CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 181/22

In the matter between:

PETRUS JOHANNES BESTBIER	First Applicant
HANLIE BESTBIER N.O.	Second Applicant
CAREL BRINK BESTBIER N.O.	Third Applicant
FRANS STEFANUS BOTES N.O.	Fourth Applicant

and

NEDBANK LIMITED	Respondent

Neutral citation:	*Petrus Johannes Bestbier and Others v Nedbank Ltd* [2024] ZACC 2
Coram:	Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ
Judgment:	Tshiqi J (unanimous)
Heard on:	22 August 2023
Decided on:	12 April 2024
Summary:	Extension of Security of Tenure Act 62 of 1997 — Rule 46A of Uniform Rules of Court — residential property — party who may be affected

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town) the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.
3. The cross-appeal is struck from the roll and the respondent is ordered to pay the costs occasioned by the cross-appeal.

JUDGMENT

TSHIQI J (Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ, Theron J and Van Zyl AJ concurring):

Introduction

[1] This application for leave to appeal concerns the interpretation and applicability of rule 46A of the Uniform Rules of Court (Uniform Rules).[1] This issue was first considered by the High Court, Western Cape Division (High Court)[2] and it found that rule 46A finds no application in this matter. The High Court granted judgment in favour of the respondent, Nedbank Limited (Nedbank), against the first to the fourth applicants in their capacities as trustees of the Goede Hoop Trust (Trust), for payment of an

[1] The High Court considered rule 46A together with Practice Directive 33A of the High Court (Western Cape Division, Cape Town). The High Court said that the "Practice Directive deals with foreclosures (and executions when property is, or appears to be, the defendant's primary home)." The High Court further stated that the provisions of the Directive state that "this Directive must be read in conjunction with the amended rule 46A". The Court then concluded that the Directive would not be triggered if rule 46A is not applicable.

[2] *Nedbank Limited v Bestbier* [2020] ZAWCHC 107.

undisputed debt owed by the Trust to Nedbank. It also declared Goede Hoop Wine Estate (the immovable property) specially executable. Judgment was also granted against the first applicant, Mr Petrus Johannes Bestbier, in his personal capacity, based on a suretyship agreement in terms of which he stood surety for the debt. The second applicant, Mrs Hanlie Bestbier, his wife, and Mr Carel Brink Bestbier, who is the third applicant, along with the fourth applicant Mr Frans Stefanus Botes, were cited as trustees of the Trust.

[2] Leave to appeal was granted by the High Court to the Supreme Court of Appeal in respect of both the money judgment and the order declaring the property executable. The Supreme Court of Appeal dismissed the appeal and ordered the applicants to pay Nedbank's costs.[3] This application is against the order of the Supreme Court of Appeal. Nedbank also applies for leave to cross-appeal against limited parts of the Supreme Court of Appeal's judgment.[4] The appeal and cross-appeal are interlinked and both concern the applicability of rule 46A.

Background

[3] The immovable property is owned by the Trust. The Trust conducts business on the property as a wine farm, wine cellar, wine merchant and restaurateur. The Trust also owns equipment, machinery and stock in trade amounting to approximately R5 000 000. Mr Petrus Johannes Bestbier and Mrs Hanlie Bestbier, reside in the main house on the property and Mr Carel Brink Bestbier, occupies a cottage on the property. A number of permanent Trust employees (the farmworkers) also live, together with their families, in 12 cottages on the property. Many have occupied the property as their only or principal home since the 1990s.

[4] The Trust obtained substantial financial assistance from Nedbank in the form of an overdraft and a loan, secured by nine mortgage bonds over the property,

[3] *Petrus Johannes Bestbier v Nedbank Limited* [2022] ZASCA 88; 2023 (4) SA 25 (SCA).

[4] The appeal was against the whole or part of paragraphs 25-8 and 31 of the Supreme Court of Appeal's judgment.

totalling R9 200 000. The Trust failed to comply with its repayment obligations. Nedbank issued summons against the Trust and the first applicant in his personal capacity, for the amounts of R5 529 477.36 together with interest at a rate of 12.5% per annum (on the facility agreement) and R3 034 966.88 together with interest at a rate of 11% per annum (on the loan agreement), together with costs. Nedbank also sought an order that the property be declared specially executable.

[5] The applicants entered appearances to defend and opposed the application on various grounds. This was met with an application for summary judgment by Nedbank. On 21 February 2019, the applicants and Nedbank reached a settlement agreement, which was reduced to writing and signed by the parties on 29 March 2019. In terms of the settlement agreement, the applicants, admitted, inter alia, their indebtedness to Nedbank, and agreed to pay an amount of R1 800 000 by 17 May 2019 and the balance by 1 June 2019. They also agreed that in the event that they defaulted in paying the amount, Nedbank would be entitled to proceed with an application for payment, failing which, the private sale of the property or judgment by consent in terms of a confession in accordance with rule 31(1) of the Uniform Rules[5]. They also agreed to an order declaring the property executable and further agreed on a reserve price of R21 000 000.

[6] It is common cause that the Trust failed to adhere to the terms of the settlement agreement in that it did not pay Nedbank, failed to sell the property privately and refused to honour the consent for the immovable property to be declared executable.

Litigation history

High Court

[7] On 30 September 2019, Nedbank launched an application for judgment on confession in terms of rule 31(1)(c) of the Uniform Rules, based on the settlement agreement. It sought payment of the amounts outstanding at that time – R5 529 477 (on

[5] Rule 31(1) of the Uniform Rules of Court deals with judgments on confessions and by default as well as rescission of judgments.

the facility agreement) and R3 034 967 (on the loan agreement), plus interest. It also sought an order to have the property declared specially executable, with a reserve price of R21 000 000. The application was opposed by the applicants.

[8] It was not in dispute that the High Court's Practice Directive 33A was applicable to the proceedings.[6] At the time of the proceedings in the High Court,[7] rule 46A of the Uniform Rules in relevant parts read:

> "(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—
>
> (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.
>
> (3) Every notice of application to declare residential immovable property executable shall be—
>
> . . .
>
> (b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in

[6] In applications to have immovable property declared executable, an execution creditor must comply with the High Court's Practice Directive 33A, which is modelled on the provisions of rule 46A when the property is, or appears to be, a judgment debtor's primary home.

[7] Rule 46A was, along with other rules, amended with effect from 19 June 2023. The amendments to rule 46A are inconsequential for present purposes.

rule 46(5)(a): Provided that the court may order service on any other party it considers necessary;

(c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and

(d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.

(4)

(a) The applicant shall in the notice of application—

(i) state the date on which the application is to be heard;

(ii) inform every respondent cited therein that if the respondent intends to oppose the application or make submissions to the court, the respondent must do so on affidavit within 10 days of service of the application and appear in court on the date on which the application is to be heard;

. . .

(5) Every application shall be supported by the following documents, where applicable, evidencing—

(a) the market value of the immovable property;

(b) the local authority valuation of the immovable property;

(c) the amounts owing on mortgage bonds registered over the immovable property;

(d) the amount owing to the local authority as rates and other dues;

(e) the amounts owing to a body corporate as levies; and

(f) any other factor which may be necessary to enable the court to give effect to subrule (8):

Provided that the court may call for any other document which it considers necessary.

(6)

(a) A respondent, upon service of an application referred to in subrule (3), may—

(i) oppose the application; or

(ii) oppose the application and make submissions which are relevant to the making of an appropriate order by the court; or

(iii) without opposing the application, make submissions which are relevant to the making of an appropriate order by the court.

. . .

(8) A court considering an application under this rule may—

(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;

(b) order the furnishing by—

(i) a municipality of rates due to it by the judgment debtor; or

(ii) a body corporate of levies due to it by the judgment debtor;

. . .

(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;

(e) set a reserve price;

(f) postpone the application on such terms as it may consider appropriate;

(g) refuse the application if it has no merit;

(h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or

(i) make any other appropriate order.

(9)

(a) In an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set.

(b) In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court shall take into account—

(i) the market value of the immovable property;

(ii) the amounts owing as rates or levies;

(iii) the amounts owing on registered mortgage bonds;

(iv) any equity which may be realised between the reserve price and the market value of the property;

(v) reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);

(vi) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;

(vii) the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;

(viii) any prejudice which any party may suffer if the reserve price is not achieved; and

(ix) any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.

(c) If the reserve price is not achieved at a sale in execution, the court must, on a reconsideration of the factors in paragraph (b) and its powers under this rule, order how execution is to proceed.

(d) Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within five days of the date of the auction, which report shall contain—

. . .”

[9] In their opposition, the present applicants contended that immovable property owned by a trust and occupied as a primary residence by natural persons (such as the trustees, trust beneficiaries and trust employees) constitutes “residential immovable property of a judgment debtor”, therefore triggering the application of rule 46A. The applicants further submitted that the wording and literal meaning of the rule show that rule 46A applies to all residential immovable property of a judgment debtor and is not limited to property that constitutes the primary residence of the judgment debtor. The applicants further contended that apart from their occupation, the property serves as a primary residence to the farmworkers and their families who would be seriously affected by the sale in execution, and should have received notice pursuant to rule 46A(3)(b).

[10] Nedbank contended that the provisions of Practice Directive 33A and rule 46A were not applicable to the application, because the property is a commercial wine farm which belongs to a trust. Nedbank argued further that the applicants were legally represented during the settlement negotiations leading up to the signing of the settlement agreement. According to Nedbank, the applicants were aware of their rights in terms of section 26(1) of the Constitution[8] and consented to the property being

[8] Section 26(1) of the Constitution enshrines everyone’s right to have access to adequate housing.

declared executable in the event of them defaulting on the terms of the settlement agreement. Nedbank further submitted that the applicants failed to raise the section 26(1) argument in their opposing affidavit and further failed to raise an objection in respect of the applicability of rule 46A. It further argued that, given the property's actual valuation of between R35 000 000 and R40 000 000 and the reserve price which is set at R21 000 000, there would be more than enough residue to purchase alternative accommodation, after the debt owed to Nedbank has been extinguished.

[11] The High Court held that the Trust could not be considered a natural person and be afforded the protection reserved exclusively for natural persons. It also took into account the fact that the value of the property as a going concern is in excess of R30 000 000.

[12] The High Court further reasoned that even if its finding that the Trust, as a juristic entity, was not afforded the protection under rule 46A was wrong, there were further reasons why rule 46A and Practice Directive 33A were not applicable. One of those reasons, according to the High Court, was that rule 46A is aimed at the protection of individuals and the *residential* immovable property of a judgment debtor. It then referred to, amongst others, *Saunderson*,[9] *Jessa*[10] and *Dawood*[11] in support for that conclusion and highlighted that all those cases referred to individuals as opposed to legal entities.

[13] The High Court also rejected the argument that the application should have been made on notice to the trustees, the Trust beneficiaries and the farmworkers. It held that the farmworkers have adequate legal protection afforded to them under section 26 of the Constitution. And that since they do not have a legal interest requiring joinder in proceedings relating to executability, their intervention, at that stage of the proceedings

[9] *Standard Bank of South Africa v Saunderson* [2005] ZASCA 131; (2006) 2 SA 264 (SCA); 2006 (9) BCLR 1022 (SCA).

[10] *Nedbank Ltd v Jessa, ABSA Bank Ltd v Morulane, Firstrand Bank Ltd v Hendricks* [2011] ZAWCHC 495; 2012 (6) SA 166 (WCC).

[11] *Standard Bank of South Africa Ltd v Dawood* [2012] ZAWCHC 40; 2012 (6) SA 151 (WCC).

was not warranted. The High Court reasoned that if the property is sold at an auction, the new owners of the property would in any event be compelled to comply with the provisions of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act[12] (PIE) or the Extension of Security of Tenure Act[13] (ESTA) before the occupiers may be evicted.

[14] The High Court also disagreed with the reasoning in *Mgedesi*,[14] that because a sale in execution will, or may, affect the rights to accommodation of a tenant as enshrined in section 26 of the Constitution, a notice must be served on the tenant or in this case, the occupier. In its view, the occupier, does not *at that stage* have a legal interest in the proceedings which would warrant notice of the proceedings on them. This, according to the High Court, would merely delay the proceedings, the judgment and the realisation of a creditor's security in order to satisfy the debtor's indebtedness to it.

[15] The High Court granted the application; it ordered payment of the debt, and permitted the sale of the bonded property, with the reserve price of R21 000 000, if payment was not made. The Court held that the agreement between the parties had to be enforced.

Supreme Court of Appeal

[16] Aggrieved by the outcome in the High Court, the applicants approached the Supreme Court of Appeal. In dealing with the applicability of rule 46A, the Supreme Court of Appeal found that the purpose of rule 46A "is to assist the Court in considering whether the section 26 rights of the judgment debtor would be violated if her house is sold in execution." It highlighted that *Jaftha*[15] and *Gundwana*[16] were

[12] 19 of 1998.

[13] 62 of 1997.

[14] *Firstrand Bank Limited v Mgedesi* [2019] ZAMPMHC 12.

[15] *Jaftha v Schoeman, Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

[16] *Gundwana v Steko Development CC* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

concerned with cases where the right to adequate housing was impaired or potentially impaired and that section 26(1) of the Constitution is not implicated in every case where execution is ordered against immovable property. The Supreme Court of Appeal highlighted that in *Jaftha*, the two property owners were unemployed women who occupied homes purchased with the assistance of a state housing subsidy. It noted that it was clear in those cases that, if the property owners were evicted because of the sale in execution, they would have been left with no adequate accommodation.

[17] The Supreme Court of Appeal looked closely at the requirement in rule 46A that there should be judicial oversight, and reasoned that judicial oversight entails a consideration by a court of various factors when a creditor seeks to execute against "the residential immovable property of a judgment debtor". It held that there is considerable force in Du Plessis and Penfold's analysis 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.[17] The sole purpose of judicial oversight was, according to the Supreme Court of Appeal, to ensure that the orders being granted do not violate section 26(1) of the Constitution, and to avoid a situation where the judgment debtor is likely to be left homeless as a result of the execution.

[18] The Supreme Court of Appeal agreed with the High Court's finding that the applicants' rights to adequate housing were not engaged or compromised in this matter. It highlighted that the application to declare the property executable was brought after numerous attempts by Nedbank to obtain payment from the applicants, who did not dispute their indebtedness, but consented to the judgment. The Supreme Court of Appeal reasoned that, given that rule 46A(2) provides that a court "shall not" authorise execution unless "all relevant factors" have been considered, it could find no reason why the fact that the relevant immovable property is owned by a trust, and occupied as

[17] Du Plessis and Penfold "Bill of Rights Jurisprudence" (2005) 27 *Annual Survey of South African Law* at 77-81 and 87.

a place of residence by the beneficiaries of that trust, should not be one of the factors to be taken into account.

[19] The Supreme Court of Appeal stated that it was 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*" (Emphasis added). The Court stated that it was 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, according to the Supreme Court of Appeal, should be directed at establishing whether the persons occupying the immovable property in question are of the *Jaftha* kind.[18] As the Court saw 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, so continued the Court, rule 46A would have to be followed.

[20] The Supreme Court of Appeal therefore rejected the submission by Nedbank's counsel that what has 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 or an institution such as a trust, "even if the immovable property is the shareholder's, member's or beneficiary's only residence".[19] It held that a blanket approach that says all immovable property held in the name of a juristic person falls outside the protection of rule 46A is too narrow.

[21] The Supreme Court of Appeal considered the impact that a sale in execution might have on vulnerable and poor trust beneficiaries who are occupying immovable property owned by the judgment debtor, and who were at the risk of losing their only

[18] The Supreme Court of Appeal relied on *Gundwana* above n 16 at para 43 for this reasoning.

[19] The Supreme Court of Appeal relied on *Firstrand Bank Ltd v Folscher* [2011] ZAGPPHC 79; 2011 (4) SA 314 (GNP) at para 32 for this reasoning.

homes. It held that, given the clear provisions of rule 46A, there was no reason why trust beneficiaries who fall in the *Jaftha* category and occupy the trust's immovable property as a primary residence (and are thus likely to be affected by an order declaring the immovable property specially executable), should be excluded from the protection of rule 46A, merely because the property in question is owned by a trust.

[22] According to the Supreme Court of Appeal, the fact that, in addition to being a primary residence for the Trust beneficiary, the Trust's immovable property in the present case was also used commercially as a wine farm could not, 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, so continued the Court, an 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 section 26 of the Constitution as set out in rule 46A, would defeat the very purpose for which the protection is granted. On this aspect, it concluded that vulnerable and poor beneficiaries of a trust who use the trust's immovable property as their home ought not to be excluded from the protection of section 26 of the Constitution, merely because the judgment debtor is a trust and not a natural person.

[23] Regarding the alleged prejudice that the farmworkers would suffer in the event of a sale in execution, the Supreme Court of Appeal held that the applicants in their argument did not go further than merely making the bold allegation that the farmworkers would be seriously affected by the sale in execution. They did not explain the nature of the farmworkers' tenure, that is, whether it was dependent on a contract of employment or lease or any other arrangement. It also held that the farmworkers already enjoy protection in terms of ESTA in that their rights to adequate housing are protected, should any post-execution developments endanger their tenure.

[24] The Supreme Court also dealt with the settlement agreement signed by the parties and found that, in the specific circumstances of this case, it was of significance

that the impugned order was by agreement between the parties, in circumstances where both parties were, from the outset, legally represented. It noted that when the settlement terms were being negotiated, the applicants were represented by an attorney, who is the first and second applicants' daughter. The applicants expressly consented to judgment being granted against them, coupled with an order declaring the trust's immovable property specially executable.

[25] The Supreme Court of Appeal also held that the applicants had not established facts that show that the matter can be categorised as being of the *Jaftha* kind. This, according to the Supreme Court of Appeal, is because the applicants had not shown that, as a result of indigence, the beneficiaries would be left vulnerable to homelessness if the property was sold in execution. On the contrary, so noted the Supreme Court of Appeal, the property was valued at between R35 000 000 and R40 000 000, and the reserve price was fixed at R21 000 000. On this basis, it concluded that the ability of the applicants to acquire alternative accommodation was unquestionable.

[26] Although the Supreme Court of Appeal held that rule 46A was applicable despite the judgment debtor being a trust, it concluded that judicial scrutiny, based on the facts of this case, revealed that the applicability of rule 46A could not avail the applicants, because they had failed to show that they fall in the *Jaftha* category of home owner. Thus, according to the Court, there was nothing to show that if rule 46A was applied, default judgment and an order declaring the immovable property specially executable would not have been granted.[20] It then concluded that the appeal fell to be dismissed with costs.

[20] The Supreme Court of Appeal relied on *Mkhize v Umvoti Municipality* [2011] ZASCA 184; 2012 (1) SA 1 (SCA); 2012 (6) BCLR 635 (SCA) at para 29; *Baloyi N.O. v Pawn Star CC* [2022] ZACC 10; 2022 (12) BCLR 1431 (CC) at para 23.

In this Court

Legal standing and alleged abuse of process

[27] Nedbank challenges the legal standing of the applicants on the basis that there is nothing to show that their right to adequate housing has been infringed or threatened. It argues that the only issue that the applicants rely on is that the rights of the farmworkers have been infringed because they were not given notice of Nedbank's application for the property to be declared specially executable.

[28] Nedbank contends that there will be no immediate prejudice to the farmworkers as a result of the failure to give them notice in terms of rule 46A, because there is no allegation that any buyer of the property or successive owner will evict the farmworkers from the property. And that, in any event, any such buyer or successive owner will be obliged to comply with the law before any eviction may take place, specifically regarding those farmworkers that enjoy the protection by ESTA. It further submits that any potential prejudice to the farmworkers will only be relevant if the successive owner wishes to evict the farmworkers.

[29] Nedbank highlights that this matter is an attempt to appeal against a judgment granted pursuant to an admission and consent to judgment in favour of a bank, that did not receive payment as agreed and now wishes to execute against the asset that the commercial debtor made available as security for the due compliance with its obligations.

[30] Nedbank further argues that, if the applicants were truly concerned about the plight of the farmworkers, they would have taken steps to assist them in joining the proceedings in the High Court, or at least made provision for their interests when they concluded the settlement agreement with Nedbank. Nedbank contends that the Trust's belated reliance on the interests of the farmworkers is an indication that their interests are now being abused as a way of enabling the applicants to be granted a further appeal against the execution order.

[31] The applicants submit that they have standing, as they bring this application in their own interest as well as in the public interest, in terms of sections 38(a) and (d) of the Constitution. They contend that they have a direct and substantial interest in the outcome of these proceedings, since default judgment was granted against them without compliance with rule 46A and Practice Directive 33A. This, according to them, rendered the entire process defective and unconstitutional. Further, the proper interpretation of rule 46A is a matter of public interest since it aims to protect the constitutional right to housing enshrined in section 26 of the Constitution. They submit that it is also in the interests of justice for this Court to clarify the proper interpretation of rule 46A, given the conflicting case law referred to in the High Court and the Supreme Court of Appeal judgments.

[32] The courts have taken a wide approach to standing. In *Ferreira*,[21] Chaskalson JP took the view that, although a litigant must act in his or her own interest, that person need not be the one whose constitutional right had been infringed, and the court would have to decide what constitutes "sufficient interest". *Port Elizabeth Municipality*[22] illustrates the proposition that the interest referred to need not relate to a constitutional right of the applicant, but may relate to a constitutional right of some other person. These dicta make it clear that a party can litigate in his/her or its own interest even where it is not that party's constitutional right that has been infringed. Thus, the applicants have standing in terms of section 38(d).

Jurisdiction and leave to appeal

[33] The parties contest the issue of jurisdiction. Both the applicants and respondent rely on this Court's decision in *Baloyi*. That matter concerned the application of rule 46A in the execution of immovable property owned by a Trust, on the basis of a consent order. This Court concluded that its jurisdiction was not engaged. The

[21] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 163-8.

[22] *Port Elizabeth Municipality v Prut N.O.* 1996 (4) SA 318 (E); 1996 (9) BCLR 1240 (E).

applicants contend that their application can be distinguished from *Baloyi* whilst Nedbank submits that the two are on all fours; that *Baloyi* should be followed; and that this Court's jurisdiction is not engaged.

[34] Nedbank's reliance on this Court's judgment in *Baloyi* as a ground for lack of jurisdiction is misplaced. The facts of this case are distinguishable in that in *Baloyi* there were no similarly situated persons such as the farmworkers, and all the "affected parties" were cited in the proceedings. Furthermore, the issue raised in *Baloyi* did not engage this Court's jurisdiction because there was no dispute regarding the applicability of rule 46A, nor was such a determination necessary to resolve the primary issue between the parties.

[35] Rule 46A was promulgated against the backdrop of *Jaftha* and *Gundwana*. Those two judgments emphasised that judicial oversight is a tool to preserve the right to adequate housing and security of tenure. In this matter, the decision of this Court on whether rule 46A is applicable to the farmworkers will affect other farmworkers and other parties who are not directly involved in litigation in the same way as the judgment debtor. Therefore, this matter engages this Court's constitutional jurisdiction and raises an arguable point of law of general public importance that ought to be considered by this Court.

[36] Furthermore, the operation of rule 46A has been unclear from its inception.[23] It has attracted attention in journals, highlighting the lack of clarity in the provision.[24] As stated in *Gundwana*,[25] 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

[23] See *Mgedesi* above n 14; *Absa Bank Ltd v Mokebe; Absa Bank Ltd v Kobe; Absa Bank Ltd v Vokwani; Standard Bank of South Africa Ltd v Colombick* [2018] ZAGPJHC 485; 2018 (6) SA 492 (GJ); *Absa Bank Ltd v Schuurman* 2019 JDR 0353 (GP); *Investec Bank Ltd v Fraser N.O.* [2020] ZAGPJHC 107; 2020 (6) SA 211 (GJ); *Land Agricultural Development Bank v Du Plessis N.O.* [2020] ZAFSHC 136; *Assetline South Africa (Pty) Ltd v Manhattan Deluxe Properties (Pty) Ltd* [2020] ZAGPJHC 97; and *Body Corporate of Oakmont v Awah* [2019] ZAGPJHC 362.

[24] Brits "Executing a Debt against Residential Property: The potential of rule 46A of the Uniform Rules of Court beyond a literal reading of 'property of a judgment debtor'" (2020) 45 *Journal for Juridical Science* 74 (Brits).

[25] *Gundwana* above n 16 at para 28.

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.

Counter-application

[37] The Supreme Court of Appeal held that rule 46A is applicable to residential immovable property owned by a trust. Such a finding was against the submissions made by Nedbank in that Court, to the effect that rule 46A is not applicable to juristic persons. However, for different reasons as articulated above, Nedbank was successful in the Supreme Court of Appeal. Nedbank therefore did not appeal against the order. It could not do so. What it attempted to do was to challenge the Supreme Court of Appeal's reasoning that rule 46A is applicable to residential immovable property owned by a trust, by lodging a counter-application for leave to appeal against that specific reasoning. During argument in this Court, Nedbank conceded that this is impermissible and that its counter-application is therefore incompetent or irregular. The counter-application therefore falls to be struck from the roll as it challenges the reasoning of the court as opposed to the order.[26]

[26] *Ayres v Minister of Justice and Correctional Services* [2022] ZACC 12; 2022 (5) BCLR 523 (CC); 2022 (2) SACR 123 (CC) at para 15. See also *Zuma v Democratic Alliance* [2021] ZASCA 39; (2021) (5) SA 189 (SCA); [2021] 3 SA 149 (SCA) at para 85; *Willis Faber Enthoven (Pty) Limited v Receiver of Revenue* [1991] ZASCA 163; 1992 (4) SA 202 (SCA) at 214F-G; and *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 395G-H.

Merits

Applicants' submissions

[38] The applicants argue that rule 46A is applicable to all residential immovable property and that the High Court erred in finding that the rule is only triggered when a property "is the primary residence of a debtor" and that the Supreme Court of Appeal also erred in confirming this reasoning by the High Court. The applicants further contend that the High Court and the Supreme Court of Appeal ought to have held that rule 46A applies to all "residential immovable property" owned by a judgment debtor, irrespective of whether such property is the judgment debtor's primary residence, as long as it is occupied by natural persons.

[39] According to the applicants, the wording of rule 46A(1) is intentionally couched in broad language in order to cover all residential immovable property owned by a judgment debtor. The contention that the rule covers a broader scope is, the applicants submit, apparent when one compares the headings of rule 46A and rule 46. The heading of rule 46A is "Execution against residential immovable property", indicating that the rule applies to all immovable property that is residential in nature. This, according to the applicants, could include the judgment debtor's holiday home or a property leased to other natural persons by the judgment debtor. In contrast, the heading of rule 46 is "Execution – Immovable property", indicating that rule 46 applies to all property that is not residential in nature. This, according to the applicants, could include commercial property or industrial property that is not occupied by natural persons.

[40] The applicants also invited the Court to have regard to the fact that certain provisions of rule 46A, including subrule 46A(1), refer to "residential immovable property of a judgment debtor" whilst other provisions of rule 46A, including subrule 46A(2), refer to "the primary residence of the judgment debtor". The applicants argue that this difference in wording is intentional and confirms that rule 46A encompasses two kinds of applications: applications concerning the judgment debtor's primary residence and applications concerning property that is not the judgment

debtor's primary residence but nonetheless constitutes "residential immovable property", because it is occupied by natural persons. The applicants further contend that if rule 46A was intended to apply only to the judgment debtor's primary residence, the heading and subrule 46A(1) would state this expressly, and all the subrules would use consistent language throughout the rule and refer only to "the judgment debtor's primary residence".

[41] The applicants argue further that the following features of the text of rule 46A illustrate that the rule is intended to apply to property occupied by persons other than the judgment debtor:

(a) Rule 46A(3)(b) expressly states that every 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".

(b) Rule 46A(9)(b)(vi) provides that, in deciding whether to set a reserve price and the amount at which the reserve price is to be set, the court shall take into account whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation.

(c) Rule 46A(2)(a)(i) enjoins the court "considering an application under this rule" to establish "whether the immovable property which the execution creditor intends to execute against, is the primary residence of the judgment debtor". The applicants contend that the subrule would be rendered meaningless if the rule only applies to a judgment debtor's primary residence.

[42] The applicants therefore submit that, when considering the provisions of rule 46A holistically, and the literal meaning of the words used, the only reasonable interpretation is that rule 46A must be complied with in every application to declare residential immovable property executable, irrespective of whether or not it is the judgment debtor's primary residence. All permanent occupiers of residential immovable property are entitled to notice in terms of rule 46A(3)(b) before property is

declared executable. As an alternative, the applicants argue, that in the event this Court finds that rule 46A is only applicable to property that is the judgment debtor's primary residence, then the Court should conclude that all permanent occupiers of such property are entitled to notice of proceedings to declare the property executable, as envisaged in rule 46A(3)(b), because they "may be affected by the sale in execution".

Respondent's submissions

[43] Nedbank submits that the applicants' interpretation of the rule results in an unjustified extension of the rule, to the effect that there is an addition of a further safeguard for the rights of occupiers of immovable property, whereas the primary purpose of the rule is to regulate the debtor-creditor relationship in the execution of property. It contends that the applicants' interpretation is untenable as there exists special machinery, such as PIE and ESTA, in the event of a possible infringement of section 26 rights.

[44] Nedbank further highlights that the rule exists as a result of this Court's judgment in *Jaftha*, and further submits that this matter is distinguishable as the applicants do not meet the jurisdictional facts of *Jaftha*. According to Nedbank, the applicants merely seek to benefit from measures put in place to prevent injustice to homeowners in a *Jaftha*-like situation.

[45] Nedbank refers to the language used in the rule and identifies the following as jurisdictional factors which must be met before rule 46A can find application: (a) judgment must have already been taken against the judgment debtor; (b) the judgment debtor must be the owner of the property; and (c) the property must be residential in nature. Nedbank urges this Court to find that where a property is commercial in character but those involved in the business also reside on the property, such occupation is merely incidental and does not change the character of the property from business to residential.

[46] Nedbank submits that its argument is strengthened by the fact that rule 46A(2)(a) requires that the property must be the primary residence of the judgment debtor. This, so the argument goes, is the strongest indication that only natural persons may rely on rule 46A. Nedbank submits that the immaterial conglomerate of rights and obligations that comprise the institution of a trust cannot "reside" in a "home" as only an individual can. Therefore, so the argument goes, the rule ought to be applied only in circumstances where an individual homeowner stands to lose her house and would, as a consequence of loss of ownership, lose her dignity and security of tenure that the ownership of the house brings.

[47] Nedbank further argues that the above proposition finds support in *Jaftha*, *Gundwana* and *Saunderson*. In those matters, judicial oversight of execution was found to be applicable in instances where the debtors were the owners of the homes concerned, and where the loss of ownership of those homes would immediately and directly affect their existing access to adequate housing.

[48] Nedbank is prepared to accept that, potentially, a beneficiary may be in a position where the dwelling she occupies may only nominally be held in the name of a trust. It then accepts that in such a case it could, depending on the circumstances, be fair to prefer form over substance and treat a beneficiary as if she is the owner. It argues, however, that in the present matter there is no indication that the property is only nominally being held by the Trust. It argues that the contrary is the case: the Trust operates as a business, borrowing operating capital against security of its business asset, the farm; the main purpose of the farm is business; and the housing facilities are incidental to the main business. Nedbank therefore takes issue with paragraph 28 of the Supreme Court of Appeal judgment, which reads:

> "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 section 26 of the Constitution."

Nedbank contends that such beneficiaries are already adequately protected by ESTA and PIE, and are not entitled to the additional protection of rule 46A.

[49] Regarding the farmworkers, Nedbank submits that their right to adequate housing is already adequately provided for by existing legislation in the form of ESTA, as any new owner wishing to evict them is bound by the prescripts of section 26 of the Constitution and the provisions of ESTA. They are, the argument goes, not entitled to the additional protection of rule 46A, which was meant for the individual judgment debtor who is the owner of the house in which she lives, and which house is due to be sold in execution. Nedbank further argues that the requirement in rule 46A(3)(b), that notice be given to *any affected party*, refers to entities such as preferential creditors, the local municipality and body corporates who have commercial interests in the proceeds of the sale. Therefore, according to Nedbank, the right to be given notice is triggered by ownership of the property and not by mere occupation thereof. Nedbank argues that in any event, the applicants did not even provide it with the details pertaining to the farmworkers' tenure, such as whether it was dependent on a contract of employment, or lease or any other arrangement.

[50] In the alternative, Nedbank argues that even if it could be found that rule 46A ought to have applied, its provisions were materially complied with, allowing a court to condone any non-compliance if it is of the view that good cause was shown. It argues that in this matter the High Court was in a position to consider the matter as full papers had been exchanged, the parties were legally represented and had a full opportunity to place all relevant factors to be considered, as envisaged by rule 46A(2)(b), before the Court.

Issues on the merits

[51] During the hearing, counsel for the applicants made certain concessions which impact standing, jurisdiction and the relief sought. The one concession, correctly made, regarding the merits is that the money judgment is competent and should stand.

[52] Initially, during argument by counsel for the applicants, it appeared as if the only issue before this Court is whether the farmworkers are affected persons in terms of rule 46A(3)(b) of the Uniform Rules. However, in argument, counsel for Nedbank argued that neither the Trust beneficiaries nor the farmworkers were entitled to notice in terms of rule 46A(3)(b) and that rule 46A is not applicable at all to residential immovable property owned by a trust. Therefore, what has to be considered, bearing in mind the facts of the matter, is whether the Trust beneficiaries and the farmworkers fall in the category of "any other party who may be affected by the sale in execution". A related matter is whether residential property owned by a trust, but occupied by natural persons as their primary residence falls within the scope of the rule. What also arises is whether rule 46A can be invoked by occupiers other than the judgment debtor who utilise the immovable property as their primary residence.

[53] The logical starting point is the purpose of the rule. In order to discern its purpose, it is helpful to trace the context and the jurisprudence that led to the formulation of rule 46A. As the rule seeks to further entrench the right to adequate housing as enshrined in section 26 of the Constitution. It is helpful to have regard to how courts have dealt with cases where it transpired that there was a threat to section 26 rights.

Background leading to the drafting of rule 46A

[54] Rule 46A was added to the Uniform Rules with effect from 22 December 2017.[27] The historical background of rule 46A may be traced to *Jaftha*, which concerned two indigent judgment debtors who were at risk of losing their only accommodation if the sales in execution of their homes were to proceed.[28] Executions against immovable property in the Magistrates' Court were dealt with in terms of section 66(1)(a) of the Magistrates' Courts Act.[29] The constitutional validity of section 66(1)(a) was challenged on the basis that it infringed a judgment debtor's section 26 constitutional

[27] GN R1272 *GG* 41257, 2017. The equivalent new rule in the Rules regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa is rule 43A.

[28] *Jaftha* above n 15 at paras 3-5.

[29] 32 of 1944.

rights. Section 66 made provision for a process whereby a judgment debtor's home could be sold in execution by the sheriff on the strength of a writ of execution issued by the clerk of the court if there was no movable property or where such property was insufficient to satisfy the judgment.

[55] In dealing with the purpose of section 26, this Court said:

> "Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified."[30]

[56] The Court having regard to the effect of section 66(1)(a) on the right to adequate housing held:

> "The importance of access to adequate housing and its link to the inherent dignity of a person has been well emphasised by this Court. In the present matter access to adequate housing already exists. Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity. Section 66(1)(a) is therefore a severe limitation of an important right."[31]

[30] *Jaftha* above n 15 at para 29.

[31] Id at para 39.

[57] It is clear that the concern of this Court was the deprivation of the poor of their homes. This led the Court to the conclusion that judicial oversight is required when seeking a writ of execution on residential immovable property in order to protect the section 26 right to adequate housing.[32]

[58] In addressing an appropriate remedy, the Court highlighted that it is not possible to delineate all circumstances in which a sale in execution would not be justifiable. It also emphasised that there are several ways in which the facts of a case might differ and that it was not possible to anticipate all permutations which might arise in other cases in the future:

> "There are countless ways in which the facts of a case might differ and it would not be possible to anticipate all these permutations. An appropriate remedy should be sufficiently flexible, therefore, to accommodate varying circumstances in a way that takes cognisance of the plight of a debtor who stands to lose his or her security of tenure, but is also sensitive to the interests of creditors whose circumstances are such that recovery of the debt owed is the countervailing consideration, in a context where there is a need for poor communities to take financial responsibility for owning a home."[33]

[59] Clearly the Court in *Jaftha* was alive to the fact that the justice system should be such that there should be hesitation or caution before people who already have access to adequate housing are deprived of their properties. The Court also accepted in *Jaftha* that in certain circumstances execution cannot be avoided.[34] However, it is important to emphasise that the Court appreciated that there may be circumstances that are different from the facts in *Jaftha* and highlighted the point that deprivation will depend on the facts of each case.

[60] The Court then concluded:

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[32] Id at paras 54-60.

[33] Id at para 53.

[34] Id at para 42.

> "It was the appellants' contention that an appropriate remedy would require that once insufficient movable property to satisfy the debt has been found a creditor should approach a court to request execution against the immovable property of the debtor. It would then be for the court to order execution and only if the circumstances of the case make it appropriate.
>
> It is my view that this is indeed an appropriate remedy in this case. Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on sections 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act."[35]

[61] *Gundwana* reaffirmed *Jaftha* and extended its purview to cases where the creditor is seeking to execute against a property put up as security in the form of a mortgage bond.[36] The case concerned the constitutionality of rule 31(5) of the Uniform Rules, which empowered the Registrar of the High Court to order default judgment and declare immovable property specially executable. The facts in *Gundwana* were different from *Jaftha* but there, as well, the judgment debtor was at risk of losing a home. Regarding the fact that the home was put up as security for a loan, this Court held that:

> "[T]he willingness of mortgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to put those cases beyond the reach of *Jaftha*."[37]

[62] The Court further held regarding the function of the courts:

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[35] Id at paras 54-5.

[36] *Gundwana* above n 16 at paras 48-9.

[37] Id at para 49.

> "It is rather ironic that the effect of this judgment is to restore to the courts a function that they exercised for close on a century before the introduction of rule 31(5) in 1994. The change to the original position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders."[38]

[63] This Court then highlighted the importance of tailoring a remedy after having regard to the facts of a particular case and also highlighted that execution itself is not an odious thing. But the Court stressed the point that other available means to satisfy the debt should be explored. It stated:

> "In *Jaftha*, Mokgoro J, before listing some relevant factors that needed to be considered in judicial oversight of the execution process, warned that 'it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight'. Mindful of that warning, I would merely add the following. It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."[39]

[64] When one has regard to the facts of *Jaftha* and *Gundwana*, and the reference of the Court to section 26 of the Constitution, it must be accepted that rule 46A aims to protect and entrench the right of access to adequate housing. This Court in *Jaftha* has concluded that section 26(1) is not triggered in every execution against immovable

[38] Id at para 53.

[39] Id at para 54.

property. The Supreme Court of Appeal in *Saunderson* endorsed this principle and further expanded on the adequacy aspect of the right:

> "But *Jaftha* did not decide that the ownership of all residential property is protected by section 26(1); nor could it have done so bearing in mind that what constitutes 'adequate housing' is necessarily a fact-bound enquiry. One need only postulate executing against a luxury home or a holiday home to see that this must be so, for there it cannot be claimed that the process of execution will implicate the right of access to adequate housing at all."[40]

[65] Having dealt with how the Courts have protected the right enshrined in section 26, and the advent of rule 46A, I will now look closely at the language used in the rule, as well as its interpretation and applicability. In the analysis of who qualifies as an affected person, the applicable provisions of rule 46A should be considered. In *Democratic Alliance v Speaker of the National Assembly*,[41] this Court reiterated the proposition that—

> "'context' does not mean only 'parts of a legislative provision which immediately precede and follow the particular passage under examination'; it 'includes the entire enactment in which the word or words in contention appear.'"[42]

Rule 46A(1)

[66] Rule 46A(1) provides that the rule applies whenever an *execution creditor* seeks to *execute* against the *residential immovable property of a judgment debtor*. Rule 46A (1) therefore applies "whenever", meaning in all instances, where there is an execution against residential immovable property and the execution is at the instance of an *execution creditor*. Further, the property against which execution is sought must be the residential immovable property of a judgment debtor. Therefore, the phrase,

[40] *Saunderson* above n 9 at para 17.

[41] *Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC) at para 27. This was also cited with approval by this Court in *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 29.

[42] Id at para 27. This was also cited with approval by this Court in *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 29.

"residential immovable property of a judgment debtor" can and should be interpreted to mean immovable residential property "belonging to" or "owned by" the judgment debtor. At this stage of the enquiry, the question is whether the immovable property which the judgment debtor "owns" is "residential immovable property". Whether this is the nature of the property depends, in my view, on the physical characteristics of the property coupled with its actual use.

[67] Therefore, the focus of the text in rule 46A(1) is on the following:

(a) It states the circumstances in which the rule applies. These are whenever there is an execution at the instance of a judgment creditor against a judgment debtor; and

(b) It further identifies the type of property to which the rule applies and stipulates that it is the residential immovable property of the judgment debtor.

Rule 46A(2)

[68] Rule 46A(2) deals with the factors that a court considering an application under this rule must take into account. Rule 46A(2)(a)(i) and (ii) provide that the court *must* establish whether the immovable property which the execution creditor intends to execute against is the "primary residence of the judgment debtor" and that, if this is so, it must consider alternative means of satisfying the debt, by the judgment debtor, other than execution against the judgment debtor's primary residence.

[69] 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. After the court has considered all the relevant factors, it can then determine whether execution against such property is warranted. This narrowed focus of rule 46A(2) is understandable when one keeps in mind the purpose of the rule; that is, to entrench the section 26 rights to adequate

housing. Put differently, if property is the primary residence of the judgment debtor, rule 46A(2) requires that the court must exercise caution before it declares it executable.

Rule 46A(3)(b)

[70] Rule 46A(3)(b) requires that every 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", including the entities referred to in rule 46(5)(a), provided that the court may order service on any other party it considers necessary.

[71] The language used in rule 46A(3)(b) is peremptory. It states that the application shall be on notice to the judgment debtor and to any other party who may be affected by the sale in execution including the entities referred to in rule 46(5)(a). It also contains a proviso that grants the court a discretion to order service on any other party it deems necessary. Rule 46(5)(a) provides that, subject to rule 46A and any order made by the court, no immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless the execution creditor has caused notice of the intended sale to be served upon: preferent creditors; the local authority, if the property is rated; and the body corporate, if the property is a sectional title unit.

[72] There is good reason why notice should be given to the parties stipulated in rule 46(5)(a). It is because they may potentially have a claim against the immovable property. Their specific mention was made because they have a direct and substantial interest in a forced sale. Service upon these entities is as a result of legal requirements, and their interest in foreclosures has not been disputed.

[73] The entities listed in rule 46(5)(a) also have a common denominator. None of them is given notice on the basis of a potential infringement of their section 26 rights. Their interest is purely commercial and is clearly not the kind of interest that occupied this Court's mind when it decided *Jaftha* and *Gundwana*. Preferent creditors are entitled to the proceeds of estate assets in preference over other creditors. The local

authority is entitled to insist that its property rates be paid before the property is transferred to the prospective buyer and may refuse to issue a rates clearance certificate. The body corporate may also require that its levies be paid before the property is transferred. While rule 46A is applicable to all residential immovable property, its purpose is to protect the right to adequate housing. It does not extend to the protection against the execution of residential property that does not result in the infringement of this right, except with regard to those entities listed in rule 46(5).

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

[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.

[76] Certain parts of rule 46A apply only to residential immovable property which is the "primary residence" of the judgment debtor. These provisions are rule 46A(2)(a)(i), 46A(2)(b) and 46A(8)(d). In essence, these are the provisions which require the court not to order execution against a primary residence of the judgment debtor unless there is no other satisfactory means of satisfying the judgment debt.

[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.

[78] 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".

[79] During argument in this Court, counsel for the applicants postulated a scenario where a minor claimant in a Road Accident Fund matter had received compensation, and a trust was formed to manage her property. In that scenario the trust would be a juristic entity but the sole beneficiary would be a natural person. How can it be concluded that the natural person residing in that property may not be an affected person and that rule 46A is not applicable in that scenario, if we accept that the immovable property is their primary residence? Rule 46A(2)(a)(ii) provides that a court considering an application for execution must also consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence. In the above example of a trust set up for a minor RAF claimant, the court would be entitled to postpone execution to see if there are no other ways of satisfying the debt.

[80] The property in this matter had mixed characteristics and use. The farm is a business enterprise but the residential premises are used as residential immovable property. The premises occupied by the trustees, the beneficiaries and the farmworkers are thus residential immovable property within the meaning of rule 46A(1). We know that the applicants in this matter are not complaining that they were not given notice as envisaged in rule 46A. We also know that the applicants had signed a settlement agreement in which they effectively consented to judgment being taken and an order that the property be declared specially executable. In any event, the reality is that after the sale of the property there will be a surplus (on the assumption that at least the reserve price set by the parties is achieved) and these Trust beneficiaries, who are seemingly members of the family, may utilise the surplus to acquire alternative housing. But those are some of the factors that the court declaring the property specially executable would have considered in terms of rule 46A(8).

[81] It must be borne in mind that rule 46A applies not only to executions against "primary residential immovable property" but 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.

[82] The Supreme Court of Appeal in its judgment moved from the premise that trust beneficiaries and farmworkers' section 26 rights are clearly distinguishable, and that rule 46A does not find application because farmworkers are entitled to adequate legislative safeguards against eviction, such as ESTA, in the event of their eviction. It is this that I now turn to consider.

Are farmworkers "any other party who may be affected by the sale in execution"?

[83] Farmworkers occupy the property through employment contracts and other terms applicable between them and a farm owner. Section 24 of ESTA provides:

> "**24. Subsequent owners**
>
> (1) The rights of an occupier shall, subject to the provisions of this Act, be binding on a successor in title of an owner or person in charge of the land concerned.
>
> (2) Consent contemplated in this Act given by the owner or person in charge of the land concerned shall be binding on his or her successor in title as if he or she or it had given it."

[84] While it is true that we do not know the tenancy conditions of the farmworkers in this matter, it is irrelevant for the purposes of section 24 of ESTA. Regardless of the manner in which the Trust gave the farmworkers permission to occupy the property, either oral or written, this consent will nevertheless bind potential future owners of the property by virtue of section 24(2). As the provision states, the new owner of a property occupied by farmworkers will be bound to the existing rights of the farmworkers residing on the property at the time of the sale in execution. Consent to remain in the property will not change simply because the property has been sold in execution.

Therefore, the rights of the farmworkers will remain the same even when there has been a change of ownership.

[85] Any owner of property, whether it is the present owner or a successor in title, may change her plans concerning the property at any time, even if the property is not subject to a sale. The point is that the farmworkers' security of tenure will not necessarily be affected by the sale in execution. The exclusion of the farmworkers from the operation of rule 46A is as a result of the fact that their section 26(1) rights are not impaired by a sale in execution and their rights are adequately protected by section 24 of ESTA.

[86] The question of their rights in terms of section 26 of the Constitution must be determined at the point of the sale in execution. Of course, in the event of an eviction, the provisions of sections 8 and 9 of ESTA must be complied with. At that stage, the applicable provision is section 26(3) of the Constitution, which provides that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances".

[87] In any event, in this matter there is no evidence that the farmworkers' security of tenure may be affected by the proposed sale in execution. It is thus safe to conclude that it is not necessary to give these farmworkers notice. It would be stretching the rule too far to say that, because one does not know whether they may or may not be evicted in terms of ESTA in the near future, they must be entitled to notice. Even where the farming property is subject to a mortgage, and the owner's consent to occupation was given after the mortgage was registered, section 24 of ESTA would protect the farmworker.

[88] Section 8 of ESTA provides that an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to those listed therein. Section 9 of ESTA provides that notwithstanding any other law, an occupier may be evicted only

in terms of an order of court issued under the Act. It also provides that a court may make an order for the eviction of an occupier if the occupier's right of residence has been terminated in terms of section 8 of ESTA. Section 9(2) of ESTA lists other requirements to be satisfied before a court can make an order for eviction.

[89] What then would be the situation of other persons who occupy the immovable property for residential purposes? Here I have in mind the rights of tenants occupying property through a lease agreement. A tenant's right to occupy the property, in the event of a sale, may be protected through the Roman-Dutch law rule of *huur gaat voor koop,*[43] (lease enjoys preference over sale). The underlying principle behind this rule is that, in the event of the sale of the property, the new owner steps into the shoes of the previous owner when it comes to the rights and obligations in terms of the lease agreement.

[90] In the case of lessees, the *huur gaat voor koop* rule would safeguard the position of a lessee where execution is levied against unmortgaged property. In the case of mortgaged property, the rule would likewise safeguard the lessee if the lease was concluded before the mortgage bond was registered. Where, however, the lease was concluded after the registration of the mortgage bond, the rule is that the property must first be put up for sale subject to the lease. If the property does not realise sufficient funds to discharge the secured indebtedness, the mortgagee can insist on the property being put up for sale free from the lease, and the lessee's right of occupation would then be imperilled by the sale in execution and in such a case notice to the lessee might be required in terms of rule 46A(3)(b).

Costs

[91] The applicants' belated concern for the security of tenure of the farmworkers is self-serving. The rights of the farmworkers were raised for the first time in the affidavit opposing the application for confession judgment. When the settlement agreement was

[43] Brits above n 24 at 86.

concluded, the applicants were indifferent about the farmworkers and made no provision for them in the settlement agreement. Furthermore, the applicants have reneged on the settlement agreement. As held by Mahomed DP in *Gauteng School Education Bill*:[44]

> "A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the Court takes a view which is different from the view taken by the petitioner. This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or *they have acted from improper motives* or there are other circumstances which make it in the interest[s] of justice to direct that such costs should be paid by the losing party." (Emphasis added.)

[92] I find that in this matter the applicants had improper motives; that is, they used the farmworkers as a means to frustrate execution.

Order

[93] I therefore make the following order:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.
3. The cross-appeal is struck from the roll and the respondent is ordered to pay the costs occasioned by the cross-appeal.

[44] *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC);1996 (4) BCLR 537 (CC) at para 36.

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