue. The court *a quo* found that, although the subject property is registered in the name of a Trust, it was purchased as a residential property and is being used as a dwelling or shelter by the second

respondent being the Trust beneficiary and his children¹. The court *a quo* further found that the provisions of Rule 46A are applicable and as such, the respondents were entitled to the protection afforded by Rule 46A. The appellant did not comply with the provisions of the rule².

- [5] Referring to the protection afforded by section 26 of the Constitution³ in respect of access to adequate housing and the decision of the Constitutional court in **Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others**,⁴ the court *a quo* stated the following:

"[14] I have to consider whether the rules of court have been complied with; whether there are alternative ways of recovering the judgement debt; further take into account, among other things, the circumstances in which the judgement debt was incurred; attempts made to pay off the debt; the financial position of the parties; the amount of the judgement debt; whether the judgement debtor is employed or has a source of income to pay off the debt; and other factors relevant to this case. These circumstances were set out in the case of Jaftha. Further, the applicant must state the manner in which it dealt with the respondents when it became clear that the latter was defaulting. The process of reaching the conclusion that execution was a last resort must also be disclosed.

[15] The respondents case meets the above test because of the fact that the second respondent is living in the immovable property with his children.

[24] When considering an application under Rule 46A, I must establish whether the immovable property which the execution creditor intends to execute against, is the primary residence of the judgment debtor. If that is so, I must further consider whether the judgment debtor has at his disposal

¹ Para 20 of Judgment.

² Para 28 of Judgment.

³ Act 108 of 1996.

⁴ **Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others** (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004).

alternative means of satisfying the judgment debt. I must also consider whether execution against the judgement debtor's primary residence is the last resort. The execution creditor must have complied with all court rules and processes. I can only authorise execution against immovable property which is the primary residence of a judgment debtor, after having considered all relevant factors. All considered factors must confirm that execution against such property is warranted".

- [6] The appellant's initial contention that the provisions of Rule 46A do not apply to a residential property registered in the name of a trust, has been abandoned because as at the time of the hearing of this application, the position has since changed following the decision in the matter of **Petrus Johannes Bestbier and Others v Nedbank Limited**⁵ ("**Bestbier**").

- [7] In affirming that a court considering the Rule 46A applications must have judicial oversight as an essential element of the application and consider all the relevant factors that execution against such property is warranted, the Supreme Court of Appeal in **Bestbier** cited with approval, the decision in **Jaftha supra** and stated that:

"[25] The text of rule 46A(1) reveals that the rule applies whenever an execution creditor seeks to execute against residential immovable property of a judgment debtor. Notably, rule 46A(2) provides that a court considering an application in which a creditor seeks to execute against the judgment debtor's immovable property must consider various matters.⁶ Given that rule 46A(2) provides that a court 'shall not' authorise execution unless 'all relevant factors' have been considered, I can see no reason why the fact that the relevant immovable property is owned by a trust and occupied as a place of residence by the beneficiaries of that Trust should not be one of the factors to be taken into account.

⁵ (Case No. 150/2021) [2022] ZASCA 88 (13 June 2022).

⁶ These include whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor and whether there are other alternative means by which the judgment can satisfy the debt other than execution against the judgment debtor's primary residence.

[26] It is clear from a plain reading of the entire text of rule 46A that it is important to have a preceding enquiry in all cases where the immovable property of the judgment debtor is used as residential immovable property. This preceding enquiry should be directed at establishing whether the persons occupying the immovable property in question are of the Jaftha kind.⁷ As I see it, a creditor seeking to execute against immovable property owned by a trust would have to establish whether beneficiaries of that trust occupy the immovable property in question. Where that has been established, rule 46A would have to be followed.

[27] Due regard must be had to the impact that the sale in execution is likely to have on vulnerable and poor beneficiaries who are occupying the immovable property owned by the judgment debtor, who are at risk of losing their only homes. Given the clear provisions of rule 46A, I can see no reason why trust beneficiaries who fall in the Jaftha-kind category and occupy the trust's immovable property as a primary residence (and are thus likely to be affected by the order declaring the immovable property specially executable) should be barred from the protection of rule 46A merely because the property in question is owned by a trust".

- [8] Conceding that the current status is that Rule 46A indeed applies where the property is registered in the name of Trust or whether it's registered in the name of the company or close corporation, Mr Minaar however submitted that if one has regard to the value of the property being R2.5 million, it is highly improbable that the respondents might be declared indigent occupiers of the property. He further submitted that the court *a quo* should have granted the Rule 46A order and afford the respondents the protection referred to in **Bestbier**, which can only relate to setting a reserve price, considering that the arrear amount owed by the respondents at the time of hearing the matter was over R 700 000.

⁷ Gundwana para 43.

- [9] I do not agree with the submissions because if one applies the *Bestbier* principles, it is clear that the inquiry that is applicable in the Rule 46A applications when it comes to a Trust, must entail a determination of whether the respondents *in casu* are indigent persons that might lose access to housing and fall under the *Jaftha's* requirements. There is no evidence before this court as to whether the respondents are indigent or not, or whether they fall under the *Jaftha's* requirements. Consequently, a proper inquiry into the circumstances surrounding the respondents must be done as provided for in terms of Rule 46A before this court can adjudicate the appeal. The court in *Bestbier* emphasized the importance of judicial oversight. At paragraph [20] the court pronounced:

"[20] The aim of rule 46A is to assist the court in considering whether the S26 rights of the judgment debtor would be violated if his/her house is sold in execution. Rule 46A contains procedural prescripts, not substantive law.⁸ The requirement of judicial oversight in Section 26 of the Constitution must be viewed in light of South Africa's history of forced removals and vast evictions during apartheid and the need to protect security of tenure of all South Africans."

- [10] In light of the above, the matter ought to be remitted back to the court *a quo* to deal with the inquiry in terms of Rule 46A, which the court *a quo* stated **must** be had, as stated in paragraph 5 *supra*. For the court *a quo* to properly exercise its judicial discretion on whether the relief sought by the appellant should be granted, both parties ought to be given the opportunity to file supplementary affidavits dealing with those issues and to be able to argue and make further submissions when the matter is heard.

⁸ *Karpakis v Mutual and Federal Insurance Co Ltd* 1991 (3) SA 489 (c) at 492 F.

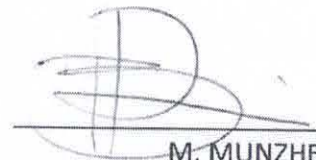
[11] In the circumstances, the following order is made:

1. The appeal is dismissed.
2. The matter is remitted to the court *a quo* to conduct a Rule 46A inquiry.
3. The parties are to file and serve the supplementary affidavits by no later than 17 March 2023.
4. The appellant is granted leave to place the matter on the roll on the date to be determined by the Registrar.
5. The costs are reserved.



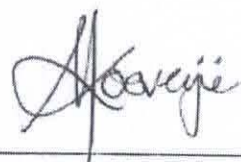
PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,



M. MUNZHELELE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree



H. KOOVERTJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Date of Hearing
Date of Judgment

: 24 August 2022
: 16 February 2023