



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 13 June 2022

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

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

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Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs including the costs of two counsel, an appeal against the decision of the Western Cape Division of the High Court, Cape Town (the high court).

This appeal concerned the applicability of rule 46A of the Uniform Rules of Court (the rules) and Practice Directive 33A of the high court as the property sought to be declared executable was owned by a trust and was a primary residence of the trust beneficiaries, as well as the trust employees and their families (the farmworkers). The appellants were the trustees of the trust, and the first appellant was also a surety. The trust conducted business as a wine farm, wine cellar, wine merchant and restaurateur in Stellenbosch, Western Cape. The first and second appellants resided in the main house while their son occupied a cottage on the property. The trust's permanent employees and their families occupied 12 smaller cottages on the property. The trust obtained substantial financial assistance from the respondent (Nedbank) in the form of an overdraft and a loan, secured by nine mortgage bonds over the property, totalling R9,2 million. When the appellants failed to comply with their obligations, the respondent issued summons against them for repayment of the debt and an order declaring the trust's mortgaged property executable. The respondent's claim against the appellants amounted to R8 564 443.00 plus interest. The respondent launched an application for judgment by consent, including an order declaring the property executable, which was opposed by the appellants. The high court granted judgment for payment and an order declaring the immovable property executable. The appellants appealed both the judgment and the order. In addition, the appellants disputed the order declaring the property executable, substantially on the grounds that the respondent were obligated to comply with the procedure prescribed by rule 46A.

The appellants contended that the immovable property owned by a trust and occupied as a primary residence by natural persons (such as the trustees, trust beneficiaries and trust employees) constituted residential immovable property of a judgment debtor, therefore triggering the application of rule 46A. The appellants also contended that the high court erred and misinterpreted rule 46A in finding that the rule was only triggered when a property was the debtor's primary residence. It was further argued that the interpretation adopted by the high court was contrary to the value-orientated approach sanctioned by the Constitutional Court, which demanded that the interpretation must be generous and purposive and give expression to the values of the Constitution whilst paying due regard to the language used. The appellants further argued that the high court's interpretation of rule 46A was inconsistent with s 39(2) of the Constitution and that the restrictive interpretation failed to adequately protect the rights under s 26, particularly the rights of persons occupying property owned by a trust, as well as vulnerable farmworkers.

In order for this Court to make a finding under these circumstances, the case of *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others (Jaftha)* had to be applied. In that case, the Constitutional

Court found that it was unconstitutional for a creditor to execute an indigent debtor's home as it violated their section 26 right to housing. The Constitutional Court ordered that the appropriate remedy would be an order requiring judicial oversight over the execution process of all immovable property. The construction and the order in *Jaftha* recognised that the sale in execution of a person's home limited the right to housing, and such limitation must be justifiable in terms of s 36 of the Constitution. Thus, judicial oversight was an essential element of the application for the sale in execution of a residential home.

The SCA held that, the circumstances in *Jaftha* were not the same as the ones in this matter. The circumstances did not involve a mortgage loan taken out to acquire a primary residence but involved a commercial loan to be employed in the business of the trust, which conducted business as a wine farm. The question was whether the execution of the immovable property could impair the appellants' existing and potential access to adequate accommodation. The *Jaftha* case was only concerned with cases where the right to adequate housing was impaired or potentially impaired. Section 26(1) of the Constitution was not compromised in every case where execution is levied against immovable property. The SCA agreed with the high court's finding that the appellants' rights to adequate housing were not engaged or compromised. The application to declare the property executable was brought after numerous attempts by the respondent to obtain payment from the appellants, who did not dispute the debt and even consented to the judgment. However, the appellants failed to show how their constitutional rights to adequate housing would be impacted. The Court went on further to state that rule 46A(2) provided that a court considering an application in which a creditor sought to execute against the judgment debtor's immovable property should consider various matters. Given that rule 46A(2) provided that a court 'shall not' authorise execution unless 'all relevant factors' had been considered, the Court saw no reason why the fact that the relevant immovable property was 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 was clear from a plain reading of the entire text of rule 46A that it was important to have a preceding enquiry in all cases where the immovable property of the judgment debtor was used as residential immovable property. This preceding enquiry should be directed at establishing whether the persons occupying the immovable property in question were of the *Jaftha* kind. In addition, the SCA held that 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. Once that had been established, rule 46A would have to be followed and, consequently, rule 33 of the Practice Directive would have to be complied with. The SCA disagreed with the respondent's argument that the person to be protected by rule 46A was, in the tradition of *Jaftha*, a natural person and not a legal persona 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. Clearly, a blanket approach that considered all immovable property held in the name of a juristic person to fall outside the protection of rule 46A was too narrow. As to the prejudice that the farmworkers would suffer through a sale in execution, the SCA held that the appellants in their argument go no further than the bald allegation that they would be seriously affected by the sale in execution, and did not explain the farmworkers' tenure, whether it was dependant on a contract of employment, or lease or any other arrangement. And in any event, the farmworkers in casu already enjoyed the protection in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA), in that their rights to adequate housing were protected should any after-sale developments endanger their tenure. The SCA further held that the impugned order was granted by agreement between the parties, in circumstances where both parties were legally represented and they expressly consented to judgment being granted against them, coupled with an order declaring the trust's immovable property specially executable. Moreover, the appellants have failed to disclose any factors which may suggest that, if rule 46A was applied, the consent order would not have been granted. They have not shown that as a result of indigence, the beneficiaries will be left vulnerable to homelessness if the farm in question was sold in execution. On the contrary, the farm was valued between R35 million and R40 million, and the reserve price was fixed at a minimum of R21 million; therefore the ability to acquire alternative accommodation was unquestionable. Upon judicial scrutiny based on the facts of this case it was revealed that the applicability of rule 46A cannot be applied to the appellants because they have failed to show that they fall under the *Jaftha*-kind category of the home owner. Thus, 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. Consequently, the appeal was dismissed with costs.

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