



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 150/2021

In the matter between:

**PETRUS JOHANNES BESTBIER
HANLIE BESTBIER N O
CAREL BRINK BESTBIER N O
FRANS STEFANUS BOTES N O**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT**

and

NEDBANK LIMITED

RESPONDENT

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

Coram: SALDULKER, MOLEMELA and DLODLO JJA and WEINER and MOLEFE AJJA

Heard: 9 March 2022

Delivered: 13 June 2022

Summary: Applicability of rule 46A of the Uniform Rules of Court (the rules) – whether rule 46A of the rules applies when property sought to be declared executable was owned by a trust and is a primary residence of trust beneficiaries – whether trust beneficiaries and their employees are entitled to the constitutional safeguards.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Kusevitsky J sitting as court of first instance):

1 The appeal is dismissed.

2 The appellants shall pay the respondent's costs jointly and severally, the one paying the others to be absolved, including the costs of two counsel where so employed.

JUDGMENT

Molefe AJA (Saldulker, Molemela and Dlodlo JJA and Weiner AJA concurring):

[1] This is an appeal against the order and judgment of the Western Cape Division of the High Court, Cape Town (the high court), per Kusevitsky J. The high court granted judgment in favour of the respondent, Nedbank Limited, against the first to the fourth appellants in their official capacities as trustees of Goede Hoop Trust (the trust), for payment of the undisputed debt, as well as declaring Goede Hoop Wine Estate (the property) executable. Judgment was also granted against the first appellant, Petrus Johannes Bestbier, in his personal capacity based on a suretyship agreement. Leave to appeal was granted by the high court in respect of both the money judgment and the order declaring the property executable.

[2] This appeal concerns 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 is owned by a trust and is a primary residence of the trust beneficiaries, as well as the trust employees and their families (the farmworkers).

Factual background

[3] The appellants are the trustees of the trust, and the first appellant is also a surety. The trust conducts business as a wine farm, wine cellar, wine merchant and restaurateur in Stellenbosch, Western Cape. The trust also owns equipment, machinery and stock in trade amounting to approximately R5 million. The first and second appellants reside in the main house while their son occupies a cottage on the property. The trust's permanent employees and their families occupy 12 smaller cottages on the property.

[4] The trust obtained substantial financial assistance from the respondent 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 amounts to R8 564 443.00 plus interest.

[5] Thereafter, the respondent launched an application for a summary judgment. Following this, the matter was settled in terms of a written settlement agreement between the parties in March 2019. In terms of that settlement agreement, the appellants, admitted, *inter alia*, their indebtedness to the respondent and agreed to pay a specified amount together with interest. They also agreed that in the event that they failed to pay the amount in question, the respondent would be entitled to proceed with an application that provided for payment, failing which, the private sale of the property or, failing which judgment by consent. They also agreed to an order declaring the property bonded to the respondent executable and they agreed on the minimum reserve price. The appellants reneged on their undertaking to pay the respondent, failed to sell the property privately and refused to honour their consent for the immovable property to be declared executable.

[6] As a result, 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 appeal both the judgment and the order. In addition, the appellants dispute the order declaring the property executable, substantially on the grounds that the respondent was obligated to comply with the procedure prescribed by rule 46A, although the appellants had agreed to privately sell the property and consented to the sale in execution if they failed to pay.

[7] The appellants contend 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) constitutes 'residential immovable property of a judgment debtor', therefore triggering the application of rule 46A. The appellants submitted that the wording and literal meaning of the rule confirm that the requirement of compliance with rule 46A is not limited to property that is the primary residence of the judgment debtor.

The legislative and historical context of rule 46A

[8] It is trite that the Constitution of South Africa provides for justiciable socio-economic rights and this includes the right to have access to adequate housing which is enshrined in s 26 of the Constitution. The underlying rationale of rule 46A is to impose procedural rules to give effect to that fundamental right. Rule 46A must therefore be interpreted purposively against the backdrop of s 26 of the Constitution, which grants access to housing.

[9] In 2010, the rules were amended to introduce the express requirement in rule 46(1)(a)(ii) that residential property may only be sold in execution if so authorised by a court having considered all the relevant factors.¹ Rule 46A was added to the rules on 22 December 2017 in response to divergent approaches adopted by the South African courts regarding the nature of the enquiry and factors to be considered when exercising judicial oversight over orders of execution against residential immovable property.²

¹ High Court Rules of Court, rule 46(1)(a)(ii) as formulated pre-2017 GN R 981, 19 November 2010.

² Uniform rule 46A inserted by GN R1272, GG 41257, 17 November 2017.

[10] Rule 46A must be interpreted in view of the relevant historical and legislative context, and taking into account the purpose and objectives of the rule. 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.' (My emphasis).

[11] In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others (Jaftha)*,³ the Constitutional Court had occasion to consider the constitutionality of section 66 of the Magistrates' Court Act 32 of 1944 (the Magistrates' Act). The impugned section 66 provided as follows:

'Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, 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.'

³ *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

The Constitutional Court held that section 66(1)⁴ was unconstitutional as it violated the right to access to housing as provided for in s 26(1)⁵ of the Constitution 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.⁶ The construction and the order in *Jaftha* recognised that the sale in execution of a person's home limits 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.

[12] In *Gundwana v Steko Development and Others (Gundwana)*,⁷ 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.

[13] This Court, in *Mkhize v Umvoti Municipality and Others*,⁸ endorsed the observation of the court a quo,⁹ per Wallis J, who, relying on this Court in *Standard Bank of South Africa Ltd v Saunderson and Others*,¹⁰ held that s 26(1) of the Constitution is not compromised in every case where execution is levied against immovable property. Wallis J observed that:

⁴ Section 66(1)(a) of the Magistrates' Court Act 32 of 1944 allowed the sale and execution of a property without judicial oversight in certain cases.

⁵ Section 26(1) of the Constitution provides that everyone 'has the right to the have access to adequate housing'.

⁶ *Jaftha* fn 3 *ibid* paras 54 & 55.

⁷ *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) paras 41-49.

⁸ *Mkhize v Umvoti Municipality and Others* [2011] ZASCA 184; 2012 (1) SA 1 (SCA); [2011] 4 All SA 460 (SCA); 2012 (6) BCLR 635 (SCA) para 10.

⁹ Reported *sub nom Mkhize v Umvoti Municipality and Others* [2010] ZAKZPHC 20; 2010 509 (KZP); [2011] 1 All SA 144 (KZP).

¹⁰ *Standard Bank of South Africa Ltd v Saunderson and Others* [2005] ZASCA 131; [2006] 2 All SA 382 (SCA); 2006 (9) BCLR 1022 (SCA).

‘ . . . The present is a case where it is not compromised or even engaged. It would be wrong to construe the declaration made and reading-in decreed by the Constitutional Court as applying to sales in execution in the magistrates’ court that it did not consider or hold to suffer from a constitutional defect. That would amount to saying that the Court has amended s 66(1)(a) in the absence of a constitutional foundation for doing so. Such a result would infringe the doctrine of the separation of powers that is fundamental to our constitutional order.’¹¹

[14] In *Standard Bank of South Africa v Hendricks and Another and Related Cases*,¹² the court emphasised that creating a greater degree of national uniformity between divisions of the high court would be advantageous to litigants as well as to the courts. In *Camps Bay Ratepayers and Residents Association v Harrison*, the Constitutional Court quoted with approval Hahlo and Kahn, who explained the principles underlying the doctrine of precedent as follows:

‘certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*.’¹³

The Constitutional Court in *Camps Bay* went on to say that the doctrine of precedent is ‘ . . . a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos’.¹⁴

[15] Section 39(2) of the Constitution mandates a value-orientated approach to the interpretation of the law, in which the values that ‘suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality. . .’.¹⁵ We must guard against manufacturing our interpretation of the law to erode constitutional authority.

¹¹ *Mkhize* fn 9 above para 40.

¹² *Standard Bank of South Africa v Hendricks and Another and Related Cases* [2018] ZAWCHC 175; [2019] 1 All SA 839 (WCC); 2019 (2) SA 620 (WCC) para 68.

¹³ *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (2) BCLR 121 (CC); 2011 (4) SA 42 (CC) para 28.

¹⁴ *Ibid* para 28.

¹⁵ *Coetsee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* [1995] ZACC 7; 1995 (10) BCLR 1382 (CC); 1995 (4) SA 631 (CC) para 46.

Analysis

[16] The appellants contended that the high court erred and misinterpreted rule 46A in finding that the rule is only triggered when a property is the debtor's primary residence. It is further argued that the interpretation adopted by the high court is contrary to the value-orientated approach sanctioned by the Constitutional Court, which demands 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.¹⁶ It was further argued that the high court's interpretation of rule 46A is inconsistent with s 39(2) of the Constitution and that the restrictive interpretation fails to adequately protect the rights under s 26, particularly the rights of persons occupying property owned by a trust, as well as vulnerable farmworkers.

[17] As aforementioned, *Gundwana* determined that the combined effect of *Jaftha* and *Lesapo v North West Agricultural Bank and Another*¹⁷ was 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 security of tenure 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 their homes and give effect to s 26 of the Constitution.¹⁸

[18] The facts in casu indicate a diametrically opposite situation. 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 appellants' existing and potential access to adequate accommodation.

¹⁶ *S v Makwanyane and Another* [1995] ZACC 1995 3; (6) BCLR 665; 1995 (3) SA 391 (CC); [1996] 2 CHRLD 164; 1995 (2) SACR 1 para 9.

¹⁷ *Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420.

¹⁸ *Investec Banks Limited v Fraser NO and Another* [2020] ZAGPJHC 107; 2020 (6) SA 211 (GJ) para 39.

[19] As aforementioned, *Jaftha* and *Gundwana* were only concerned with cases where the right to adequate housing was impaired or potentially impaired. Section 26(1) of the Constitution is not compromised in every case where execution is levied against immovable property.¹⁹ In *Jaftha*, the two applicants were unemployed women who occupied homes purchased with the assistance of a State housing subsidy. It was clear that if they were evicted because of the sale in execution, they would have been left with no adequate accommodation.

Judicial Oversight

[20] The aim of rule 46A is to assist the Court in considering whether the s 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.²⁰ The requirement of judicial oversight in s 26 of the Constitution must be viewed in light of South Africa's history of forced removals and racist evictions during apartheid and the need to protect security of tenure of all South Africans. The following passage in *Jaftha* is apposite:

'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.'²¹

[21] As correctly stated in *Jaftha*, 'judicial oversight . . . is 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'.²² In my view, the observations made by the majority judgment in *Mkhize v Umvoti* are equally apposite in the circumstances of this

¹⁹ *Mkhize* fn 8 above para 10 (SCA judgment).

²⁰ *Karpakis v Mutual and Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 492F.

²¹ *Jaftha* fn 3 para 29.

²² *Mkhize v Mvoti* fn 8 para 18. See *Jaftha* fn 3 paras 42-43 and 55.

case, even though they were expressed in a slightly different context before rule 46A was added to the rules. The majority judgment said:

[20] . . . the order made in *Jaftha*, as the context of the judgment shows, is aimed at preventing the infringement of the right to adequate housing. This is the sole purpose of requiring judicial oversight in all cases of execution against immovable property.

. . .

[24] We detect no ambiguity in the order in *Jaftha*. In that case and later in *Gundwana* the Constitutional Court made it clear that in all cases of execution against immovable property judicial oversight is required. . . . In *Gundwana* Froneman J said the following: “Some preceding enquiry is necessary to determine whether the facts of a particular matter are of the *Jaftha*-kind”.

. . .

[26] The object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated. In the main a number of cases grappling with *Jaftha* sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight? We are unable to understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. . . .’²³

With these remarks I would like to express unqualified agreement.

[22] Rule 46A requires judicial oversight and consideration by a court of various factors when a creditor seeks to execute against ‘the residential immovable property of a judgment debtor’. There is considerable force in Du Plessis and Penhold’s argument in their discussion 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.²⁴ The sole purpose of judicial oversight in all cases of execution against immovable property is to

²³ *Mkhize* fn 8 paras 20, 24 and 26.

²⁴ ‘Bill of Rights Jurisprudence’ 2005 *Annual Survey of South African Law* 27 at 77 to 81 and 87.

ensure that the orders being granted did not violate s 26(1) of the Constitution and that the judgment debtor is likely to be left homeless as a result of the execution.

[23] The court's function is to remain consistent with the legislative scheme and protect the entrenched rights. Accordingly, Rogerson posits that:

'Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserves some protection.'²⁵

[24] The high court correctly found 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 might be impacted.

[25] 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.²⁶ Given that rule 46A(2) provides that a court 'shall not' authorise execution unless 'all relevant factors' have been considered, I can see 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.

²⁵ C Rogerson 'The Judicial Search for Appropriate Remedies under the Charter: The Examples of overbreadth and Vagueness' in Robert J Sharpe (ed) *Charter Litigation* (1987) 233 at 288 cited with approval in the Supreme Court of Canada in *R v Schachter* [1992] 2 SCR 679; [1992] 10 CRR (2d) 1 at 13-15.

²⁶ These include whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor and whether there are other alternative means by which the judgment can satisfy the debt other than execution against the judgment debtor's primary residence.

It is 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 . . .'. (Own emphasis).

[26] 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.²⁷ As I see 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, rule 46A would have to be followed and, consequently, rule 33 of the Practice Directive would have to be complied with. I therefore disagree with the submission made by the respondent's counsel that the person 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, nor an institution such as a trust, ' . . .even if the immovable property is the shareholder's, member's or beneficiary's only residence'.²⁸ Clearly, 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.

[27] 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, I can see 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.

²⁷ *Gundwana* para 43.

²⁸ *Firstrand Bank Ltd v Folscher and Another and similar matters* 2011 (4) SA 314 (GNP) para 32.

[28] In my opinion, the fact that, in addition to being a primary residence for the 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 s 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 farmworkers

[29] As to the prejudice that the farmworkers would suffer through a sale in execution, the appellants in their argument go no further than the bald allegation that they would be seriously affected by the sale in execution, and do not explain the farmworkers' tenure, ie, 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 casu, 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.

[30] The appellants argue that the finding of the high court that service was not necessary for the farmworkers and their families is contrary to *Firstrand Bank Limited v Mgedesi and Another (Mgedesi)*.²⁹ The court in *Mgedesi* acknowledged that a new owner would be compelled to comply with the legislation regulating the eviction of occupiers. In that matter, the applicable legislation was the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act), and the court observed that the occupiers' and tenants' rights enjoyed comprehensive protection. In my opinion,

²⁹ *Firstrand Bank Limited v Mgedesi and Another* [2019] ZAMPMHC 12.

Mgedesi is not authority for the appellant's proposition. Notably, the court found that the occupiers' entitlement to protection in terms of s 26(1) will arise in any future eviction application (if any) and that it would be unnecessary and an ineffective application of the law to afford a person protection where he already enjoys such effective protection in terms of the PIE Act. Similarly, the farmworkers *in casu* already enjoy the protection in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA), in that their rights to adequate housing are protected should any after-sale developments endanger their tenure.

[31] I find that in the specific circumstances of this case, it is of significance that the impugned order was granted by agreement between the parties, in circumstances where both parties were, from the outset, legally represented. When the settlement terms were being negotiated, the appellants were represented by an attorney, who happens to be the first and second appellants' daughter. The parties 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. To use the terminology used in *Gundwana*, the appellants have not established facts that show that the matter can be categorised as being of the *Jaftha*-kind. This is because they have not shown that as a result of indigence, the beneficiaries will be left vulnerable to homelessness if the farm in question is sold in execution. On the contrary, the farm is valued at between R35 million and R40 million, and the reserve price was fixed at a minimum of R21 million; the ability to acquire alternative accommodation is unquestionable. Given this finding, I deem it unnecessary to deal with the arguments raised in relation to one of the trustee's status as a surety.

[32] To sum up, the object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated, and such determination cannot be made without the requisite judicial oversight. In the present case I find that 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 appellants

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.³⁰ It is for this reason that the appeal falls to be dismissed with costs.

[33] In the circumstances, the following order is made:

1 The appeal is dismissed.

2 The appellants shall pay the respondent's costs jointly and severally, the one paying the others to be absolved, including the costs of two counsel where so employed.

D S MOLEFE
ACTING JUDGE OF APPEAL

³⁰ See *Mkhize* fn 8 para 29; *Baloyi N.O. and Others v Pawn Star CC and Another* [2022] ZACC 10 para 23.

Appearances:

For the appellants:

J Roux SC (with J Foster)

Instructed by:

Thomson Wilks Inc, Cape Town

Honey Attorneys, Bloemfontein

For the respondent:

C W Kruger

Instructed by:

Van der Spuy, Cape Town

Hill McHardy & Herbst Bloemfontein.