CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/21

In the matter between:

ANDREW TUEE BALOYI N.O.	First Applicant
EUNICE MHAKA BALOYI N.O.	Second Applicant
ANDREW TUEE BALOYI	Third Applicant
EUNICE MHAKA BALOYI	Fourth Applicant
and	
PAWN STARS CC	First Respondent
SHERIFF OF THE HIGH COURT	Second Respondent

Neutral citation:	*Baloyi N.O. and Others v Pawn Stars CC and Another* [2022] ZACC 10
Coram:	Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgments:	Theron J (unanimous)
Heard on:	23 November 2021
Decided on:	15 March 2022
Summary:	Rule 46A of the Uniform Rules of Court — legal persons and trusts — determination of alleged constitutional issue not reasonably necessary for determination of dispute — jurisdiction not engaged

ORDER

On appeal from the High Court of South Africa, Limpopo Division, Polokwane:

1. The application for leave to appeal is dismissed.
2. The applicants must pay the first respondent's costs.

JUDGMENT

THERON J (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] This application for leave to appeal was precipitated by an order granted by the High Court of South Africa, Limpopo Division, Polokwane (High Court) on 17 April 2018 by agreement between the applicants and the first respondent (consent order). In terms of the consent order, and in the event that the applicants defaulted on payment of certain amounts to the first respondent, a Polokwane property (property) owned by the Navuyeriwa Business Trust (Trust), at which the third and fourth applicants reside with their minor children, would become specially executable and a warrant of execution for the property could be issued. The applicants contend that the issue for determination is whether the consent order contravenes the provisions of rule 46A of the Uniform Rules of Court. That rule 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. The applicants' central submission is that the consent order was impermissibly granted without application of

rule 46A because the High Court erroneously assumed that it does not apply to property owned by juristic persons or trusts, and that this raises a constitutional issue.

Parties

[2] The applicants are Mr Andrew Tuee Baloyi and Mrs Eunice Mhaka Baloyi, acting both in their personal and nominal capacities as trustees of the Trust. The first respondent is Pawn Stars CC (Pawn Stars), a duly registered close corporation, and the second respondent is the Sheriff of the High Court.

Background

[3] In February 2016, Mr and Mrs Baloyi, acting on behalf of the Trust, entered into a loan agreement with Pawn Stars. In terms of that agreement, Pawn Stars advanced an amount of R870 000 to the Trust which was to be repaid within three months of signature of that agreement. Mr and Mrs Baloyi stood surety for the loan. As additional security, a mortgage bond was registered in favour of Pawn Stars over the property. In the event of default, Pawn Stars was entitled, on written notice and if the default was not remedied within seven days, to claim immediate repayment of the full amount outstanding, together with interest, and to make an application to declare the property specially executable. Pawn Stars was also entitled, if payment of the capital sum was not made within the stipulated three months, to levy a penalty fee of R90 000 per month, which would first fall due on the day immediately following the due date for repayment of the capital sum.

[4] The Trust failed to repay the amounts owing within the stipulated time period. From 23 May 2016 until 31 October 2016, Mr Baloyi engaged in correspondence with Pawn Stars, in which he sought various extensions within which to make payment. Those extensions were granted, on condition that the penalty fees and interest be paid. By 31 October 2016, the Trust had only made one payment of R95 000 to Pawn Stars,

which thus claimed that it was owed an amount of R452 410, in addition to the full capital amount.[1]

[5] On 8 February 2017, Pawn Stars instituted proceedings against the applicants in the High Court in which it sought payment of the capital amount together with interest thereon and penalty fees and an order declaring the property specially executable.

[6] Subsequent settlement discussions between the Trust and Pawn Stars came to nought and Pawn Stars' application proceeded unopposed. On 18 April 2017, Pawn Stars obtained default judgment against the applicants. Phatudi J ordered, amongst others, that the applicants pay Pawn Stars the amount of R870 000 together with interest and penalty fees, and that the property was specially executable.

[7] On 15 June 2017, the applicants applied to rescind that order. They contended that they had not been served with Pawn Stars' application and had only become aware of it when they were served with a notice of attachment for the property on 18 May 2017. The applicants further contended that they were only indebted to Pawn Stars in an amount of R540 000, which they said they could pay by 1 September 2017. They submitted, in addition, that the penalty clause in the agreement was contrary to public policy, and that the property was occupied by Mr and Mrs Baloyi, together with their three minor children, as their primary residence. Had this information been before Phatudi J, the applicants submitted, the order of 18 April 2017 would not have been granted.

[8] Pawn Stars opposed the application for rescission on the basis that for purposes of the declaration of special executability it was irrelevant that the property was occupied, because it was owned by a trust. Pawn Stars also noted that, despite the applicants' averment that they could make payment of R540 000 by

[1] The amount of R452 410 was the monthly penalty of R90 000 for six months, minus a payment of R87 590, being the balance of the payment of R95 000 after deducting agreed legal fees of R7 410.

1 September 2017, by 25 October 2017, when it delivered its answer, it had received no further payments.

[9] After deliberation between the parties, who were both legally represented, the rescission proceedings were settled in terms of the consent order granted by Mokgohloa DJP. The material terms of that order were:

(a) The order of 18 April 2017 was rescinded.

(b) The applicants were directed to pay Pawn Stars an amount of R690 000, together with interest and costs on the attorney and client scale.

(c) The first payment of R100 000 was due on or before 23 April 2018 and a second payment on or before 31 May 2018. Thereafter, the balance was to be paid in equal monthly instalments of R40 000 payable on the last day of each subsequent month commencing on the last day of June 2018.

(d) In the event of any instalment not being paid on due date, the full balance of the repayable amount then due would become immediately due, owing and payable, the property would become specially executable, and the sheriff would be authorised to issue a warrant of execution in respect of the property.

[10] On 23 April 2018, the Trust made payment of R100 000 to Pawn Stars, but thereafter defaulted on its obligations in terms of the consent order. A warrant of execution for the property was issued on 25 July 2018, and by subsequent notice a sale in execution of the property was scheduled for 5 December 2018.

[11] The applicants alleged that they were made aware of the warrant of execution on 13 September 2018 and the pending sale in execution on 21 November 2018. On 29 November 2018, the applicants instituted urgent application proceedings in which they sought, in Part A of their notice of motion, an order interdicting the sale of the property pending a determination of Part B, in which, amongst others, they sought to

set aside the warrant of execution of 25 July 2018, and to vary the consent order. In terms of the proposed variation, the property would only become specially executable "upon the application of the applicant, Pawn Stars CC . . . for an order of judicial supervision before the property can be sold".

[12] The primary basis upon which the applicants claimed entitlement to this relief was that the consent order had allegedly been impermissibly granted without application of rule 46A. The applicants alleged that the consent order had been granted without a reserve price being set, and without consideration of factors that might have militated against declaring the property specially executable. The applicants submitted further that the consent order left it to the discretion of Pawn Stars to determine whether the applicants were in default and that, in effect, the property would therefore become specially executable without judicial oversight. All this, the applicants said, was contrary to the prescripts of rule 46A.

[13] Pawn Stars opposed Part A, but the urgent relief was granted on 5 December 2018. Prior to Pawn Stars filing its answering papers in respect of Part B, the applicants on 19 December 2018 delivered yet another application. This application sought substantially similar relief to Part B of the previous application.

[14] The nub of Pawn Stars' response to Part B and to the further application of 19 December 2018 was that, before the consent order was granted, the parties discussed the issue of executability, and the outcome of these deliberations was embodied in the consent order. Pawn Stars submitted that the applicants had not alleged that this order was granted by mistake or as a result of fraud, and were therefore not entitled to the relief sought. Pawn Stars noted further that, in any event, the applicants had failed to demonstrate that they would be able to satisfy their obligations without a sale of the property, and had also failed to set out any other factor which militated against the declaration of executability. Pawn Stars also brought a counter-application, conditional upon the success of the applicant's Part B

application, in which it sought an order declaring the property specially executable and setting a reserve price at R1 620 009.

[15] On 7 November 2019, Madavha AJ refused the relief sought in terms of Part B and in the application of 19 December 2018. Madavha AJ held that the writ of execution had been issued by the sheriff in accordance with the consent order. Since the applicants had not sought to rescind that order, a legal cause remained extant for the issuance of the writ of execution. There was accordingly no basis on which to set that writ aside. Regarding the applicability of rule 46A, Madavha AJ appeared to accept that the rule has application even where the relevant property is owned by a juristic person or trust. However, she went on to hold that the impugned order had been granted by agreement, and that the applicants had failed to make out a case for its variation or rescission.

[16] The applicants' subsequent efforts to petition the High Court and Supreme Court of Appeal for leave to appeal were unsuccessful. Notably, in their application for leave to appeal in the High Court, the applicants seemingly accepted that, in their view, Madavha AJ had correctly held that rule 46A applies to properties owned by juristic persons or trusts.

[17] In this Court, the applicants have adopted a different tack. They say that the question as to the applicability of rule 46A was not decided by Madavha AJ. As a result, they say that Madavha AJ failed to consider whether the consent order was granted after proper application of that rule. They also contend that Phatudi J's order was granted without application of the erstwhile rule 46(1)(a)(ii), which, at the time that order was granted, regulated proceedings in which a creditor sought to have immovable property declared specially executable. Plainly, however, the correctness of Phatudi J's order is not before us, that order having been rescinded by the consent order of Mokgohloa DJP.

[18] The central issue for determination – or so say the applicants – is whether rule 46A applies in respect of property owned by a juristic person or trust (rule 46A issue). In this regard, the applicants ask that this Court overturns the decision in *Folscher*,[2] where it was held that the erstwhile rule 46(1)(a)(ii) did not apply in respect of immovable property owned by juristic persons.

[19] Pawn Stars offers three responses. First, it contends that Madavha AJ found in favour of the applicants in respect of the rule 46A issue, but dismissed the application because the applicants had failed to make out a case for the variation or rescission of the consent order. It therefore says that the applicability of rule 46A, and the correctness of *Folscher*, were resolved in favour of the applicants. Second, Pawn Stars notes that the consent order was granted after all relevant issues were canvassed, and in circumstances where both parties were legally represented, and argues that the applicants have failed to set out any basis for the variation or rescission of that order. Finally, Pawn Stars notes that even if rule 46A did have application, the applicants have failed to set out any factors which militate against declaring the property specially executable.

Jurisdiction

[20] As mentioned, the applicants contend that this application requires a determination of whether rule 46A applies in respect of property owned by a juristic person or trust. This, they say, is the constitutional issue which engages our jurisdiction. The applicants are mistaken. On the facts of this case we simply do not reach the rule 46A issue and our jurisdiction is therefore not engaged. This is so for four reasons.

[21] First, as Pawn Stars correctly notes, Madavha AJ appears to have accepted that rule 46A applied to the immovable property in question, even though it was owned by a trust rather than by the applicants in their personal capacities. As a result, and since Madavha AJ dismissed the application, the rule 46A issue was plainly immaterial to

[2] *First Rand Bank Ltd v Folscher* 2011 (4) SA 314 (GNP).

her decision. For this reason alone, that issue does not engage our jurisdiction. Issues which are immaterial to a lower court's decision cannot provide a jurisdictional foothold in this Court.[3]

[22] Second, even if rule 46A ought to have been applied before the consent order was granted, this, without more, would not entitle the applicants to variation of that order. They would, in addition, need to satisfy the requirements for variation contained in rule 42 of the Uniform Rules of Court or in the common law. Plainly, the applicants cannot (and did not) contend that the consent order was erroneously granted in their absence. They have failed to show that the consent order contains any "ambiguity, or patent error or omission" or that it was granted as a result of a mistake common to the parties. They have also failed to show that the consent order was granted as a result of fraud or on any other basis which would constitute sufficient cause to vary that order. An adjudication of the rule 46A issue is therefore not reasonably necessary for a determination of this matter and, for this reason too, does not engage our jurisdiction.

[23] Third, relatedly, for the rule 46A issue to engage our jurisdiction, the applicants would need to show that, if rule 46A was applied, the consent order would not have been granted. Absent such a showing, an adjudication of the rule 46A issue is not reasonably necessary for a determination of the present dispute. The applicants have failed to disclose any factors which may suggest that, if rule 46A was applied, the consent order would not have been granted. They do not allege that they will be left vulnerable to homelessness if the property is sold in execution and they have given no indication that they will be able to satisfy their debts absent a sale in execution. The applicants' counsel submitted that the sole reason why variation is sought is to ensure that a reserve price is set for the sale in execution. But there is no absolute requirement that a reserve price be set before a property is sold in execution. Rule 46A(8) provides that a High Court "may" set a reserve price. In this case, even if rule 46A did apply, the High Court might well have been satisfied that since the parties

[3] *Mbatha v University of Zululand* [2013] ZACC 43; 2013 JDR 2759 (CC); 2014 (2) BCLR 123 (CC) at para 198.

had been legally represented and had agreed to the consent order, which did not make provision for a reserve price, there was no need for a reserve price to be set.

[24] Finally, in any event, whatever the correct answer to the rule 46A issue, rule 46A had no application in the proceedings which culminated in the consent order. That order, it will be recalled, was granted pursuant to an application to rescind the default judgment. Rule 46A does not apply in these circumstances. Rule 46A(1) applies "whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor". Rule 46A(2) provides that a court considering "an application under this rule" – that is, an application in which a creditor seeks to execute against the judgment debtor's immovable property – must consider various matters. Rule 46A(3)-(9) are framed with reference to an application brought by a creditor seeking leave to execute against the judgment debtor's immovable property. Rule 46A therefore only has application where a creditor seeks leave to execute against a judgment debtor's immovable property. The consent order was not granted pursuant to such an application and, for this reason, rule 46A has no application.

[25] It is trite that jurisdiction is decided on the basis of the pleadings.[4] The applicants pegged their jurisdictional case entirely on the rule 46A issue and have thus failed to establish that our jurisdiction is engaged. The application for leave to appeal must therefore be dismissed. There is no reason why costs should not follow the result.

Order

[26] The following order is made:

1. The application for leave to appeal is dismissed.
2. The applicants must pay the first respondent's costs.

[4] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 38.

For the Applicants:	S S Cohen instructed by Ledwaba Attorneys
For the First Respondent:	J G Dobie instructed by Lloyd Keiser Attorneys