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## Introduction

1. Rule 46A of the Uniform Rules of Court (“**the Rules**”) regulates the execution against residential immovable property. Rule 46 came to effect in response to the South African courts approach regarding factors to be considered when exercising judicial oversight for the execution of residential immovable property.
2. In ***Petrus Johannes Bestbier and Others v Nedbank Limited (Case no. 150/2021) [2022] ZASCA 88 (13 June 2022) (“Bestbier”)***<sup>1</sup>, the Supreme Court of Appeal had to consider whether the above provision is applicable when the debtor is a trust and the immovable property is the primary residence of trust beneficiaries. Below is an analysis of the Supreme Court’s judgment per Molefe AJA.

## Facts

3. The matter is an appeal of the judgment handed down by the Western Cape High Court, Cape Town, per Kusevitsky J, which ordered in favour of the Respondent and declared immovable property owned by the trust executable. The Appellants, in their official capacity as trustees, applied for leave to appeal, which was granted by the court a quo.
4. The property is owned by the trust, and operates as a wine farm, wine cellar, wine merchant and restaurateur. Whilst the main house is occupied by Mr. and Mrs. Bestbier (the First and Second Appellant), their son occupies one of the cottages on the property and their workers occupy a few other cottages on the farm, as their primary residences.
5. The dispute arose from financial assistance offered to the trust, comprising of an overdraft facility and a loan in the amount of **R9,200,000.00 (Nine Million Two Hundred Thousand Rand)**, the amount was secured by 9 (Nine) mortgage bonds over immovable property, which is the subject matter of this appeal, owned by the trust.
6. The trust defaulted on payments per the loan and overdraft agreement, whereafter the

Respondent launched an application for summary judgment. The matter was settled between the parties before it was heard in court. In terms of the settlement agreement (“**the agreement**”), the trustees admitted to their indebtedness and committed to making monthly payments towards the arrears and interest thereon. Any default by the trust entitled the Respondent to approach the court for an application that provided for payment, alternatively private sale, alternatively judgment by consent. The Appellants further agreed to an order declaring the property executable with an agreed minimum reserve price.

7. The Trust defaulted and failed to comply with the obligations in terms of the agreement, which triggered the penalties in the agreement. The Respondent applied for judgment by consent, and an order declaring the property executable, which was opposed by the trustees and ultimately granted by the court *a quo*.

## Issues

8. The Appellants contend that the property met the conditions of a “residential immovable property of a judgment debtor” as defined by the Rules. Therefore, judicial oversight needed to be exercised where residential immovable property is to be executed, and the High Court failed to exercise such oversight in granting its order.

## Consideration of the Applicable Law

9. In coming to its decision, the Supreme Court of Appeal with authority from the Constitutional Court in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC) (“**Jaftha**”)<sup>2</sup> confirmed that Rule 46A was deemed necessary so as to provide indigent debtors with sufficient protection of their right to access to adequate housing as provided for by Section 26(1) of the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”).
10. In *Jaftha* the court declared Section 66(1) of the Magistrates’ Court Act 32/1944 unconstitutional in that it allowed execution against the primary residences of indigent debtors without properly considering the prevailing circumstances, leaving them

homeless. The court in *Jaftha* therefore ordered that judicial oversight be exercised where immovable property is to be executed against, to remedy the constitutional defect as such order limits a constitutional right, which triggers Section 36 of the Constitution.

11. The Constitutional Court in *Gundwana v Steko Development and Others [2011] ZACC 14; 2011 (3) SA 608 (CC)* ("**Gundwana**")<sup>3</sup> confirmed that the decision in *Jaftha* applies generally and not only in exceptional circumstances.
12. As previously indicated, judicial oversight is required where Section 26(1) of the Constitution is compromised, however, the Supreme Court of Appeal in *Mkhize v Umvoti Municipality and Others [2011] ZASCA 184; 2012 (1) SA 1 (SCA)* ("**Mkhize**")<sup>4</sup> held that Section 26(1) is not compromised in each instance where execution against immovable property is being ordered.
13. In simple terms, Rule 46A was meant to protect indigent debtors who were in danger of losing their homes and give effect to Section 26 of the Constitution. The objective of judicial oversight is to determine whether Section 26 of the Constitution is implicated.

## Ratio

14. The loan and overdraft facility were provided for commercial undertakings operated by the trust and does not relate to indigent individuals who stand to be homeless should the order sought be granted (as was the case in *Jaftha*).
15. Per Rule 46A, all relevant factors must be considered before an order declaring immovable property executable is granted. The occupation by the beneficiaries of the trust of immovable property owned by the trust is a relevant factor.
16. However, the argument provided by the Respondent that Rule 46A does not apply to juristic persons is incorrect and narrows down the protection offered by the Rule. Therefore, should the occupants of the property owned by a juristic entity be of the "*Jaftha-kind*", then judicial oversight should be exercised. When the only determining factor is the nature of the entity owning the immovable property, then the purpose of Rule 46A would be defeated.
17. The Appellant however failed to show prejudice suffered by the farmworkers.

18. An essential point is that the order being appealed against herein, is in pursuance of an agreement between the parties, who were legally represented at all material times.
19. Further, in the said agreement the parties had agreed to a reserve price of **R21,000,000.00 (Twenty-One Million Rand)** with the farm having a value of between **R35,000,000.00 (Thirty-Five Million Rand)** and **R40,000,000.00 (Forty Million Rand)**.
20. Finally, the Appellants failed to show that if Rule 46A was applied, the order granted by the court a quo would have been different. Essentially, the Appellants have failed to show that as a result of indigence, the trust beneficiaries will be left vulnerable to homelessness if the farm in question is sold in execution.

#### Decision

21. Rule 46A was indeed applicable in the circumstances, however, the Appellants failed to discharge the onus of proving that the occupants of the property are the "*Jaftha-kind*"<sup>5</sup>.
22. The appeal was dismissed with costs.

#### Conclusion

23. Rule 46A applies in all instances where immovable residential property is to be executed against, regardless of the nature of the entity that owns the property in question.
24. The application of the Rule is preceded by considering all the relevant facts to determine whether the circumstances are similar to the facts in the *Jaftha case*<sup>6</sup>, in which judicial oversight must be exercised to ensure that the execution of the property, if so ordered, does not result in the homelessness of the occupiers due to their indigence<sup>7</sup>.

#### Value

Where residential property is to be declared executable, and the occupiers thereof might become homeless as a result of their indigence, judicial oversight must be exercised.

[1] *Petrus Johannes Bestbier and Others v Nedbank Limited (Case no. 150/2021) [2022] ZASCA 88 (13 June 2022).*

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

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

[4] *Mkhize v Umvoti Municipality and Others [2011] ZASCA 184; 2012 (1) SA 1 (SCA).*

[5] *Bestbier* at para 32.

[6] *Gundwana* at para 43.

[7] *Bestbier* at para 26.

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