IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 1204/2021

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA	Applicant
and	
JAN WILLEM CASPARUS STEENKAMP N.O.	First Respondent
CARIN STEENKAMP N.O.	Second Respondent
JOHANNA MARIA STEENKAMP N.O.	Third Respondent
JAN WILLEM CASPARUS STEENKAMP	Fourth Respondent
CARIN STEENKAMP	Fifth Respondent

Heard on: **18 March 2022**

Delivered on: **31 May 2024**

JUDGMENT

RAMAEPADI AJ

INTRODUCTION

1 The applicant, the Land and Agricultural Development Bank of South Africa (the Land Bank) has brought an application against the Kromdrif Trust (the Trust), represented by the first, second and third respondents in their capacities as trustees of the Trust, and the fourth and fifth respondents. In terms of the notice of motion dated June 2021, the applicant seeks the following order: -

1.1. Judgment against the Trust, represented by the first, second and third respondents, and the fourth and fifth respondents, jointly and severally, for the sum of R10 887 200.63 (ten million eight hundred and eighty-seven thousand two hundred rand and sixty-three cents) plus interest at the rate of 7.50% per annum, monthly compounded, from 28 February 2021, until date of final payment;

1.2. Judgment against the Trust, represented by the first, second and third respondents, and the fourth and fifth respondents, jointly and severally for the sum of R558 606.51 (five hundred and fifty-eight thousand six hundred and six rand and fifty-one cents) plus interest at the rate of 7.50% per annum, monthly compounded, from 28 February 2021, until date of final payment.

2 The applicant also seeks an order that the following immovable properties be declared executable:

2.1. Remainder of the farm Matjesfontein No. 25 situated in the Karoo Highland Municipality, Sutherland division, Northern Cape Province, in extent 4484,8543 hectares and held under deed of transfer no. T[...] registered in the name of the first, second and third respondent;

2.2. Portion 5 (a remainder of Portion 2) of the farm Matjesfontein No. 25 situated in the Karoo Highland Municipality, Sutherland division, Northern Cape Province, in extent 8,2912 hectares and held under deed of transfer no. T[...] registered in the name of the first, second and third respondents;

2.2.1. Remainder of the farm Kleine Fontein No. 886 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 3073,6773 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

2.2.2. Portion 6 (a portion of Portion 2) of the farm Stinkkuil No. 888 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 15,9751 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

2.2.3. Portion 5 (a portion of Portion 4) of the farm Stinkkuil No. 888 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 3,4666 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

2.2.4. Remainder of Portion 1 (Klein Karoo) of the farm Stinkkuil No. 888 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 1982,0193 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

2.2.5. Portion 3 (Blaauw Krans) of the farm Stinkkuil No. 888 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 742,3234 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

2.2.6. Portion 1 of the farm Middelpos No. 887 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 1051,9974 hectares and held under deed of transfer no. T[...] in the name of the fourth respondent;

2.2.7. Portion 2 of the farm Middelpos No. 887 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 1994,9654 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent.

2.3. The applicant also seeks an order declaring that it is entitled to perfect its security in terms of the long-term loan agreement and medium-term loan agreement entered into between the applicant and the Trust and the fourth respondent, as read with the covering mortgage bonds registered in favour of the applicant, by taking any steps it deems necessary to realize the above properties.

2.4. The applicant also seeks an order directing the respondents to pay the costs of the application on attorney and client scale, jointly and severally.

3 The application is opposed by the first to fifth respondents. They do so essentially on two grounds.

3.1. First, non-compliance with the provisions of Uniform Rule 46A. The respondents' contention in this regard is that the applicant ought to have complied with the provisions of Rule 46A as there are natural persons resident on the farms listed as security in the mortgage bond.[1]

3.2. Second, that the Trust's performance was rendered impossible or partially impossible due to *force majeure*. In this regard, the respondents refer to the nine years of intense drought in the Northern Cape, as well as veld fires that occurred during the summer of 2016/2017, which on the respondents' version, caused the Trust extreme financial difficulties.[2]

4 An examination of the pleadings will immediately reveal that the respondents do not dispute their indebtedness to the applicant, the amount of the indebtedness, and the failure to pay the agreed instalments on the loans. The respondents' case as I understand it, is dependent entirely on the two defenses set out in sub-paragraphs 3.1 and 3.2. Accordingly, all that remains of this case, is a determination of the respondents' defenses.

5 In the discussion below, I deal with each of the defenses summarized above. However, before doing so, it is necessary to set out a brief background of this matter.

<u>PERTINENT BACKGROUND</u>

The following background facts emerge from the pleadings filed off record.

6 The applicant concluded two loan agreements with the Trust and the first respondent, Jan Willem Casparus Steenkamp ('Steenkamp').

6.1. First, the long-term loan agreement concluded on 22 August 2013 at Calvinia, Northern Cape. In concluding the long-term agreement, the Trust was represented by Steenkamp in his capacity as a trustee of the Trust, as well as in his personal capacity, whereas the applicant was

[1] AA p213 para 2.1.
[2] AA p217 para 13.1.

represented by Helperius Eritzema Louw and Willem Adriaan Louw. The terms of the long-term loan agreement relevant to this case are:

6.1.1. The applicant advanced the amount of R9 000 000.00 (nine million rand) to the Trust and Steenkamp for purchase of certain immovable properties;

6.1.2. The loan was subject to, inter alia, registration of the first mortgage bond for the amount of R10 000 000.00 (ten million rand) and the fifth respondent binding herself as surety and co-principal debtor in respect to the Trust and Steenkamp's indebtedness to the applicant;

6.1.3. The loan shall attract interest at the rate of prime plus 0,5% per annum, calculated daily and compounded monthly;

6.1.4. The loan shall be repaid in instalments of approximately R974 917.39 (nine hundred and seventy-four thousand nine hundred and seventeen rand and thirty-nine cents) per annum, annually in arrears over a period of twenty-five (25) years;

6.1.5. A certificate signed by an official of the applicant whose authority need not be proved, setting out the outstanding balance due to the applicant shall constitute prima facie proof of the amount owing by the Trust and Steenkamp to the applicant;

6.1.6. In the event of default by the Trust or Steenkamp, the applicant shall be entitled to claim and recover from the Trust and Steenkamp the full outstanding balance due in terms of the long-term loan agreement, together with interest thereon at the rate of prime plus 0,5% per annum;

6.1.7. The long-term loan agreement can only be varied in writing and when signed by the parties to the long-term agreement;

6.1.8. The Trust and Steenkamp both selected their *domicilium citandi et executandi* at the farm Botuin, Middelpos, Calvinia, Northern Cape;

6.1.9. The Trust and Steenkamp shall be jointly and severally liable in terms of the long-term loan agreement to the applicant.

6.2. Second, the medium-term loan agreement concluded between the applicant, represented by Helperius Eritzema Louw and Willem Adriaan Louw, and the Trust represented by Steenkamp as trustee of the Trust, and also in his personal capacity. The terms of the medium-term loan agreement relevant to this case are:

6.2.1. The applicant advanced the amount of R1 000 000.00 (one million rand) to the Trust and Steenkamp for the purchase of certain movables and livestock;

6.2.2. The loan was subject to, inter alia, the registration of the first covering mortgage bond for the amount of R10 000 000.00 (ten million rand) and the fifth respondent binding herself as surety and co-principal debtor in respect of the Trust and Steenkamp's indebtedness to the applicant;

6.2.3. The loan shall attract interest at the rate of prime plus 0,5% per annum, calculated daily and compounded monthly;

6.2.4. The loan shall be repaid in instalments of approximately R197 998.87 (one hundred and ninety-seven thousand nine hundred and ninety-eight rand and eighty-seven cents) per annum annually in arrears over a period of ten (10) years;

6.2.5. A certificate signed by an official of the applicant whose authority need not be proved, setting out the outstanding balance due to the applicant shall constitute prima facie proof of the amount owing by the Trust and Steenkamp to the applicant;

6.2.6. In the event of default by the Trust or Steenkamp, the applicant shall be entitled to claim and recover from the Trust and Steenkamp the full outstanding balance due in terms of the medium-term loan agreement, together with interest thereon at the rate of 0,5% per annum;

6.2.7. The medium-term loan agreement can only be varied in writing and when signed by the parties to the medium-term loan agreement;

6.2.8. The Trust and Steenkamp shall be jointly and severally liable to the applicant under the medium-term loan agreement.

6.3. On 5 November 2013 the Trust and Steenkamp passed a covering mortgage bond B[...] in favour of the applicant as security for their indebtedness towards the applicant in the sum of R10 000 000.00 (ten million rand) together with the additional amount of R2 000 000.00 (two million rand). In terms of the covering mortgage bond:

6.3.1. The mortgage bond constitutes continuous covering security for monies loaned and advanced by the applicant to the Trust and Steenkamp;

6.3.2. The Trust and Steenkamp waived the benefits of inter alia, lawful exceptions, revision of accounts, no value received, *de duobus vel pluribus reis debendi* and *beneficia ordinis seu excussiones et divisiones;*

6.3.3. The Trust and Steenkamp shall be jointly and severally liable as co-principal debtors to the applicant for the repayment of all amounts due in terms of the loan agreements;

6.3.4. In the event of default, the applicant shall be entitled to execute against the properties put up as security in the bond;

6.3.5. A certificate of balance shall at all times be sufficient proof of any amounts due and owing by the Trust and Steenkamp to the applicant;

6.3.6. The Trust and Steenkamp agreed to pay all legal costs on the scale as between attorney and client; and

6.3.7. The following properties were listed as security:

6.3.7.1. Remainder of the farm Matjesfontein No. 25 situated in the Karoo Highland Municipality, Sutherland division, Northern Cape Province, in extent 4484,8543 hectares and held under deed of transfer no. T[...] in the names of the first, second and third respondents;

6.3.7.2. Portion 5 (a remainder of Portion 2) of the farm Matjesfontein No. 25 situated in the Karoo Highland Municipality, Sutherland division, Northern Cape Province, in extent 8,2912 hectares and held under deed of transfer no. T[...] registered in the names of the first, second and third respondents;

6.3.7.3. Remainder of the farm Kleine Fontein No. 886 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 3073,6773 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

6.3.7.4. Portion 6 (a portion of Portion 2) of the farm Stinkkuil No. 888 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 15,9751 hectares and held in the name of the fourth respondent;

6.3.7.5. Portion 5 (a portion of Portion 4) of the farm Stinkkuil No. 888 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 3,4666 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

6.3.7.6. Remainder of Portion 1 (Klein Karoo) of the farm Stinkkuil No. 888 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 1982,0193 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

6.3.7.7. Portion 3 (Blaauw Krans) of the farm Stinkkuil no. 888 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 742,3234 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

6.3.7.8. Portion 1 of the farm Middelpos No. 887 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 1051,9974 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent;

6.3.7.9. Portion of the farm Middelpos No. 887 in the Hantam Municipality, Calvinia division, Northern Cape Province, in extent 1994,9654 hectares and held under deed of transfer no. T[...] registered in the name of the fourth respondent.

6.4. On 4 October 2013, the fifth respondent signed two deeds of suretyship in terms of which, the fifth respondent bound herself as surety and co-principal debtor with the Trust and Steenkamp for the due and punctual performance of their obligations to the applicant arising out of the loan agreements (''the suretyship''). In terms of the deeds of suretyship:

6.4.1. The fifth respondent's liability to the applicant in terms of the one deed of suretyship shall be limited to R9 000 000.00 (nine million rand) and in terms of the other deed of suretyship, her liability to the applicant shall be limited to R1 000 000.00 (one million rand);

6.4.2. Should the principal debtors breach their obligations under the loan agreements, the applicant shall be entitled to claim fulfilment of such obligations from the fifth respondent;

6.4.3. A certificate of balance signed by a manager or official of the applicant, whose capacity need not be proved, shall be accepted as prima facie evidence of the amount due by the fifth respondent to the applicant;

6.4.4. The fifth respondent renounced the benefits of lawful exceptions, revision of accounts, no value received, *de duobus vel pluribus reis debendi and beneficia ordinis seu excussiones et divisiones*;

6.4.5. Any amendment or cancellation of the deeds of suretyship shall only be valid if reduced to writing and signed by the applicant.

<u>THE RESPONDENTS' INDEBTEDNESS TO THE APPLICANT</u>

7 In terms of the pleadings, the following matters are common cause between the parties, not necessarily because they have been formally admitted, but in the sense that they have not been seriously disputed:

7.1. The Trust and Steenkamp breached their obligations under the loan agreements and mortgage bond in that they failed to make payment of the agreed instalments to the applicant in terms of the loan agreements;

7.2. By reason of the respondents' breach aforesaid, the full amount outstanding under each agreement became due and payable by the respondents to the applicant. In terms of the Certificates of Balance signed by the applicant's Finance Administrator (Magdalena Groenewald) on 15 March 2021:

7.2.1. As of the 28th of February 2021, an amount of R10 887 200.63 (ten million eight-hundred and eighty-seven thousand two hundred rand and sixty-three cents), together with further interest at 7.50% per annum from 28 February 2021 to date of final payment was due and owing by the first, second, third and fourth respondents to the applicant under the long-term loan agreement; and

7.2.2. In terms of the medium-term loan agreement, an amount of R558 605.51 (five hundred and fifty-eight thousand six hundred and five rand and fifty cents) was due and owing by the first, second, third and fourth respondents to the applicant as at 28 February 2021, together with further interest at the rate of 7.50% per annum from 28 February 2021 to date of final payment.

7.3. Notwithstanding demand, the Trust and Steenkamp have failed to pay to the applicant the amounts outstanding under the loan agreements.

7.4. Accordingly, the Trust, Steenkamp and the fifth respondent became liable to the applicant as co-principal debtors under the loan agreements, mortgage bond and the deeds of suretyship.

IS RULE 46A APPLICABLE TO THIS CASE?

8 The respondents contend that the provisions of Uniform Rule 46A are applicable to this case, and that the applicant ought to have complied therewith. The respondent's argument for why rule 46A is applicable to this case is based on four (4) premises.

8.1. First, Willie Steenkamp and his wife's primary residence is situated on the farm Matjesfontein No. 25, which is referred to in prayers 3.1 and 3.2 of the notice of motion.[3]

8.2. Second, two employees, one of their spouses and their five dependent children are also permanently resident on the farm Matjesfontein.[4]

8.3. Third, Kerneels Van Wyk, Josup Karelse, his wife and son, who suffers from epilepsy permanently reside on the farms referred to in prayers 3.3 to 3.9 of the notice of motion.[5]

8.4. Fourth, should the immovable properties be declared executable, the employees will lose their employment and will be rendered homeless.

9 The applicant contends differently. It contends that the provisions of rule 46A do not find application in this case because rule 46A applies specifically to execution by a judgment creditor against the residential immovable property of a judgment debtor in cases where the judgment debtor is an individual and natural person. It does not apply, so the argument continues, to immovable

[3] AA p213 para 2.1.4.
[4] AA p213 para 2.1.5.
[5] AA p214 para 2.1.6.

property owned by juristic entities and trusts. The applicant relies on three decided cases in support of this contention.

9.1. The first, is the judgment of the Full Court of the Gauteng Division of the High Court in *First Rand Bank Ltd v Folscher and Another, and Similar Matters*.[6] In that case, the Court unanimously held that:

> "[30] The judicial oversight that must be exercised is therefore limited to those instances where the execution order relates to the debtor's principal or – usually – the only dwelling the judgment debtor owns. Execution against a holiday home or a second house that is not usually occupied by the debtor does not trigger the application of the rule.''

9.2. Importantly, at paragraphs [31] and [32] of the judgment, the court was in agreement that:

> "[31] The term 'judgment debtor' as understood, for instance, in *Saunderson* (supra) para 3 refers to an individual, a person. It is therefore the primary residence owned by a person that falls within the purview of the rule.
>
> [32] Immovable property owned by a company, a close corporation or <u>a trust</u>, of which the member, shareholder or beneficiary is the beneficial occupier<u>, is not protected by the amended rule requiring judicial oversight</u> by way of an order of court authorizing a writ of execution, even if the immovable property is the shareholder's, member's or <u>beneficiary's only residence</u>.'' (*emphasis supplied*)

[6] 2011 (4) SA 314 (GNP)- *('First Rand Bank Ltd')*.

9.3. At paragraph [50] of the judgment, the court concluded that the amended rule applies only to individual judgment debtors, not to corporate entities or trusts.

9.4. The second authority relied upon by the applicant is the Full Court decision of the Gauteng Local Division in *Absa Bank Ltd v Mokebe and Related Cases*.[7] In *Absa Bank Ltd*, the court was not invited, however, to answer the question presented in this case, thus the question of the applicability of rule 46A to execution of immovable properties not owned by individuals, but by trusts and other corporate entities. The court was invited, instead, to make a ruling on the procedures to be followed by banks when foreclosing mortgages on primary residences, and on the propriety of the practice of the courts of granting applications for money judgments against defaulting homeowners while postponing the associated applications for sale in execution. Accordingly, the judgment in *Absa Bank Ltd* does not contribute meaningfully to the debate in this case, nor does it overturn the judgment in *First Rand Bank Ltd*.

9.5. The third authority relied upon, is the judgment of the Gauteng Local Division, Johannesburg in *Investec Bank Ltd v Fraser NO and Others*.[8] In *Investec Bank Ltd*, an argument similar to the one raised by the respondents in this case was rejected by the court *per* Lapan AJ in trenchant terms. Relying on the dictum in paragraph [32] of *First Rand Bank Ltd*, the court held:

> "[54] The above dictum puts 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 s 26 of the Constitution is not implicated.

[7] 2018 (6) SA 492 (GJ)- ('*Absa Bank Ltd').*
[8] 2020 (6) SA 211 (GJ)- ('*Investec Bank Ltd').*

[55] Accordingly, in the present matter, 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. 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 property.''

10 The applicant's counsel urged me to follow the full bench judgment of the High Court in *First Rand Bank Ltd*, and the judgment of Lapan AJ in *Investec Bank Ltd*, and accordingly find that rule 46A is not applicable to this case for the reasons *inter alia*, that:

10.1. Rule 46A applies specifically to execution by a judgment creditor against the residential immovable property of a judgment debtor in cases where the judgment debtor is an individual and natural person. It does not apply to immovable property owned by juristic entities and trusts.

10.2. The Trust is not a natural person and is accordingly incapable of having a primary residence. Whether the properties are occupied by trustees or beneficiaries of the trust, or employees of the trust or another entity, is immaterial because any residents on the properties sought to be declared executable will have their rights protected in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 or by the Extension of Security of Tenure Act 62 of 1997.[9]

11 The respondents, on the other hand, place heavy reliance on the judgment of the Gauteng Division of the High Court in *Nedbank v Trustees for the time*

[9] *Applicant's heads of argument* paras 9 and 10.

being of The Mthunzi Mdwaba Family Trust and Others.[10] In that case – (‘*Nedbank’)*, the court held that the legal persona of the judgment debtor is of no significance in determining whether the provisions of rule 46A are applicable. The Court observed in relevant parts thus:

“[19] The underlying principle is that the judgment debtor must perform the function of a form of a dwelling or shelter for humans. The *legal persona* of the judgment debtor is of no significance. 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. The second respondent is a trustee and a surety to the loan granted to the Trust. It is not essential for the judgment debtor to be a surety to the loan granted to the Trust for Rule 46A to be applicable.

[20] The right to housing is recognised as a fundamental human right by section 26(3). I also have to determine the purpose for which the immovable property was purchased and used and by whom it was used. In this case, the immovable property which is registered in the name of the trust, is purchased as a residential property which is registered in the name of the trust, is purchased as a residential property and is being used as a dwelling or shelter for one of the trustees or trust beneficiary and his children. These are natural persons. What is important is that the property must be used as a dwelling by the trustee of trust beneficiaries (or by the shareholders of the company). As a consequence, an obligation is placed on the judgment creditor to conduct an investigation as to the purpose for which the property is being used for and by whom.’’

12 On the affidavits, it is not in dispute, that

[10] (7901/2017) [2019] ZAGPPHC 336 (9 July 2019)- (‘*Nedbank’).*

12.1. One of the beneficiaries of the Trust (Willie Steenkamp) and his wife have their primary residence situated in Matjesfontein No. 25, which is one of the immovable properties against which execution is sought in this application.[11]

12.2. Two employees, one of their spouses and their five dependent children are also permanently resident on the farm Matjesfontein.[12]

12.3. Josup Karelse, his wife and a child of 18 years who is suffering from epileptic fits, as well as Kerneels van Wyk are residing on the farms referred to in prayers 3.3 to 3.9.

13. On the undisputed facts, therefore, all the immovable properties against which execution is sought in this application are used as a residential dwelling by the people referred to in paragraphs 12.1 to 12.3 above. These are natural persons.

14. Once it is so, then on the authority of *Nedbank* (*supra*) an obligation is placed on the judgment creditor ("the Land Bank") to conduct an investigation as to the purpose for which the immovable properties are being used for and by whom. Such investigation will probably, further reveal whether the occupants of the immovable properties have access to alternative accommodation, or whether a sale in execution of the immovable properties will render them homeless. The implication of this obligation is to trigger the provisions of Rule 46A.

15. Rule 46A provides, in relevant part, that:

"(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 –

[11] AA p213 para 2.1.4.
[12] AA p213 para 2.1.5.

(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) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.''

16. The text of rule 46A (1) and (2) is instructive on the purpose of the rule. An examination of the rule will immediately reveal that the rule is concerned, in the main, with procedural prescripts only. However, in *Bestbier*,[13] the SCA found that the aim of the rule is to assist the court in considering whether the s 26 rights[14] of the judgment debtor would be violated if their house is sold in execution. The SCA concluded that, whenever it is established that the immovable property of the judgment debtor, irrespective of whether the property is owned by a trust or a natural person, is used as residential immovable property, rule 46A would have to be followed.

17. In the *Bestbier* case, the SCA drawing strength from the remarks of the Constitutional Court in *Jaftha*,[15] and the SCA decision in *Mkhize,*[16] observed that:

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[13] *Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA).
[14] *See* Section 26 of the Constitution of the Republic of South Africa, 1996.
[15] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)- (‘*Jaftha').*
[16] *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA)- (‘*Mkhize').*

“[22] Rule 46A requires judicial oversight and consideration by a court of various factors when a creditor seeks to execute against ‘the residential immovable property of a judgment debtor’. There is considerable force in Du Plessis & Penhold’s argument in their discussion of *Jaftha* and *Saunderson,* that the only way to determine whether the right to adequate housing has been compromised is to require judicial oversight in all cases of execution against the immovable property on a case-by-case basis. The sole purpose of judicial oversight in all cases of execution against immovable property is to ensure that the orders being granted did not violate s 26(1) of the Constitution and that the judgment debtor is not likely to be left homeless as a result of the execution.’’

18. Then, at paragraphs 25 to 28 of the judgment, the court remarked as follows about rule 46A:

“[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.[17] 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 <u>immovable property is owned by a trust and occupied as a place of residence by the beneficiary of that trust</u>, should not be one of the factors to be taken into account. It is also noteworthy that rule 46A(3) requires that ‘every notice of application to declare residential immovable property executable shall be . . .on notice to the judgment debtor and to any other party who may be affected by the sale in execution.

[17] 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 [debtor] 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. 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 and, consequently, rule 33 of the Practice Directive would have to be complied with. I therefore disagree with the submission made by the respondent's counsel that the person to be protected by rule 46A is, in the tradition of *Jaftha* and *Gundwana,* a natural person and not a legal persona such as a company or a close corporation, nor an institution such as a trust, 'even if the immovable property is the shareholder's, member's or beneficiary's only residence'.[18] Clearly, a blanket approach that considers all immovable property held in the name of a juristic person to fall outside the protection of rule 46A is too narrow.

[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 into 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.

[18] *FirstRand Bank Ltd v Folscher and Another and Similar Matters* 2011 (4) SA (GNP) para 32.

[28] In my opinion, the fact that, in addition to being a primary residence for the trust beneficiary, the trust's immovable property was also used commercially as a wine farm, cannot, in and of itself and without any preceding enquiry, be a bar to affording the beneficiaries the protection of rule 46A. The protection of rule 46A should be objective. Thus, <u>the exclusive consideration of the nature of the entity in which the judgment debtor's immovable property is registered, as the decisive determining factor for affording the protection envisaged in s 26 of the Constitution as set out in rule 46A, would defeat the very purpose for which the protection is granted. Vulnerable and poor beneficiaries of a trust who use the trust's immovable property as their home ought not to be barred from the protection of s 26 of the Constitution merely because the judgment debtor is a trust and not a natural person</u>.'' *(My emphasis).*

19. I agree. The nature of the entity in which the immovable properties are registered, should not be decisive in determining whether to afford the beneficiary of the Trust (Willie Steenkamp and his wife) who reside at the farm Matjesfontein, the protection of section 26 of the Constitution. For so long as the properties are used as a dwelling for residential purposes, he is entitled to the protection under section 26 of the Constitution.

20. However, the fact that Willie Steenkamp and his wife are entitled to the protection in terms of section 26 of the Constitution, does not mean that the immovable property in question (Matjesfontein No. 25) may not be sold in execution purely because it is being used by Willie Steenkamp and his wife as their primary residence. What it means, however, is that any declaration of executability against the immovable property must be preceded by an enquiry in terms of rule 46A.

21. It is that enquiry that will inform the court whether execution against the immovable property is likely to violate the rights in terms of section 26(1) of the Constitution or not, and whether Willie Steenkamp and his wife will be left homeless as a result of the execution. At this stage of the proceedings, this

Court does not have that information before it to determine whether execution against the immovable property is likely to violate the rights in terms of section 26(1) of the Constitution.

22. An argument may be advanced that execution against the farm Matjesfontein No. 25 is not likely to violate the rights in terms of section 26(1) of the Constitution, because Willie Steenkamp is a white person and is therefore not likely to be rendered homeless should execution be granted against the immovable property. The complete answer to that proposition is that this Court simply does not know at this stage, whether execution against the immovable property is likely to render Willie Steenkamp and his wife homeless, or not.

23. Had this application been brought in terms of rule 46A, the Court would have been placed in possession of the relevant material to determine whether to grant execution against the immovable property. Admittedly, the applicant has failed to bring the application in terms of rule 46A of the Uniform Rules of Court, on the basis that rule 46A is not applicable to execution of immovable property registered in the name of a trust. That contention is demonstrably false. Rule 46A is not confined to execution of immovable property owned or registered in the name of a natural person. The rule equally applies to execution of immovable property owned or registered in the name of a trust. The decisive factor is that the immovable property must be used for residential purposes, and as a primary residence.

24. The allegations in the respondents' answering affidavit, which have not been disputed by the applicant, are that:

    24.1. Willie Steenkamp (who is the beneficiary of the Trust) and his wife's primary residence is situated on the farm Matjesfontein No. 25, in respect of which the applicant is seeking execution.[19]

[19] AA p213 para 2.1.4.

25. Once it is so, then it follows that rule 46A is applicable to this application because the applicant seeks execution against immovable property (Mtajesfontein No. 25), which is being used by the beneficiary of the Trust (Willie Steenkamp) and his wife, for residential purposes as their primary residence. It is important to note that as a beneficiary of the Trust, Willie Steenkamp will not enjoy protection, either under the Extension of Security of Tenure Act, 62 of 1997 because he does not fall within the definition of 'occupier'[20] under the Act, or 'unlawful occupier'[21] under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE Act').

26. Though the position of the two employees may be different from that of the beneficiary of the Trust in that they would probably receive protection under the Extension of Security of Tenure Act, just like Willie Steenkamp, they too use the farm (Matjesfontein No. 25) for residential purposes. For that reason, it matters not that the farm workers would be protected by the Extension of Security of Tenure Act. For as long as they use the immovable property for residential purposes, they are also entitled to the protection under rule 46A of the Uniform Rules of Court.

27. The same applies to the immovable properties referred to in prayers 3.3 to 3.9 of the notice of motion. In their answering affidavit, the respondents allege that Kerneels van Wyk, Josup Karelse, his wife and a child of 18 years who is suffering from epileptic fits are residing at those farms.[22] Not much has been

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[20] Section 1 (1) of the Extension of Security of Tenure Act defines an **'occupier'** as a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter, had consent or another right in law to do so, but excluding –

(a) . . . [Para*. (a)* omitted by Act 2 of 2018 (wef 1 April 2024).]

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount.

[21]Under the PIE Act, an **'Unlawful Occupier'** is defined as a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996)

[22] AA p213 para 2.1.6.

placed before the Court in the form of the arrangements for their stay at the immovable properties in question, *i.e*, whether their stay is in terms of a lease agreement or some other arrangement. For present purposes, however, that is not material.

28. What is material, is that they are using the immovable properties referred to in prayers 3.3 to 3.9 of the notice of motion for residential purposes. It is not clear as to how are they residing at all those immovable properties. However, since the allegations by the respondents in this regard have not been disputed by the applicant, there is no reason to question the respondents' allegations in this regard. Accordingly, I shall accept for present purposes that the immovable properties referred to in prayers 3.3 to 3.9 of the notice of motion are being used for residential purposes.

29. Once it is so, then it follows that they too, are entitled to the protection under section 26(1) of the Constitution. It is irrelevant that they may also receive protection under the PIE Act. This Court is obliged at this stage to ensure that their rights under section 26(1) of the Constitution are not violated.

CONCLUSION

30. The undisputed evidence before this Court is that one of the beneficiaries of the Trust (Willie Steenkamp)'s primary residence is situated at the farm Matjesfontein No. 25, and that he resides with his wife at the farm. It is further undisputed that the other immovable properties referred to in prayers 3.3 to 3.9 of the notice of motion are also used for residential purposes by Kerneels, Van Wyk and his family. The personal circumstances of these people are not known to the Court. In particular, it is not known whether these people fall into the poor and vulnerable group, who are likely to be homeless should the immovable properties be sold in execution.

31. It is no answer to the respondents' plea for judicial oversight, for the applicant to argue, as it does, that Willie Steenkamp, the employees, Kerneels, and Van Wyk and his family will have their rights protected in terms of the Prevention of

Illegal Eviction from and Unlawful Occupier of Land Act, or by the Extension of Security of Tenure Act.

32. Rule 46A places an obligation on this Court at this stage of the proceedings, not thereafter, to ensure that the order which the court is asked to grant, does not violate s 26(1) of the Constitution and that execution of the immovable property in question, will not result in poor and vulnerable members of society who permanently reside on the immovable property being rendered homeless. This is made clear by the judgment of the Supreme Court of Appeal in *Mkhize*, where the court said the following about the role of judicial oversight in matters of this nature.

> "*. . .*judicial oversight … is constitutionally required so that the judicial officer can engage in a balancing process and consider all the relevant circumstances of a case to determine whether there is good cause to order execution against the immovable property concerned."[23]

33. It is only through judicial oversight that the Court is able to make an informed determination whether rights in terms of s 26(1) of the Constitution are implicated. This was aptly explained by the SCA in *Mkhize* as follows:

> "[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*. . .*"

[23] *Mkhize,* above n 16 at para 18.

34. It may be, that ultimately the court may find that Willie Steenkamp and his wife do not fall into the category that will be rendered homeless should the immovable property (the farm Matjesfontein) be sold in execution or, that they have access to alternative shelter. However, such information is not before the Court at this stage. What is before the Court, instead, is that the farm Matjesfontein is being used by one of the beneficiaries of the Trust (Willie Steenkamp) and his wife for residential purposes. This is not denied by the applicant.

35. Once it is so, then it follows that judicial oversight in terms of rule 46A is applicable to the intended execution of the immovable properties referred to in prayers 3.1 to 3.9 of the notice of motion. It matters not, that the immovable properties were purchased for commercial purposes, and that part thereof may even still be used for purposes of commercial farming.

36. In the result, I find that rule 46A of the Uniform Rules of Court is applicable to this application. Accordingly, the respondents' first point *in limine* of non-compliance with rule 46A of the Uniform Rules of Court is upheld. The application to declare the immovable properties referred to in prayers 3.1 to 3.9 of the notice of motion executable, must comply with the provisions of rule 46A of the Uniform Rules of Court.

37. A decision on the point *in limine* of non-compliance with rule 46A would have been dispositive of this case had it not been for the money claim in prayers 1 and 2 of the notice of motion.

SECOND POINT IN LIMINE: *FORCE MAJEURE*

38. At the hearing of this application, Ms. Stanton who appeared for the respondents did not seriously persist with the plea of *force majeure*. She urged me that if the Court was not with her on the *force majeure* defence, the Court should do one of two things. Either, the Court should -

38.1. grant the money judgment, but postpone the execution of the immovable properties, or

38.2. postpone the case in its entirety, because the drought has passed and the Trust will be able to keep up with the repayments of the loans.

39. As I have already indicated above, the respondents do not dispute their indebtedness to the applicant and the amount thereof. Ordinarily, I would have been inclined to grant the money judgment, but postpone the execution of the immovable properties as requested by Ms. Stanton.

40. However, the proposed approach appears to be at odds with the judgment of the Full Court of the Gauteng Local Division in *Absa Bank Ltd*.[24] In the *Absa Bank Ltd* matter, the court found that the claim for payment and the claim for execution must be heard simultaneously and, should the claim for execution not be finalised and require postponement, the monetary claim should be dealt with in the same way.[25]

41. Borrowing freely, if I may, from the eloquent explained of the court in *Absa Bank Ltd*, this Court has the '*power in the exercise of its discretion to postpone the granting of an order declaring property executable or to defer its operation where the property is a debtor's primary residence because the order implicates a constitutional right – the constitutional s 26 right to adequate housing'*. The court concluded that the discretion emanates from section 172(1)(b) of the Constitution, which empowers courts with a broad discretion when deciding a constitutional matter within its powers to grant just and equitable relief.

42. I agree. It would not be competent for this Court to adjudicate this matter on a piecemeal basis, by deciding the money claim now, and defer the adjudication on the execution of the immovable properties to a hearing in due course. As I have already indicated above, both aspects of the case must be heard and adjudicated upon in the same hearing.

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[24] *Absa Bank Ltd v Mokebe and Related Cases*, above n 7.
[25] *Absa Bank Ltd*, (supra) at paras 29 and 31.

43. In the result I make the following order:

1. The application is postponed *sine die*.

2. The application to declare the immovable properties referred to in prayers 3.1 to 3.9 of the notice of motion executable, must comply with the provisions of rule 46A of the Uniform Rules of Court.

3. The costs of the application are reserved for determination at the hearing of the entire application.

M J Ramaepadi

Acting Judge of the High Court of South Africa, Northern Cape Division, Kimberley

APPEARANCES

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