

EXECUTION SALE OF A DEBTOR'S HOME HELD IN A TRUST

Petrus Johannes Bestbier and Others v Nedbank Limited (150/2021) [2022] ZASCA 88 (13 June 2022)

For a while now, it was considered that the Rule 46A judicial scrutiny that is performed before an order for the sale in execution of a debtor's primary residence is granted applies only where an indigent debtor risks losing the home he owns in his personal capacity. Is the same scrutiny then denied to trustees, shareholders who live in a property owned by a company or trust? And does it matter that the mortgage debt relates to loans obtained for the business that is (also) conducted on the property, and not primarily for the purchase of the land as primary residence? No, said the Supreme Court of Appeal here, as the Courts' scrutiny must take all factors into account and weigh these up in context, before the execution order is granted.

The Judgment can be viewed [here](#).

FACTS

The Goede Hoop Trust ('the Trust') conducts business as a wine farm, wine cellar and merchant, and restaurateur in Stellenbosch. The Trust also owns equipment, machinery and stock in trade amounting to approximately R5 million. Two of the trustees of the Trust reside in the main house on the farm, whilst one of the trust beneficiaries (and the son of the two trustees) occupies a cottage on the property. The Trust's permanent employees and their families occupy 12 smaller cottages on the farm.

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, totalling some R9,2 million. When the Trust failed to comply with its obligations under the loan agreements, the bank issued summons claiming repayment of the outstanding debt (some R 8,5 million) and an order declaring the Trust's mortgaged property executable, on failure to pay. This was followed with an application for summary judgment.

Subsequent thereto, in March 2019, the bank and the trustees reached a settlement: The trustees admitted their indebtedness to the bank and agreed to pay a specified amount together with interest. They further agreed that failure to pay the amount would entitle the bank to proceed with steps to enforce payment, failing which they would arrange for a private sale of the property; or, failing this, judgment by consent. They also agreed to an order declaring the property executable and they agreed on the minimum reserve price. Nothing came from these undertakings by the trustees.

As a result, the bank successfully launched an application for judgment by consent, including an order declaring the property executable. The Cape Town High Court granted judgment in favour of the bank.

The trustees appealed. They disputed that the order (declaring the property executable) complied with the procedure prescribed in High Court Rule 46A which dictates steps for a court to follow when asked to declare a person's residential property executable (with the aim to ensure that an indigent debtor in these circumstances does not lose his access to adequate housing if an order is granted without more). They specifically raised the point that in this context, it should not matter that the property that was their primary residence, was owned by a Trust.

HELD

The legislative and historical context of High Court Rule 46A

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- Our Constitution provides for justiciable socio-economic rights, one of which is the right to have access to adequate housing (enshrined in section 26 of the Constitution). Parallel hereto, High Court Rule 46A imposes procedural rules when an order for the execution against residential property is sought and gives effect to the constitutional right to adequate housing.
- In 2010, the High Court Rules were amended to introduce an express requirement (in Rule 46(1)(a)(ii)) that residential property may only be sold in execution if so authorised by a court after it has considered all the relevant factors. Rule 46A was added to the rules in December 2017 in response to divergent approaches adopted by the provincial courts regarding the nature of the enquiry and factors to be considered by the Court in these circumstances.
- *Rule 46A(1) and (2) provide that:*

*'(1) This rule applies whenever an execution creditor seeks to execute against the **residential immovable property of a judgment debtor**.*

(2)(a) A court considering an application under this rule must –

*(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.**' (Our emphasis).*

- The historic context of this Rule is important. The Constitutional court judgments in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* ('*Jaftha*'), where the constitutionality of section 66 of the Magistrates' Court Act 32 of 1944 (the Magistrates' Act) was considered, has reference. (That section stated that 'whenever a court gives judgment for the payment of money ... such judgment, in case of failure to pay such money forthwith ... at the time and in the manner ordered ... shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.')
- The Constitutional Court held that section 66(1) was unconstitutional as it violated the constitutional right to access to housing to the extent that it allowed for the execution of the homes of indigent debtors resulting in them losing their security of tenure even where there were no countervailing considerations in favour of the creditor justifying the sales in execution.
- The Constitutional Court ordered that the appropriate remedy to save the section would be an order *requiring judicial oversight over the execution process of all immovable property*. Later on, in *Gundwana v Steko Development and Others* ('*Gundwana*'), the Constitutional Court clarified that the *Jaftha* decision applies not only in exceptional cases but also in typical mortgage foreclosure cases brought before the High Court. Hence the introduction of Rule 46A.

- It is so that section 26(1) of the Constitution is not compromised in every case where execution is levied against immovable property; the "constitutional defect" arises only where the execution sale would rob a judgment debtor of access to adequate housing.

Is the enquiry prescribed in Rule 46A triggered only when a property is the debtor's primary residence?

- Initially, after *Gundwana*, the Rules were interpreted by the Courts to mean that: (a) execution may only follow upon a judgment by a court of law; and (b) where execution against the homes of *indigent* debtors who run the risk of losing *their own homes* is sought, judicial oversight of the execution process by a court of law is essential. Simply put, rule 46A was meant to protect indigent debtors who were in danger of losing the homes that they owned following on execution steps initiated by a creditor.
- In the present matter, the facts are diametrically opposite. The circumstances do not involve a mortgage loan taken out to acquire a primary residence, but involve a commercial loan to be employed in the business of the trust, which conducts business as a wine farm. The question is whether the execution of the immovable property could impair the trustees' existing and potential access to adequate accommodation.
- *Jaftha* and *Gundwana* were only concerned with cases where the right to adequate housing of indigent persons was impaired or potentially impaired. As mentioned, section 26(1) of the Constitution is not compromised in every case where execution is levied against immovable property.

Judicial Oversight

- The aim of rule 46A is to assist the Court in considering whether the section 26 rights of the judgment debtor would be violated if his/her house is sold in execution. Rule 46A contains procedural prescripts, not substantive law.
- Thus, section 46A imposes a "judicial oversight" process so that the judicial officer can engage in a balancing process and consider all the relevant circumstances of a case to determine whether there is good cause to order execution against the immovable property concerned. The aim of judicial oversight is to determine whether rights in terms of section 26(1) of the Constitution are implicated. Such an enquiry would be necessary in every case where execution against a residential home is sought, to see whether section 26(1) rights are implicated.
- Applying these considerations to the facts, the Court *a quo* (the Cape Town High Court) correctly found that the trustees' rights to adequate housing were not engaged or compromised: The application to declare the property executable was brought after numerous attempts by the bank to obtain payment from the trustees, who did not dispute the debt and even consented to the judgment. The trustees also failed to show how their constitutional rights to adequate housing might be impacted.
- The text of rule 46A(1) reveals that the rule applies whenever an execution creditor seeks to execute against residential immovable property of a judgment debtor. Notably, rule 46A(2) provides that a court considering an application in which a creditor seeks to execute against the judgment debtor's immovable property must consider various matters. Given that rule 46A(2) provides that a court 'shall not' authorise execution unless 'all relevant factors' have been considered, there is no reason why the fact that the relevant immovable property is owned by a trust and occupied as a place of residence by the beneficiaries of that Trust should not be one of the factors to be taken into account. It is also relevant 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 . . .’.

- It is clear from a plain reading of the entire text of rule 46A that it is important to have a preceding enquiry in all cases where the immovable property of the judgment debtor is used as residential immovable property. This preceding enquiry should be directed at establishing whether the persons occupying the immovable property in question are of the ‘*Jaftha* kind’ (i.e., indigent persons who will lose their primary residence if the property is sold in execution and who would, as a result, no longer have access to adequate housing). A creditor seeking to execute against immovable property owned by a trust would have to establish whether beneficiaries of that trust occupy the immovable property in question. Where that has been established, rule 46A would have to be followed.
- It is incorrect to hold that Rule 46A’s application is limited, in the tradition of *Jaftha* and *Gundwana*, to a natural person and not a legal person such as where immovable property to be executed upon is held by a company, close corporation or a trust which property is the shareholders, members or beneficiaries’ only residence.
- Due regard must be had to the impact that the sale in execution is likely to have on vulnerable and poor beneficiaries who are occupying the immovable property owned by the judgment debtor, who are at risk of losing their only homes. Given the clear provisions of rule 46A, there can be no reason why trust beneficiaries who fall in the *Jaftha*-kind category and occupy the trust’s immovable property as a primary residence (and are thus likely to be affected by the order declaring the immovable property specially executable) should be barred from the protection of rule 46A merely because the property in question is owned by a trust.
- The fact that, in addition to being a primary residence for two trustees and a trust beneficiary, the Trust’s immovable property was also used commercially as a wine-farm cannot, in and of itself, and without any preceding enquiry, be a bar to affording the beneficiaries the protection of rule 46A. The protection of rule 46A should be objective. Thus, the exclusive consideration of the nature of the entity in which the judgment debtor’s immovable property is registered as the decisive determining factor for affording the protection envisaged in section 26 of the Constitution as set out in rule 46A would defeat the very purpose for which the protection is granted. Vulnerable and poor beneficiaries of a trust who use the trust’s immovable property as their home ought not to be barred from the protection of s 26 of the Constitution merely because the judgment debtor is a trust and not a natural person.

The farm workers

- As to the prejudice that the farm workers would suffer through a sale in execution, the trustees stated that the workers would be seriously affected by the sale in execution. They do not explain the farmworkers’ tenure, i.e. whether it was dependant on a contract of employment, or lease or any other arrangement. The same cannot be said about the trust beneficiary in this matter, as he does not fall within the definition of ‘occupier’ in the relevant statute. The applicability of rule 46A under these circumstances could not be more manifest.

Conclusion

- To sum up, the object of judicial oversight is to determine whether rights in terms of section 26(1) of the Constitution are implicated, and such determination cannot be made without the requisite judicial oversight. In the present case, Rule 46A was applicable despite the judgment debtor being a trust.
- However, judicial scrutiny based on the facts of this case reveals that the applicability of rule 46A cannot avail the trustees because they have failed to show that they fall under the *Jaftha*-kind category of the home owner. Thus, there is 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.

CONCLUSION

The appeal was dismissed.