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LEGAL UPDATE

The applicability of Rule 46A to juristic persons and trusts: Have we been getting it wrong all along? Yes- says the SCA

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by Tandiwe Matshebela, Director, Neo Kgame, Senior Associate and, Zoe Austen, Candidate Attorney

Since Rule 46A of the Uniform Rules came into operation on 22 December 2017, South African Courts have recurrently held that the procedural protection afforded under Rule 46A does not apply to property owned by a company, close corporation or trust, even if such property is occupied for residential purposes by a natural person who is a shareholder, member or beneficiary of the respective company, close corporation or trust.

The legal position as we know it, however, has now been overruled by the Supreme Court of Appeal (SCA) in the case of *Petrus Johannes Bestbier and Others v Nedbank Limited* (150/2021) [2022] ZASCA 88 (13 June 2022) ("*Bestbier*") wherein the court held that *"a blanket approach that considers all immovable property held in the name of a juristic person to fall outside the protection of rule 46A is too narrow"*.

Below, we unpack this recent judgment of the SCA (view judgment here) and what it means for execution creditors going forward.

The historical background of Rule 46A

Rule 46A regulates the procedure for which execution creditors are to follow when seeking to execute a judgment debt against immovable property.

The legal genealogy of Rule 46A can be traced back to the case of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC) ("*Jaftha*") wherein the Court was tasked to consider the constitutional validity of section 66(1)(a) of the Magistrates Courts Act 32 of 1944 ("the Magistrates Court Act") which permitted the sale in execution of property in order to satisfy a debt, without any judicial oversight.

In *Jaftha*, the judgment debtor, being unable to meet a judgement for non-repayment of a meagre loan of R 250, was forced to vacate her home, which was sold in execution for R 5 000 — far below the market-value of the property.

Recognising the injustice caused to the judgment debtor, the court held that a sale in execution of residential immovable property was subject to the judgment debtors' right to have access to adequate housing under section 26 of the Constitution, and that the failure to provide, in section 66(1)(a) of the Magistrates' Court Act, for judicial oversight over sales in execution of immovable residential properties of judgment debtors was unconstitutional and invalid. The Constitutional Court further held that the **main reason for judicial oversight is to prevent execution against the homes of indigent debtors, where they stand to lose their security of tenure and risk being rendered homeless.**

In 2011, the constitutional principle established by *Jaftha* was applied and further developed by the Constitutional Court in the case of the *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) ("*Gundwana*") by confirming the need for judicial scrutiny in all execution cases concerning residential property and not just in exceptional cases such as those presented in the case of *Jaftha*.

It is against the background of *Jaftha* and *Gundwana* that Rule 46A was enacted: to give effect to section 26 of the Constitution and afford vital protection to indigent persons who risk losing their homes.

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The interpretation of Rule 46A prior to *Bestbier*

To understand why the Courts have traditionally adopted "a blanket approach" that Rule 46A does not apply to property owned by juristic persons and trusts, one need not look any further than the wording of the rule itself which states as follows:

> *"(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."*

In this regard it is submitted that a *literal* reading of Rule 46A(1) instructs that:

1. The rule will only apply if:
    - the immovable property is used for residential purposes by the person cited as the judgment debtor; and
    - the judgment debtor is the registered owner of the immovable property.
2. The rule does not apply if the judgment debtor and the occupier of the property are two different persons.

In *FirstRand Bank Ltd v Folscher and another and similar matters* 2011 (4) SA 314 (GP) ("*Folscher*") the court considered the meaning of "*primary residence*" and "*judgment debtor*" and held that:

1. a person's primary residence is the *dwelling* where they usually live, typically a house or an apartment, and a person can only have one primary residence at any given point in time;
2. a "*home*" means the place where one lives; the fixed residence of a family or household; a dwelling house or the physical structure within which one lives, such as a house or apartment";
3. "*housing*" means "*shelter*" or "*lodging*"; and
4. the term "*primary residence*" was held to be the same concept as "*the home of a person*"

In considering the meaning of the term "*judgment debtor*" the court in *Folscher* referred to the case of *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) (*Saunderson*) wherein it was held that the term refers to "***an individual, a person"*** and concluded that:

1. "*It is therefore the* ***primary residence owned by a person*** *that falls within the purview of the rule*"; and
2. ***"Immovable property owned by a company, a close corporation or a trust****, of which the member, shareholder or beneficiary is the beneficial owner,* ***is not protected by the amended rule*** *requiring judicial oversight by way of an order of court authorising a writ of execution,* ***even if the immovable property is the shareholder's, member's or beneficiary's only residence."***

Following the dictum in *Saunderson*, the court in *Investec Bank Limited v Fraser NO and Another* 2020 (6) SA 211 (GJ) ("*Investec v Fraser*") similarly held that "*if the judgment debtor is not a natural person, the constitutional considerations and protections are not available to such a judgment debtor and the right to access adequate housing in section 26 of the Constitution is not implicated*".

It is a known fact that legal entities and trusts are not capable of residing in property and calling it a home as they (as the court aptly put it in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 (HL)), have "*no body to be kicked and no soul to be damned*".

In light of the above, it is not difficult to see why the Courts – until now – have regarded the *persona* of the judgment debtor as an essential enquiry to be made when determining whether a judgment debtor's section 26 rights would be violated if his or her property is sold in execution, and by implication the application of Rule 46A.

Findings of the court in *Bestbier*

In determining the question of whether Rule 46A applies to an immovable property owned by a trust wherein it was alleged that the dwelling is a primary residence of the trust beneficiaries, the SCA in *Bestbier* held *inter alia* that:

1. The underlying rationale of Rule 46A is to impose procedural rules to give effect to the fundamental right to adequate housing. Thus, Rule 46A must be interpreted purposively to achieve what was stated in *Jaftha* and prevent the social injustices of execution processes.
2. The object of judicial oversight is to determine whether rights in terms of section 26(1) of the Constitution are implicated. Judicial oversight is therefore constitutionally required so that the judicial officer can engage in a balancing process and consider all the relevant circumstances of a case to determine whether there is good cause to order execution against the immovable property concerned.
3. 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'.*** 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.
4. 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.***
5. It is therefore incorrect to conclude that a person to be protected by Rule 46A is, in the tradition of *Jaftha* and *Gundwana*, a natural person and not a ***legal person*** such as a company or a close corporation, nor an institution such as a trust even if the immovable property is the shareholder's, member's or beneficiary's only residence.

Having regard to the above, it is clear that the main import from the Bestbier case is this: in order to adequately give effect to section 26 of the Constitution, rule 46A ought to be interpreted broadly and purposefully to ***include*** residential property occupied by "beneficial owner" through a juristic person or trust.

In light of the SCA's full concurring bench judgment in *Bestbier*, it would appear that the identity of the registered owner of the immovable property has now become redundant. The relevant question is rather who *occupies* the residential immovable property sought to be declared executable in order to establish whether Rule 46A finds application.

Questions which may arise from creditors, post *Bestbier*

Now that it has been established by *Bestbier* that Rule 46A must be interpreted broadly and purposefully to include an occupier who is a "beneficial owner" through a juristic person or trust, possible issues which execution creditors' may need to grapple with are:

1. the extent to which Rule 46A applies to other categories of occupiers who are neither the registered owner nor a "beneficial owner" through a juristic person or trust; and
2. whether it is necessary for an occupier (in the case where he or she is not the judgment debtor) to be joined as a party in an application for execution.

We discuss the possible scenarios pertaining to these issue below.

Does Rule 46A apply to tenants as occupiers?

Bestbier has made it clear, that where a person's right in terms of section 26(1) of the Constitution is found to be implicated, Rule 46A must be applied.

Accordingly, the key question to be asked in this instance is whether a tenant is entitled to protection under section 26 of the constitution in circumstances where the leased property is subject to an application to declare the property specially executable.

In our view, the simple answer to this question is no. *Bestbier* has not changed the legal position in this regard.

In the case of *Nedbank Ltd v Fraser and Another* 2011 4 SA 363 (GSJ), the court held that the judicial oversight requirement does not apply to a tenant of the property that is sought to be attached in execution, because the interest of the tenant is not akin to that of a homeowner.

In amplification of the above, the court held that tenants are adequately protected by the common-law principle of *huur gaat voor koop* and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998.

Would a recalcitrant debtor, who themselves do not reside in the property, be able to avoid execution of a property by allowing a "Jaftha" kind person to occupy the property?

The difficulties of the findings made by Bestbier were foreshadowed and the consequences elaborated in *Investec v Fraser*, where the court stated:

> *"Such an interpretation could have the unintended consequence of a* ***company or a trust allowing any individual to occupy its property with a view to avoiding or delaying execution against its property****. The execution creditor will then be required to take the steps set out in rule 46A to safeguard the interests of the occupant who is not the judgment debtor and whose rights in terms of section 26 of the Constitution are not implicated."*

While principally it would be possible for a judgment debtor to allow indigent persons to occupy the property with the view of delaying or avoiding execution against the property, it is important for any creditor that is faced with such a scenario to take note of the following:

1. although an execution creditor would be required to take the steps set out in Rule 46A in the scenario contemplated above, this does not mean that a court will decline to grant an order declaring the immovable property specially executable; and
2. this is so, as the Court is enjoined in terms of Rule 46A(2) to investigate the legitimacy of the occupier's claim to tenure which, in the scenario contemplated above, would include considering factors such as (i) the identity of the occupiers and their relation to the owner of the property; and (ii) how long the occupiers have been living on the property; and
3. while it may be difficult for an execution creditor to acquire information about third parties occupying the property, it is important to remember that the burden to bring such information before the court does not lie solely with the execution creditor. If a judgment debtor alleges that an occupier's rights in terms of section 26(1) will be compromised by a sale in execution, it is incumbent upon the judgment debtor to place information supporting that claim before the Court.

To join or not to join?

Given that the SCA has now held that Rule 46A can be applicable to a "beneficial owner" through a juristic person or trust, and not just the judgment debtor, it is understandable why some execution creditors may be confused as to whether such a "beneficial owner" needs to be cited as a party to the application.

Though the court in Bestbier was silent on this issue, our view is that joinder of the "beneficial owner" or any other category of occupier that is not the judgment debtor, is not required in terms of Rule 46A.

The test for joinder is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.

As held by the Court in the case of *FirstRand Bank Limited v Mgedesi and Another* (727/2016) [2020] ZAMPMHC 23 (5 June 2020), the subject matter of an application to have immovable property declared executable, in circumstances where the property is not the primary residence of the judgment debtor, is limited to two aspects:

1. The judgement debtor's right of ownership in the property; and
2. The judgment creditor's entitlement to execute upon its judgment.

It therefore follows that even though an occupier may have interest insofar as security of tenure is concerned in the property, this will not equate to a legal interest in the matter that requires joinder.

Notwithstanding the above, it must be noted that an occupier is considered to be an affected person in terms of Rule 46(5)(a), which rule requires notice to be given to any parties who may be affected by the sale of execution. An execution creditor must therefore ensure that service of an application to declare property specially executable is effected on an occupier.

Conclusion

The decision of *Bestbier* has been highly criticised by legal practitioners for holding that Rule 46A is applicable to property owned by juristic person and trusts. Irrespective, however, of the view held by some that it is the SCA which got it wrong, the decision (until over overturned by a higher court) is binding and must be adhered to.

Given the broad interpretation of Rule 46A by the SCA it may be necessary for execution creditors to adopt a bells and whistle approach to fully comply with Rule 46A. As challenging and cumbersome as this may be, we advise creditors to obtain as much information as possible regarding the occupants of a property (irrespective of who the registered owner is) before instituting applications to declare property specially executable.



Neo Kgame

Director

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