

Agriculture, Aquaculture & Fishing and Dispute Resolution



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SOUTH AFRICA

- From vine to verdict:
Rule 46A execution against
trust-owned farmland
serving both commercial
and residential purposes

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From vine to verdict: Rule 46A execution against trust-owned farmland serving both commercial and residential purposes

When a borrower defaults on a loan secured by a mortgage bond over agricultural property, a lender's instinct is to enforce its security. In practice, however, execution proceedings against immovable property have become considerably more complex since Rule 46A of the Uniform Rules of Court was introduced with effect from 22 December 2017. Rule 46A requires judicial oversight when an execution creditor seeks to execute against the residential immovable property of a judgment debtor, and was introduced to protect the right of access to adequate housing enshrined in section 26(1) of the Constitution. The historical background of Rule 46A may be traced to *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25, which concerned two indigent judgment debtors who were at risk of losing their only accommodation if the sales in execution of their homes were to proceed, and *Gundwana v Steko Development CC & Others* [2011] JOL 26971 (CC), which reaffirmed *Jaftha* and extended its purview to cases where a creditor seeks to execute against a property put up as security in the form of a mortgage bond.

In the case of *Bestbier and Others v Nedbank Limited* [2024] JOL 64354 (CC), the Constitutional Court confirmed and sharpened the reach of Rule 46A, with practical consequences for the enforcement of security over immovable property, specifically in the agricultural sector and in respect of immovable property that is used for both commercial and residential purposes.

Brief facts and litigation history

The Goede Hoop Trust (Trust) owned certain immovable property on which it conducted business as a wine farm, wine cellar, wine merchant and restaurateur (the property). Certain trustees lived in the main house on the property, and several permanent farmworkers resided on the property with their families. The property therefore had a dual use, being primarily a commercial wine farm while simultaneously including residential occupation.

Nedbank advanced substantial financial assistance to the Trust, secured by several mortgage bonds registered over the property. Following the Trust's default on its payment obligations, and pursuant to a settlement agreement concluded between the parties, Nedbank instituted legal proceedings and sought judgment against the Trust together with an order declaring the property specially executable. Nedbank successfully obtained the order sought. The High Court found that Rule 46A



did not apply, on the basis that the Trust, as a juristic entity, could not be afforded the protections reserved for natural persons, with the result that the Trust did not have the benefit of the protections afforded to judgment debtors in terms of Rule 46A.

The applicants appealed to the Supreme Court of Appeal (SCA), which dealt with, among other things, the applicability of Rule 46A to residential immovable property owned by a trust. The SCA rejected the High Court's approach, holding that a blanket approach stipulating that all immovable property held in the name of a juristic person falls outside the protection of Rule 46A was too narrow. Despite this finding, the SCA dismissed the appeal with costs, concluding that on the facts the applicants had not established that they fell within the class of persons Rule 46A was designed to protect.

Rule 46A: Rationale and purpose

On appeal, the Constitutional Court therefore had to consider the applicability of Rule 46A in circumstances where the immovable property sought to be declared specially executable was registered in the name of a juristic entity (a trust), rather than a natural person, was used for both commercial and residential purposes, and was occupied by natural persons, being the trust beneficiaries and farmworkers, who used portions of the property as their primary residence. Specifically, the Constitutional Court was called upon to determine whether such natural persons fell within the category of "any other party who may be affected by the sale in execution" as contemplated in Rule 46A(3)(b), and whether residential immovable property owned by

a trust but occupied by natural persons fell within the scope of Rule 46A (notwithstanding the fact that a juristic entity, as the registered owner, could not itself reside on or occupy the property). In approaching these questions, the Constitutional Court considered the scope of Rules 46 and 46A and identified three categories of immovable property in respect of execution:

1. The first category, falling under Rule 46, being "*immovable property*" generally.
2. The second category, falling under Rule 46A, being "*residential immovable property*" – a subcategory of immovable property, subject to additional provisions and requirements.
3. The third category being immovable property which forms the "*primary residence of the judgment debtor*" – a sub-subcategory of "*residential immovable property*", to which only some parts of Rule 46A apply.

The Constitutional Court held that the determination of whether a property can be classified as "*residential immovable property*" is dependent on the physical characteristics and actual use of the property, and not on the nature or form of the registered owner. The court explained that:

"It does not matter that the judgment debtor is not herself occupying the property. It also does not matter that the judgment debtor is a trust. If a trust owns a residential house, it is 'residential immovable property', if the beneficiaries reside in it, even though the trust itself as a legal entity cannot reside in the property."

On the position where immovable property registered in the name of a juristic entity is occupied by natural persons, the court further provided that:

"Residential immovable property may be registered in the name of a juristic entity. While a juristic entity such as a trust cannot reside in a property, it is not uncommon for such property to be used as residential immovable property, that is, for it to be occupied by natural persons."

In summary, while the Constitutional Court confirmed that Rule 46A may apply to trust-owned residential immovable property, it found that on the facts of this case, neither the trustees nor the farmworkers could benefit from the protection of the rule – the trustees because they had consented to judgment and were not at risk of homelessness, and the farmworkers because their tenure was independently protected by the Extension of Security of Tenure Act 62 of 1997.

Key takeaways

When seeking an execution order against immovable property, one needs to properly consider whether Rule 46A applies. While the ownership structure of a judgment debtor may suggest the application of Rule 46 only, Rule 46A, which imposes a more stringent process, should not be overlooked.

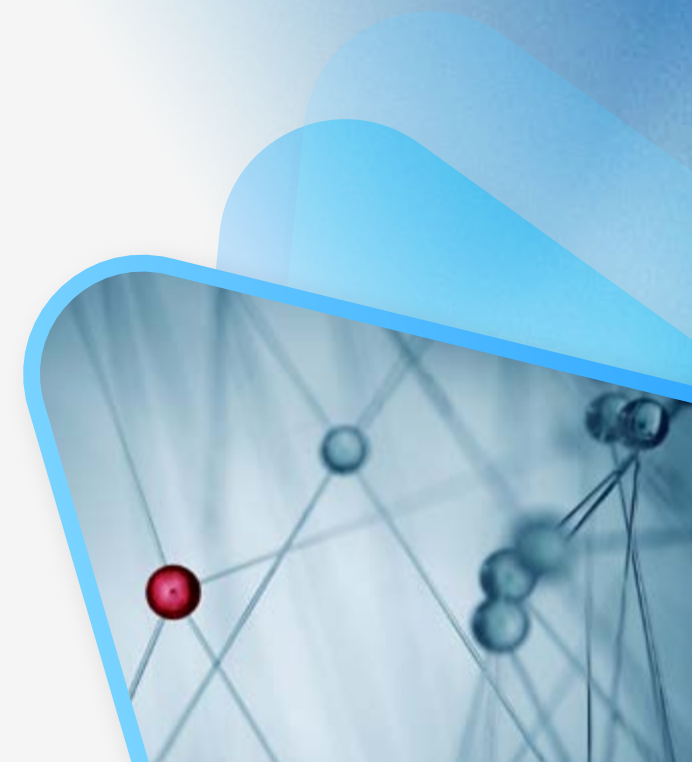
In *Bestbier*, the Constitutional Court expressly included trust-owned property within the protection of Rule 46A in certain circumstances. In line with

the Constitutional Court's broadened interpretation of "residential immovable property" under Rule 46A, lenders should now consider the use and characteristics of the property and not merely its ownership structure. There is a heightened risk in agricultural lending, as it is not uncommon for such properties to have a mixed-use character and to include on-site residential accommodation.

This judgment raises significant practical implications for lenders enforcing mortgage security, including:

- Trust-owned property is no longer shielded from Rule 46A, and assumptions based on juristic ownership should be reconsidered.
- Although certain property may, at face value, appear to be commercial, where it includes residential occupation Rule 46A may apply.
- The procedural burden in execution proceedings under Rule 46A is more stringent, and lenders must ensure judicial oversight, careful consideration of the actual use and characteristics of the property, and appropriate engagement with affected parties.

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