IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR230/2024

In the matter between:

NEW TURN INVESTMENTS (PTY) LTD Appellant
(Respondent in the Court *a quo*)

and

ALBARAKA BANK LIMITED Respondent
(Applicant in the Court *a quo*)

ORDER

On appeal from: the High Court of South Africa, Kwa Zulu-Natal Local Division, Durban (Mossop J sitting as a court of first instance), it is ordered that:

1. The appeal is upheld with costs on scale B.

2. The order of the court *a quo* is set aside and is replaced with the following order: 'The application is dismissed with costs.'

JUDGMENT

Seegobin J

Introduction

[1] This is an appeal against a judgment and order, granted *ex tempore*, by the High Court of South Africa, KwaZulu-Natal Local Division, Durban (Mossop J) on 18 July 2023. The order made was for the dissolution of a property partnership agreement and for the appointment of a liquidator, together with certain ancillary relief.

[2] An application by the appellant for leave to appeal was refused by Mossop J on 13 November 2023. The present appeal comes before this court pursuant to a successful application by the appellant to the Supreme Court of Appeal that was granted on 21 February 2024.

The parties

[3] The appellant is New Turn Investments (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa. The appellant has, throughout these proceedings, been represented by Ms Fahima Khan (Ms Khan), a director of the appellant. Ms Khan is an adherent of the Muslim faith.

[4] The respondent is Albaraka Bank Limited, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, and which carries on business as an authorised financial service's provider in terms of the banking

laws of the Republic of South Africa. In conducting its business, the appellant has regard to and applies Shariah Law.[1]

[5] The residential immovable property that forms the subject matter of the agreements, referred to herein below, is more fully described as Portion 1 of Erf 1[…], Chiltern Hills situate at 3[…] C[...] Road, Chiltern Hills, Dawncrest, Westville, KwaZulu-Natal ('the property').

[6] On 29 May 2018, the appellant and the respondent concluded three allied agreements to effect a property partnership in accordance with the principles of Shariah Law. The agreements in question were a diminishing Musharaka finance agreement ('the Musharaka agreement'), a unilateral promise agreement and an overriding agreement for the purchase of the respondent's share in the Musharaka agreement.[2]

[7] The Musharaka agreement is described as an agreement to purchase equity, and served as a vehicle for the respondent to benefit commercially in accordance with the principles of Shariah Law which, as mentioned, prohibits the charging of interest, from a loan it advanced to the appellant to enable it to purchase a residential property, being the property referred to above.

[8] The effect of the Musharaka agreement was that the property would become a partnership asset made up of undivided shares owned by the appellant and the respondent. The agreement provided for the property to be registered in the appellant's name and for a mortgage bond to be registered in favour of the respondent. In the event of the appellant breaching the Musharaka agreement, the respondent would be entitled to terminate the agreement by giving the appellant one calendar month's written notice of its intention to terminate.

---

[1] Shariah Law, derived from Islamic scriptures, is a religious law system that guides Muslims in all aspects of life, including moral, spiritual and practical matters. Amongst others, Shariah Law prohibits the charging of interest in commercial transactions.

[2] Musharaka, in the context of Islamic finance, refers to a partnership or joint venture where two or more parties contribute capital or effort to a business and share in the profits and losses according to pre-agreed ratios.

[9] The mechanism to transfer equity from the respondent to the appellant was contained in the unilateral enforceable promise agreement, concluded by the parties, also on 29 May 2018. Under this agreement, the appellant undertook to purchase the respondent's undivided share in the immovable residential property, which would be acquired over a period of 240 months in successive annual acquisitions. In the event of the appellant breaching the promise agreement, the respondent would be entitled to terminate the agreement and recover its damages from the appellant.

[10] The third agreement, being the overriding agreement, recorded that the parties had entered into the Musharaka agreement in respect of the residential property and that the appellant had promised to purchase the bank's undivided share in the property in accordance with the unilateral promise. The agreement also provided for a mortgage bond to be registered over the entire property to secure the respondent's partnership share and interest. In the event of a breach of the overriding agreement by the appellant, the respondent was required to give it seven (7) days' written notice to remedy the breach, failing which the respondent would be entitled to cancel the agreement.

[11] It is common cause that the property served as the primary residence of Ms Khan and her family.

[12] By July 2020, the appellant fell into arrears. On 7 July 2021, the respondent's legal representatives addressed a letter of demand to the appellant. This was succeeded by a further letter dated 18 November 2021 giving the appellant 30 days' notice of termination of the Musharaka agreement with immediate effect.

[13] The appellant's failure to remedy its breach of the agreement by settling all arrears, resulted in the respondent electing to cancel the agreement on 18 November 2021. The appellant, however, made part payments in respect of the arrear amounts owed. By 18 January 2022, the outstanding arrears amounted to R99 041.05.

[14] Despite the cancellation of the agreement on 18 November 2021, the respondent took no further steps against the appellant until 21 April 2022 when it launched application proceedings in the court *a quo* (the court). Amongst others, the order sought by the respondent was to have the agreement declared to be terminated and for the appointment of a liquidator in respect of the partnership property. The relief sought was in terms of the *actio communi dividundo*. The powers sought to be exercised by the liquidator were extensive and wide-ranging.

[15] The application was initially set down for hearing on 20 July 2022. On 24 June 2022, a few weeks before the date of hearing, the respondent's legal representatives emailed correspondence in the form of a letter to the appellant's attorneys in paragraph 5 of which they stated:

'We request that your client attends to payment of the arrears in the amount of R 99 041.05, failing which, our instructions are to proceed with the application which is set down for hearing on 20 July 2022.'

[16] On 11 July 2022, the respondent's attorneys emailed further correspondence to the appellant's attorney with an updated statement of account which indicated the arrears as being the amount of R142 651.49 as at 8 July 2022. It is common cause that the appellant made good these arrears on 19 July 2022.

[17] Notwithstanding the full settlement of the arrears by the appellant, the respondent persisted with the application and insisted that the appellant deliver its answering affidavit. The answering affidavit was duly delivered on 12 August 2022 and a replying affidavit by the respondent followed on 5 September 2022. The opposed application was eventually set down for hearing on 18 July 2023.

Respondent's main submissions before the court *a quo*

[18] The respondent's case was that the application sought to dissolve a partnership and that this should not be conflated with foreclosure proceedings. According to the respondent, the appellant had breached the Musharaka agreement during July 2020

and had not made good its arrears by 18 November 2021 when the respondent elected to terminate the property partnership agreement. Moreover, there was no obligation on a co-owner to continue in a property partnership against their will, which in *hoc casu* was reflected by the respondent's election to proceed with the application.

Appellant's main submissions before the court *a quo*

[19] The appellant's argument was two-fold: first, the relief sought by the respondent would deprive the appellant's director, Ms Khan, who together with her family lived in the residential property, of her right to housing under s 26 of the Constitution. Second, there was a compromise of the action as, on the common cause facts, the respondent had concluded an agreement in terms of which it had agreed to suspend legal action, on condition that the full arrears were paid. Furthermore, that it was common cause that the arrears were in fact paid in full before the application could be argued.

Court *a quo's* order

[20] The outcome of the opposed hearing on 18 July 2023 was a court order of the same day which, *inter alia,* terminated the property partnership agreement, appointed a liquidator who was imbued with wide powers to deal with the partnership assets, and declared the partnership properties executable in the hands of the liquidator. The relief granted paralleled conventional foreclosure proceedings, but with a requisite modification to the *actio communi dividundo* owing to the underlying credit agreement conforming to the tenets of Shariah Law. The court further found that despite the appellant's denial on the papers, due and proper notice had been given of the cancellation of the Musharaka agreement.

Issues on appeal

[21] The appeal raises two primary issues for consideration. These are:

(a) Whether a compromise, or *pactum de non petendo*, was concluded through the demand for payment by the respondent of the arrears, which it later breached by proceeding with the application; and

(b) Whether the respondent, in effecting foreclosure on a residential immovable property pursuant to finance being granted, is not obliged to place sufficient evidence before the court in order for the court to exercise its oversight function in terms of rule 46A of the Uniform Rules, read with s 26 of the Constitution, merely because the nature of the partnership agreement (necessitated by Shariah Law prohibiting the levying of interest) lends itself to foreclosure occurring through the *actio communi dividundo*.

First issue

[22] The court found as untenable the applicant's argument that there was a compromise of action arising from the respondent having concluded an agreement under which it had undertaken to suspend legal action on condition that the arrears were paid. In the court's view, because the payment of the arrears of R142 651.49 on 19 July 2022 was more than a year after the Musharaka and linked agreements had been cancelled, rather than resurrect the now-cancelled agreements, the payment merely served to reduce the appellant's overall indebtedness to the respondent.

[23] The court further rejected the appellant's contention that what had in fact been compromised was the respondent's ability to bring the liquidation application. The basis of the court's rejection was that while the letter of 24 June 2022 stated that the application would not proceed if payment of the arrears was made before 20 July 2022, the letter also made reference to the Musharaka agreement. The court reasoned that since no payment had been immediately forthcoming from the appellant from 24 June 2022 until 19 July 2022, the day before the matter was scheduled to be heard, the invitation to pay the arrears had lapsed. This lapsing of the invitation, according to the court, meant that the respondent had not compromised its prerogative to proceed with the liquidation application. As set out herein below, I have several fundamental difficulties with the court's reasoning in dismissing the compromise of the action out of hand.

[24] In *Mafisa v Road Accident Fund*,[3] the Constitutional Court, when referring to the legal principles of a compromise, said the following:

'A compromise is an agreement between the parties to prevent or terminate a dispute by adjusting their differences by mutual consent. It is trite that a compromise gives rise to new contractual rights and obligations which exist independently of the original cause of action. Once a compromise is reached, the parties are precluded from proceeding on the original cause of action (unless, of course, the compromise provides otherwise).' (Footnote omitted.)

[25] Given this basic premise, a compromise of action does not necessarily resurrect terminated contractual rights and duties. Instead, it creates new contractual rights and obligations, which may or may not be linked to the original cause of action. Therefore, in my view, there was no legitimate basis for the court to have rejected, without due consideration, the appellant's contention that the compromise related to the respondent's ability to proceed with the liquidation application. The contention did not seek to resurrect the terminated agreement. Instead, it was limited to what had been reflected in the letter of 24 June 2022, namely, that the application proceedings would not continue if the arrears were paid before 20 July 2022.

[26] Moreover, it is difficult to fathom the basis for the court concluding that the respondent's invitation to the appellant to pay the arrears had lapsed before the stipulated deadline of 20 July 2022. The letter to the appellant unambiguously stated that the arrears had to be paid before 20 July 2022. The appellant paid the arrears in full on 19 July 2022, a day before the deadline. Therefore, the court's finding that the invitation had lapsed is, in my view, plainly incorrect.

[27] It would seem that the only possible reason for the court to conclude as it did, would be if it regarded the invitation to pay the arrears as having lapsed on 18 November 2021, the date on which the respondent had ostensibly terminated the Musharaka agreement. However, in my view, this scenario would be impossible and

[3] *Mafisa v Road Accident Fund* [2024] ZACC 4; 2024 (4) SA 426 (CC) para 33. See also *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* [2016] ZASCA 157 para 7 where the SCA held that a compromise serves a dual purpose, to end existing litigation and to prevent or avoid litigation; *Tsholo v Road Accident Fund* [2025] ZASCA 21 paras 10-11.

would raise the following inexorable question: If the invitation to pay the arrears had lapsed on 18 November 2021, when the respondent had supposedly terminated the Musharaka agreement, why did it invite the appellant only on 24 June 2022 to make good the arrears that had been accumulating up to and well beyond the termination date? If the respondent had in fact regarded the agreement as terminated on 18 November 2021, then the entire amount of the debt would have been due, owing and payable. Consequently, any request to the appellant for payment would have been for the whole amount of its indebtedness, not merely for the instalment arrears up to the deadline of 20 July 2022. It follows that if the court had concluded that the invitation had lapsed when the agreement had ostensibly terminated on 18 November 2021, such a conclusion would be unwarranted on the facts.

[28] Apart from the above considerations, the court's conclusion that the arrears of R142 651.49, paid in full on 19 July 2022, had merely served to reduce the overall indebtedness is, in my view, untenable. The use of the term 'arrears' in the respondent's attorney's communication of 24 June 2022 is unequivocal. It refers specifically to the unpaid instalments that were due by the appellant up to the date of the communication. If the request for the payment of the arrears amount was meant to reduce the appellant's overall indebtedness to the respondent, this should have been communicated in the letter. This was not the case. Instead, the letter of 24 June 2022 referred specifically to the arrears of R99 041.05. In an updated statement of balance sent to the appellant on 11 July 2022, the arrears were reflected to be R142 651.49 as of 8 July 2022. That the court chose to interpret this payment as being towards the appellant's overall indebtedness, amounts to the court reading into the letter of 24 June 2022, something that the respondent neither intended nor specified in its invitation to the appellant. This reading in was, in my view, impermissible.

[29] In the circumstances and on this issue, I conclude that the respondent had, by accepting the arrear payments as it did on 19 July 2022, compromised its claim and precluded itself from continuing with the application thereafter.

Second issue

[30] The Musharaka agreement, which, as I pointed out already, is really a property partnership agreement, that allowed the respondent to seek a dissolution of the partnership in terms of the *actio communi dividundo*. The question that arises is whether, in such circumstances, it was unnecessary for the court to exercise its judicial oversight function in terms of rule 46 and rule 46A of the Uniform Rules, read with s 26 of the Constitution.

[31] Rule 46 deals with execution against immovable property other than the residential immovable property of a judgment debtor, the underlying principle being that, save where immovable property has been specially declared executable, execution shall not issue against immovable property until movable property has been excussed and it appears that the movable property is insufficient to satisfy the writ. Rule 46A, on the other hand, applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. Rule 46A was added to the Uniform Rules with effect from 22 December 2017. It was promulgated against the backdrop of the Constitutional Court's decisions in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[4] and *Gundwana v Steko Development and Others*.[5] Those two cases emphasised that judicial oversight is a tool to preserve the right to adequate housing and security of tenure. Rule 46A(2)*(b)* is peremptory. It specifically prohibits a court from authorising execution against immovable property that is the primary residence of the judgment debtor, unless it has considered all relevant factors. The purpose of the rule is to entrench the s 26 rights to adequate housing.

[32] Before the court a quo the appellant contended that no order can be granted to dissolve a property partnership, such as the one under consideration, without having regard to the minimum protections afforded by rules 46 and 46A. This was because the liquidator's powers would be substituted for the mandate of the sheriff to sell the property in execution.

---

[4] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC).

[5] *Gundwana v Steko Development and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC).

[33] The appellant's argument did not find favour with the court mainly for two reasons. First, it found that the appellant's director, Ms Khan, a natural person, was not to be equated with the respondent, a juristic entity. Therefore, the issue of whether Ms Khan enjoyed certain rights was not up for consideration as she was not a party to the agreements with the respondent. In the court's view, Ms Khan had agreed to the manner in which the agreements had been structured, and this precluded her from now asserting that she was prejudiced because of this structure. The court concluded that the appellant was a juristic entity, and therefore it was unconvinced that a juristic entity has a right to housing.

[34] The court's finding on this issue is in conflict with the position articulated by the Supreme Court of Appeal (SCA) in *Bestbier and Others NNO v Nedbank Ltd*[6] where the court stated that the protections afforded by rule 46A were not limited to natural persons. The following was said:

'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 . . . 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". 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.' (Footnotes omitted.)

[35] The second reason advanced by the court was that the respondent was not seeking an order of executability against the immovable property. Instead, the relief it sought was for the termination of a partnership relationship relating to the immovable property. In support of this view, the court referred to sub-paragraphs 3.6 and 3.7 of the notice of motion, which provided as follows:

[6] *Bestbier and Others NNO v Nedbank Ltd* [2022] ZASCA 88; 2023 (4) SA 25 (SCA).

‘3.6 save to the extent necessary to discharge any liabilities of the partnership to third parties, and all the liquidator’s fees and disbursements, and to ensure an equitable distribution in accordance with any agreement relating to the partnership, the liquidator shall not realize any assets of the partnership;

3.7 to the extent that it is necessary for the assets of the partnerships to be realized, to invite the parties to offer to purchase the partnerships property and/or other partnership assets that may come to light, which offer must be made to the liquidator within five (5) business days of the liquidation calling for such offer, and at a price in excess of the appraised value of such property.’

[36] On the strength of these two paragraphs, the court concluded that there was a possibility that the immovable property may in the future be acquired by the appellant, ‘in which event no discernible prejudice will accrue to the persons residing within the immovable property.’[7]

[37] This depiction by the court of how persons living in the residential property in question will have their right to housing safeguarded, falls short of the thresholds of protection provided by s 26 of the Constitution and the oversight obligations provided to the courts under rule 46A. The fact that the appellant would have the opportunity to buy the residential property serves as no guarantee of its ability to do so. Therefore, this cannot be a reason to ignore the provisions of rule 46A. Instead, it would be one of the factors the court will have to consider when performing its judicial oversight function under rule 46A.

[38] Additionally, the court’s statement that the respondent was not seeking an order of executability against the immovable property is indeed strange. The statement is contradicted by paragraph 4 of the notice of motion and the order that was finally granted. Paragraph 4 provides as follows:

‘That the partnership properties be and (sic) hereby declared executable in the hands of the liquidator.’

---

[7] *Albaraka Bank v New Turn Investments (Pty) Ltd* [2023] ZAKZDHC 43 para 22.

[39] Clearly, an order for execution against the property formed part and parcel of the overall relief granted by the court. Therefore, the conclusion in paragraph 22 of the judgment (as quoted above) that the consequences of the relief sought by the applicant (respondent current matter) are matters for another day, is incorrect. It would seem to me that the court, by restricting itself to the partnership brought about by the Musharaka agreement, and by determining the relief sought solely in terms of the *actio communi dividundo*, failed to have regard to its judicial oversight function in terms of rule 46A and s 26 of the Constitution.

[40] More recently in *Bestbier and others v Nedbank Ltd* [8] the Constitutional Court comprehensively discussed the effect of rule 46A of the Uniform Rules and s 26 of the Constitution. The brief facts in *Bestbier* are that a trust owned a wine farm from which it conducted its various business activities, but it also owned the residences, ie a main house and several cottages, wherein the workers and their families lived. *Bestbier* sets out the core issue, which is similar to the one in this matter, as follows:[9]

'Furthermore, the operation of rule 46A has been unclear from its inception. It has attracted attention in journals, highlighting the lack of clarity in the provision. As stated in *Gundwana*, the reach of this Court's decision in *Jaftha* has been interpreted in various courts (including in this matter before the High Court and the Supreme Court of Appeal), and the outcomes have not been consistent. Moreover, before this case, the courts have not yet grappled with the true meaning of "any other party who may be affected by the sale in execution" outside the ambit of judgment debtors and those listed in rule 46(5)*(a)*. Neither the Constitution nor the Uniform Rules define what meaning should be ascribed to the phrase "any other party who may be affected by the sale in execution". Eliminating uncertainty in this area is plainly a matter of considerable public importance. It is thus in the interests of justice for this Court to consider the application.'

[41] The Constitutional Court summarised the past cases, and also set out various aspects of the rule in some detail.[10] In what follows I will only highlight some of these

[8] *Bestbier and others v Nedbank Ltd* [2024] ZACC 2; 2024 (4) SA 331 (CC) (*Bestbier*) para 54 onwards.
[9] *Bestbier* para 36.
[10] *Bestbier* para 64 onwards.

aspects, including the findings of that court, that were made in terms of these discussions.

[42] Perhaps a point to note at this juncture is the following: The applicability of rule 46A to contracts wherein a juristic entity owns the primary residence is not merely inferred, as was dealt with and answered in *Bestbier*. Islamic or Shariah Law contracts are a species of contract,[11] meaning that the normal contractual principles for the conclusion of a contract would apply.[12] Hence, it may be argued, in light of *Bestbier*, that rule 46A is applicable to Islamic or Shariah Law contracts where the purchase was made through the juristic entity, and not the director/individual, who uses the residential property as their primary residence. It seems to me that in the circumstances, and in view of the fact that the respondent is subject to the company and banking laws of the Republic of South Africa, it would be incumbent upon it to also adhere to the rules and practices of our courts and the constitutional precepts, particularly, as in this case, the implementation of s 26 rights, as well as the provisions of rule 46A of the Uniform Rules.

[43] *Bestbier*, in discussing what may be referred to as a primary residence, with specific reference to 'residential immovable property', states:

'[74] From the above analysis, the following is clear; there are three categories of immovable property with which the Uniform Rules 46 and 46A deal with in relation to execution. There is "immovable property" in general, which is dealt with in rule 46. This includes, but is not limited to residential immovable property. Then there is "residential immovable property", to which rule 46A applies. This is a subcategory of "immovable property". Rule 46A adds additional provisions which apply when one is dealing with residential immovable property. Finally, there is immovable property which is the "primary residence of the judgment debtor". This is a sub-subcategory of

---

[11] See generally, J Chuah 'Impact of Islamic Law on commercial sale contracts - A private international law dimension in Europe' (2010) 2 *European Journal of Commercial Contract Law* 191-204, NM Sapuan 'An evolution of Mudarabah contract: A viewpoint from classical and contemporary Islamic scholars' (2016) 35 *Procedia Economics and Finance* 349-358. The various forms of Islamic Law loan contracts that are available in South Africa are succinctly discussed in F Kholvadia 'Islamic banking in South Africa – Form over substance?' (2017) 25(1) *Meditari Accountancy Research* 65-81.

[12] *Ismail v Jantjies and others* [2025] ZAWCHC 128 paras 38-39. See also MD Tuba '*Lodhi 5 Properties Investments CC v FirstRand Bank Limited* [2015] 3 All SA 32 (SCA) and the enforcement of Islamic banking law in South Africa' (2017) 20 *PER / PELJ* 1 at 19-20.

the subcategory “residential immovable property”. Only some parts of rule 46A apply to this sub-subcategory of “primary residence” property.

. . .

[81] It must be borne in mind that rule 46A applies not only to executions against “primary residential immovable property” but also to residential immovable property of a judgment debtor. The factor pertaining to primary residence is just one of the factors a court must consider. The text is clear that the rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. When applying rule 46A(2)*(a)*(i), one of the factors that the court must consider is whether the residential immovable property is used as the primary residence of the judgment debtor.’

[44] Whether a property is a ‘residential immovable property’ is determined by reference to its characteristics and actual use. *Bestbier* explains:

‘[75] As stated above, whether property can be classified as “residential immovable property” is determined by the characteristics and actual use of the property. It does not matter that the judgment debtor is not herself occupying the property. It also does not matter that the judgment debtor is a trust. If a trust owns a residential house, it is “residential immovable property”, if the beneficiaries reside in it, even though the trust itself as a legal entity cannot reside in the property. Among the provisions which apply to all “residential immovable property” is rule 46A(3)*(b)*, which requires notice to be given to persons who may be “affected” by the sale and execution. And that is the provision which is the focus of the present case. The importance of judicial oversight over all residential immovable property, and not only primary residential immovable property is that it would be risky to leave it to the judgment creditor to determine whether the property is used as primary residence without this question being ventilated or determined by a court.

. . .

[77] What then is the situation if the immovable property is registered in the name of a juristic entity but is occupied by natural persons? Can it be ignored that natural persons reside there and utilise the property as their primary residence? As stated, when dealing with rule 46A(1), whether property is residential immovable property depends on the physical characteristics of the property coupled with its actual use. Residential immovable property may be registered in the name of a juristic entity. While a juristic entity such as a trust cannot reside in a property, it is not uncommon for such property to be used as residential immovable property, that is, for it to be occupied by natural persons. It seems to me that in such instances one has to have regard

to the phrase “any other party that may be affected by the sale in execution” that is used in rule 46A(3)*(b)*. What has to be determined is whether such natural persons can be categorised as persons that may be affected by the sale in execution.’

[45] In other words, there are certain parts of rule 46A that are not applicable in certain instances, as is the case in the present matter. The company (judgment debtor ie the appellant herein) cannot live in the residential immovable property, however it is the primary residence of its director. *Bestbier* provides guidance on the application of rule 46A in relation to property owned by a juristic entity:[13]

‘The fact that the residential immovable property is not the “primary residence” of the judgment debtor only excludes the operation of those special provisions of rule 46A that apply only to “primary residence” property. The rest of rule 46A will still apply, even though the property is owned by a trust. This includes the right of affected persons to receive notice in terms of rule 46A(3)*(b)* and the various powers of the court in terms of rule 46A(8) (excluding only rule 46A(8)*(d)*). This includes the power to take into account conditions in the sale of the property or postponing the application in terms the court considers appropriate or “any other appropriate order”.’

[46] It should be noted that the property in *Bestbier* was a mix-use property, whereby the farming activities, and all other activities connected thereto, were for commercial purposes. However, the trustees, the beneficiaries and the farm workers lived in the residential accommodation, or what the court termed ‘residential immovable property’, that was provided on the property. The court emphasised that the fact that there was residential immovable property, meant that rule 46A was applicable.[14]

---

[13] *Bestbier* para 78.

[14] *Bestbier* para 80. The farmworkers were protected under s 24 of Extension of Security of Tenure Act 62 of 1997 (ESTA), and the headnote of *Bestbier* summarises their position, which is not directly on point in this matter, as follows:

‘The focus of the court's attention was the position of the farmworkers of the trust residing on the farm. The court noted that the farmworkers were occupiers for purposes of ESTA. By virtue of s 24 of ESTA, any new owner consequent to a sale in execution would be bound to respect any existing rights of the farmworkers residing on the property at the time of the sale in execution. As such, it could not be said that farmworkers' rights to adequate housing in terms of s 26(1) would be impaired by a sale in execution, their rights being adequately protected by s 24 of ESTA. (See [83] – [86].) The court concluded that the farm workers were not persons “who may be affected by the sale in execution” requiring notice of the application (see [87]).’

[47] In light of the legal principles set out above, it must be concluded that the court was wrong in finding that the provisions of rule 46A did not apply to the appellant's director who was occupying the property as her primary residence and as such, the court was required to exercise its judicial oversight function in terms of rule 46A when ordering execution against the said property.

[48] **Order**

In the result, I make the following order:

1. The appeal is upheld with costs on scale B.
2. The order of the court *a quo* is set aside and is replaced with the following order:
   'The application is dismissed with costs.'

Seegobin, J

I agree.

Reddi, AJ

I agree.

Sibisi, AJ

Date of hearing:	06 June 2025
Date of judgment:	05 September 2025

APPEARANCES

For the Appellant:	Mr M.C. Tucker
Instructed by:	Abdool, Gafoor, Parasram and Associates 13 Bishop Road Windermere Durban Tel: 031 301 7502 Email: mariam@agpattorneys.co.za Ref: MSAG/MB/NEW TURN c/o Stowell & Co Inc 295 Pietermaritz Street Pietermaritzburg Tel: 033 845 0541 Email: sumayan@stowell.co.za Ref: Ms S. Norgot/ ABD63/0043
For Respondent:	Mr P. J. Combrinck SC Ms J.L. Miranda
Instructed by:	Eversheds Sutherland (KZN) Incorporated 1st Floor, 29 Richefond Circle

Ridgeside Office Park
Umhlanga
Tel: 031 940 0501
Email: nirashninaidoo@eversheds-sutherland.co.za
Ref: D Avenant/N Naidoo/ MAT6834
c/o Austen Smith Attorneys
1Highgate Drive
1 George MacFarlane Lane
Wembley
Pietermaritzburg
Tel: 033 392 0500
Email: ranitha@austensmith.co.za
Ref: Cullum Smythe