REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **33437/2019**

(1) REPORTABLE: NO / YES
(2) OF INTEREST TO OTHER JUDGES: NO / YES
(3) REVISED.

Lapan 06/05/2020
SIGNATURE DATE

In the matter between:

INVESTEC BANK LIMITED Applicant

and

CHARMAINE FRASER N.O. First Respondent

THE BEST TRUST COMPANY (PTY) LTD JHB N.O. Second Respondent
(in their capacities as trustees of
TRICOUR PROPERTY TRUST
Master's Reference Number IT2448/2005)

JUDGMENT

Lapan AJ:

INTRODUCTION

[1] The applicant seeks an order declaring certain immovable property owned by the Tricour Property Trust (Trust) to be specially executable as a precursor to

satisfying a money judgment granted against the Trust, as surety, on 9 February 2015, in the amount of R13 242 075.26 plus interest and costs (judgment debt).

[2] The first respondent opposes this application on the following main grounds:

[2.1] the first respondent resides on the property with her two adult children alleging that it is her primary residence and, since the applicant failed to comply with rule 46A of the Uniform Rules, this application is fatally defective;

[2.2] the applicant failed to take account of certain proceeds received by it from the sale of a property belonging to the principal debtor which would have resulted in the judgment debt being fully discharged; and

[2.3] the applicant's calculation of the outstanding balance of the judgment debt is incorrect and not supported by a certificate of balance.

[3] The applicant contends that rule 46A is not applicable as the provisions thereof apply to individual consumers and natural persons, not to trusts.

[4] In its replying affidavit, the applicant revised its calculation of the amount owing on the judgment debt by correcting certain errors made and by including amounts previously omitted such as the proceeds from the sale of the principal debtor's property. The interest calculation on the balance was revised accordingly. The first respondent contends that this is an impermissible revision of the debt as the applicant is seeking to make out a new case in reply.

[5] Before considering these issues, the facts are set out below.

THE FACTS

[6] On 5 January 2011, the Trust executed a suretyship in favour of the applicant in terms of which it bound itself as surety and co-principal debtor, in solidum, jointly and severally, with Bridgeland Development SA (Pty) Ltd (Bridgeland) for any amounts owing, or which may become owing, by Bridgeland to the applicant, subject to a maximum amount of R17 400 000,00.

[7] Suretyships were also executed by the following sureties in favour of the applicant in respect of Bridgeland's indebtedness to the applicant:

[7.1] Mr James Fraser, a director of Bridgeland;

[7.2] Aeterno Investments 115 (Pty) Ltd (Aeterno); and

[7.3] the Tricour Share 3 Trust, of which Mr Fraser and the second respondent were the trustees.

[8] On 31 March 2011, the applicant concluded a loan agreement with Bridgeland in terms of which it lent and advanced an amount of R17 400 000.00 to Bridgeland (first loan agreement). Several months later, Bridgeland defaulted on its repayment obligations in terms of the first loan agreement and, as a result thereof, the outstanding balance became due and payable immediately.

[9] On 21 January 2013, the applicant concluded a second loan agreement with Bridgeland in terms of which it lent and advanced an amount of R15 400 000.00 to Bridgeland in order to, in effect, restructure the amount outstanding in terms of the first loan agreement (second loan agreement).

[10] On 29 July 2013, the Trust acquired certain immovable property described as holding number 103, Glenferness Agricultural Holdings, Registration Division J.R., Province of Gauteng, measuring 2,5563 hectares, held by Title Deed No. T82730/2013, situated at 103 MacGillivray Road, Glenferness Agricultural Holdings (property).

[11] The property was acquired for an amount of R4 700 000.00 and extensively renovated at a cost of over R4 000 000.00. On 1 August 2016, Mr Fraser, his wife, who is the first respondent, and their two adult children moved into the property.

[12] Bridgeland defaulted on its repayment obligations in terms of the second loan agreement and, as a result thereof, the full amount outstanding became due and payable immediately.

[13] On 12 December 2014, the applicant instituted an action against all the sureties claiming payment of Bridgeland's outstanding indebtedness.

[14] On 9 February 2015, default judgment was granted against the sureties in the amount of R13 242 075.26 (judgment).

[15] In March 2015, a writ of execution was issued against the movable assets of the Trust, in execution of the judgment debt but a *nulla bona* return was made.

[16] In April 2015, the sureties, including the Trust, brought an application to rescind and set aside the judgment. On 22 March 2016, the rescission application was dismissed as the applicants had failed to prosecute the application.

[17] On 29 July 2015, the applicant received the net proceeds, in the amount of R3 182 000.00, from the sale of immovable property owned by Bridgeland, being Unit 501, Sectional Title No.1410 Eglin, Sunninghill, Pretoria (Eglin property).

[18] On 7 October 2015, Bridgeland was placed under voluntary liquidation and the applicant proved a claim in the estate of Bridgeland in the amount of R10 106 741.02 plus interest thereon.

[19] Between May 2016 and August 2017, the applicant received dividends from the estate of Bridgeland in the aggregate amount of R8 811 929.65.

[20] In July 2019, a second attempt was made at executing against the movable assets of the Trust but a *nulla bona* return was made.

[21] As at October 2019, the judgment debt of R13 242 075.26 had been reduced to an amount of R4 937 856.72 calculated as follows:

[21.1] by deducting an amount of R3 182 000.00 in respect of the net proceeds from the sale of the Eglin property;

[21.2] by deducting an amount of R8 811 929.65 being the dividends received from the estate of Bridgeland; and

[21.3] by adding interest in the amount of R3 689 711.11, calculated in accordance with the judgment.

[22] The sureties were unable to make payment of the judgment debt. The following events had occurred:

[22.1] Aeterno was finally liquidated by an order of court granted on 24 October 2014 pursuant to an application brought by ABSA Bank Limited;

[22.2] Tricour Share 3 Trust could not be located at its *domicilium* address for purposes of executing a writ against its movable assets and a *nulla bona* return was made on 27 March 2015. No immovable property was found to be registered in the name of this trust;

[22.3] Mr Fraser was provisionally sequestrated on 14 May 2019 and finally sequestrated on 27 May 2019 pursuant to an application brought by the applicant for payment of the judgment debt;

[22.4] shortly after being sequestrated, Mr Fraser emigrated to the United Kingdom leaving the first respondent and their two adult children to continue residing on the property; and

[22.5] in respect of the Trust, two *nulla bona* returns had been made, one in March 2015 and one in July 2019, in respect of the movable assets of the Trust as explained above.

[23] In October 2019, the applicant brought this application for an order declaring the Trust's property to be specially executable.

THE ISSUES

[24] The following issues arise for consideration:

[24.1] whether the provisions of rule 46A are applicable;

[24.2] whether the revised calculation of the outstanding balance of the judgment debt is correct and whether the debt has been fully discharged; and

[24.3] whether the applicant has impermissibly sought to make out a new case in its replying affidavit by revising the calculation of the balance due in respect of the judgment debt.

ANALYSIS

Is rule 46A applicable?

[25] The applicant, relying on the *dictum* in *Mokebe*, contends that the Trust is not *"an individual consumer and a natural person"*, hence, the provisions of rule 46A are not applicable. The applicant relies on the provisions of rule 46 for this application.[1]

[1] *ABSA Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) in para [59].

[26] The first respondent, relying on the decision in *Nedbank*, contends that rule 46A is applicable and should have been complied with by the applicant.[2]

[27] Rule 46 deals with execution against immovable property and the relevant provisions are quoted in full below. Rule 46(1) provides as follows:

> *"(a) Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless-*
>
> *(i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or*
>
> *(ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5)."*

[28] Rule 46A, which came into operation on 22 December 2017, deals with execution against residential property which is the judgment debtor's primary residence. Rules 46A (1) and (2) are relevant and quoted in full below.

[29] Rule 46A (1) and (2) provides 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*

---

[2] Nedbank v The Trustees for the time being of the Mthunzi Mdwaba Family Trust (unreported judgment delivered on 9 July 2019) 2019 JDR 1398 (GP).

> *(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."*

[30] In *Mokebe,* the full bench was tasked with determining three (3) issues, including the circumstances in which a court should set a reserve price for the sale of property in execution of a judgment in terms of rule 46A(8)(e).

[31] In the course of dealing with the reserve price issue, the following was held in paragraph [59] of the judgment:

> *"We cannot stress enough that this matter concerns and applies only to those properties which are primary homes of debtors who are individual consumers and natural persons."*

[32] The first respondent contends that the above *dictum* refers to the reserve price which is the issue under consideration where this qualification is made and does not apply to the entire matter. There may be merit in this argument as it is unusual to find a general qualification relating to an entire matter in the middle of a discussion pertaining to a particular issue. General qualifications are usually made at the start or at the end of a judgment.

[33] Read in this context it would seem that the court wished to ensure that a reserve price should be set in all matters where execution is sought against the

primary home of a debtor who is an "*individual consumer and a natural person*" and not where the judgment debtor is a legal entity or a trust. The reason for this is not hard to find – it is consistent with the protections afforded to judgment debtors who are indigent persons and in danger of losing their homes in circumstances which would violate their right to access adequate housing in terms of section 26 of the Constitution.

[34] The court held that the rationale for setting a reserve price is that "*it will balance the misalignment between the banks and the debtors*" and ensures that "*the debtor is not worse off due to unrealistically low prices being obtained and accepted at sales in execution*".[3] That misalignment is not often found in relation to legal entities which generally have equal bargaining powers.

[35] From this perspective, it would seem that the first respondent may be correct in contending that the qualification in *Mokebe* (in para 59) may only apply to the setting of reserve prices to ensure that debtor's homes are not sold for unrealistically low prices. However, in my view, this is a very narrow interpretation of the *dictum* in *Mokebe* and it is inconsistent with the overriding imperative that has developed in our law of considering the constitutional safeguards which exist to protect judgment debtors who are individuals and natural persons and at risk of losing their homes.

[36] Upon analysis of the rules and the relevant cases, particularly since the seminal decision in *Jaftha*, it is clear that all of the constitutional considerations required to be taken into account for the protection of judgment debtors apply to individuals and natural persons only.[4]

---

[3] *Mokebe* (supra) in para [65].
[4] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

[37] Rule 46(1) regulates the process for executing against the immovable property of a judgment debtor and this process includes execution against residential immovable property of a judgment debtor, subject to the provisions of rule 46A.

[38] Rule 46A(1) states that this rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. Rule 46A(2)(a) requires the court to establish whether it relates to the primary residence of the judgment debtor and, if so, rule 46A(2)(b) enjoins the court to consider all relevant factors to determine whether such execution is warranted.

[39] The provisions of rule 46A encapsulate the protections afforded to indigent persons who are in danger of losing their homes and which protections are necessary to give effect to section 26 of the Constitution. These protections were put in place following upon the Constitutional Court decisions in *Jaftha* and *Gundwana* which mandated that a remedy be sought to protect poor people who are at risk of losing their homes in circumstances which would implicate their rights in terms of section 26 of the Constitution.[5] The facts in these cases are instructive.

[40] In *Jaftha*, the judgment debtors owed paltry sums of money to the judgment creditor in comparison to the value of their homes which they were at risk of losing to satisfy the judgment debt. The Constitutional Court held that judicial oversight of the execution process was necessary to safeguard the rights of the poorest of the poor in circumstances where the execution process would amount to a deprivation of the right to access adequate housing as guaranteed in section 26 of the Constitution. Based on the facts of the matter, the emphasis in *Jaftha* was on the plight of indigent judgment debtors who risked being rendered homeless and without any alternative accommodation.

---

[5] *Jaftha (supra) and Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC).

[41] In *Gundwana*, the Constitutional Court was, similarly, dealing with the home of a natural person and held that it was unconstitutional for the registrar to declare immovable property specially executable when ordering default judgment under rule 31(5) to the extent that it permits the sale in execution of a person's home. The execution creditor contended that neither the person nor the property of the judgment debtor fell within the ambit of the *Jaftha*-like circumstances that require protection but the court rejected this contention for two reasons:

[41.1] first, the court held that "*the constitutional validity of the rule cannot depend on the subjective position of a particular applicant. It is either objectively invalid or it is not*"; and

[41.2] second, the court held that *"[s]ome preceding enquiry is necessary to determine whether the facts of a particular matter are of the Jaftha kind. An enquiry of that sort requires an evaluation that goes beyond merely checking the summons to determine whether it discloses a proper cause of action. On the face of the summons in this case there is nothing to indicate, either way, whether the applicant was indigent or whether the mortgaged property was her home."* [6]

[42] It is clear from this *dictum* that a preliminary enquiry is necessary to establish whether the judgment debtor is indigent and whether the property is his/her home. The court held that the constitutional considerations do not challenge the judgment creditor's right to execute but rather cautions courts to have due regard to the impact that this may have on:

"... *judgment debtors who are poor and at risk of losing their homes.*"[7]

---

[6] *Gundwana (supra)* in para 43.
[7] *Id* in para 53.

[43] These judgments make it clear that in every case involving execution against immovable property, the enquiry starts by establishing that the judgment debtor is indigent and that the judgment debtor is in danger of losing his/her home as a result of the sale in execution to satisfy the judgment debt. This enquiry will determine whether the protections afforded by way of judicial oversight as mandated in *Jaftha* and *Gundwana* are applicable.

[44] In *Folscher,* the Full Bench was seized with considering specific issues arising in four related matters involving the potential granting of warrants of execution against immovable property that was a judgment debtor's home or primary residence.[8]

[45] The court distinguished one of the four matters where the respondents were residing in New Zealand and letting their property to third parties. In that matter, the court held that the respondents were not indigent, vulnerable debtors at risk of losing their home in circumstances that would impact their right to access adequate housing. The respondents appeared to be receiving rental income from the property while evading their obligations. In those circumstances, the court held that the ordinary commercial consequences must follow and the bank should be entitled to judgment and to have the property declared specially executable.

[46] In none of the aforesaid cases was the judgment debtor a legal entity or a trust as each case involved immovable property that was the primary residence of a natural person. This is so because legal entities and trusts are not capable of residing in property and calling it a home as they have *"no body to be kicked and no soul to be damned*".[9]

---

[8] *Firstrand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP)
[9] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 (HL) at 1127 per Lord Denning.

[47] As the court held in *Saunderson*, when judgment is given against a debtor and the debtor fails to satisfy the judgment debt, the process for recovery of the judgment debt is by execution against "*the judgment debtor's belongings*".[10] Execution does not proceed against the belongings of a third party who did not incur any liability for the judgment debt in respect of which execution is sought.

[48] When rule 46(1)(a)(ii) was amended, pursuant to GN R 981 of 19 November 2010, with effect from 24 December 2010, the following proviso was added -

> "*where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.*"

[49] Following upon this amendment and the decision in *Gundwana,* on 11 April 2011, the full bench was constituted in *Folscher* to determine, *inter alia*, what the "*relevant circumstances*" are that require consideration before issuing a warrant of execution in terms of the amended rule 46(1)(a)(ii).

[50] The court, in *Folscher*, considered the meaning of the terms "*primary residence*" and "*judgment debtor*" in the amended rule. Upon review of various dictionary definitions, the court accepted the following definitions of the term "*primary residence*":

[50.1] 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;

---

[10] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) in para [3].

[50.2] a "*home*" means the place where one lives; the fixed residence of a family or household; a dwelling house... the physical structure within which one lives, such as a house or apartment"; and

[50.3] "*housing*" means "*shelter*" or "*lodging*".[11]

[51] The term "*primary residence*" was held to be the same concept as "*the home of a person*" in the amended rule 46(1)(a)(ii).

[52] The court held that the term "*judgment debtor*" as understood, for instance, in cases like *Saunderson*, refers to "*an individual, a person*"[12] and, importantly, the court concluded that:

> *"It is therefore the primary residence owned by a person that falls within the purview of the rule."*[13]

[53] Relevant for present purposes, the court held that:

> *"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."*[14]

[54] The above *dictum* puts it beyond doubt that if the judgment debtor is not a natural person, the constitutional considerations and protections are not available to

---

[11] *Folscher* (supra) in para [28].
[12] *Folscher* (supra) in para [31], referring to *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) in para 3.
[13] Id.

such a judgment debtor and the right to access adequate housing in section 26 of the Constitution is not implicated.

[55] Accordingly, in the present matter, the provisions of rule 46A are not applicable as the property sought to be executed against is registered in the name of the Trust and it is irrelevant that the trustee and her children reside on the property and consider it their home. Since the Trust, being the judgment debtor, is not a natural person, the constitutional safeguards are not available to it where execution is sought against its immovable property.

[56] The first respondent contends that *Folscher* cannot be considered when determining the applicability of rule 46A as it predates the enactment of rule 46A. This contention is misplaced. *Folscher* determined the meaning of the concepts "*primary residence*" and "*judgment debtor*" which were central to the proviso added to rule 46(1)(a)(ii) with effect from 24 December 2010. Since these concepts were included in the provisions of rule 46A which came into effect on 22 December 2017, they are presumed to have the same meaning.

[57] The first respondent relies on the judgment in *Nedbank* in support of her case that rule 46A is applicable. In *Nedbank*, application was made by the bank for a money judgment and an order declaring the immovable property of the respondent, the Mthunzi Mdwaba Family Trust (family trust) specially executable. Although the property was registered in the name of the family trust, it was used as a primary residence by one of the trustees. [15]

[58] The court held that the family trust was not a juristic person but rather an accumulation of rights and obligations vested in the individual trustees and,

---

[14] *Id* para 32.
[15] *Nedbank* (supra) in para 6.

therefore, the provisions of rule 46A were applicable. For this reason, the court rejected the applicant's reliance on *Mokebe* where it was held that "[w]*e cannot stress enough that this matter concerns and applies only to those properties which are the primary homes of debtors who are individual consumers and natural persons*".

[59] The court also accepted the respondent's reliance on the following statement in *Erasmus*:

> *"It would seem that if immovable residential property is merely nominally registered in the name of a legal person or trust, but used as a dwelling by the shareholder(s) or the trustees/trust beneficiaries (depending on the nature of the trust deed), as the case may be, the property falls within the ambit of rule 46A in the event that the legal person or the trustees in their official capacity are the judgment debtors and the judgment creditor wants to execute against the property. Otherwise the provisions of the rule could easily be circumvented by the judgment creditors."*[16]

[60] Although the above-quoted passage in *Erasmus* refers to the nominal registration of the property in the name of a legal person or trust which is used as a dwelling by the shareholders, trustees or trust beneficiaries "*(depending on the nature of the trust deed)*", it is not clear how this type of trust differs from the type of trust contemplated in *Folscher* such that it should be treated differently.

[61] In *Nedbank*, the court emphasised the importance of the dwelling rather than focusing on the identity of the judgment debtor and held that the:

> "*... underlying principle is that the judgment debtor must perform the function of a form of a dwelling or shelter for humans. The legal persona of the judgment debtor is of no significance. It is immaterial whether the judgment debtor is a juristic person or a natural person. The trustees in their official capacity do not have to be the judgment debtors for rule*

---

[16] *Erasmus,* Superior Court Practice, Vol. 2, 2nd ed, page 632R

46A to be applicable."[17]

[62] The court held further, relying on *Erasmus*, that "*what is important is that the property must be used as a dwelling by the trustee or trust beneficiaries (or by the shareholders of a company).*" The court also considered the fact that *"the residential immovable property is used by one of the trustees or the trust beneficiaries with his children to be of paramount importance."*[18] Therefore, the court considered that the only relevant factor for invoking rule 46A is that the property was being used as a dwelling or a shelter for humans.

[63] The court did not refer to *Folscher* and the distinction made therein between, on the one hand, a judgment debtor residing in a home and in danger of losing that home in unfair circumstances and, on the other hand, a judgment debtor which is a legal entity or a trust where the right to access adequate housing is not implicated regardless as to who occupies the property.

[64] The *Nedbank* judgment is also in conflict with the provisions of rules 46A(1) and (2) which provide for the establishment of two jurisdictional facts, first, that the executor creditor seeks execution against the residential immovable property of a judgment debtor and, second, that the property sought to be executed against is the primary residence of that judgment debtor.

[65] The interpretation in *Nedbank* gives rise to an anomaly in that, although the property is registered in the name of the trustee in his official capacity, consideration is given to the trustee's personal circumstances should he/she happen to reside on the trust's property. It is illogical to grant a money judgment in a personal action against a trust, as the judgment debtor, and then, upon seeking to execute against

---

[17] *Nedbank* (supra) in para [19].
[18] *Id* in paras [20] and [25].

the trust's belongings, in particular its immovable property, to have regard to the personal circumstances of the trustee who resides on the property. Such an interpretation conflates the role of the trustee when acting in his personal capacity with his role as a representative of the trust.

[66] In *Rosner*, the following was held by Goldstein J (Malan J concurring), referring to the *dictum* in *Mariola and Others v Kaye-Eddie NO and Others* where the following was held:

> *"It is settled that in our law, a trust is not a legal persona but a legal institution, sui generis. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purposes of administration of the trust, but qua trustee he has no beneficial interest therein... In legal proceedings trustees must act nomine officii and cannot act in their private capacities."*[19]

[67] Goldstein J held further (in para 7) that:

> *"Where the trustees litigate in their representative capacity judgment cannot, of course, be given against them personally and neither does a judgment in their favour enure for their personal benefit, since it accrues to the fund of the trust."*

[68] The trustee *qua* trustee acts in a representative capacity and not in a private capacity and has no beneficial interest in the trust property. A trustee does not incur liability for the judgment debt in his personal capacity, nor is he liable to make payment thereof in his personal capacity. As such, he lacks standing, in his personal capacity, to contest execution against the Trust's immovable property to satisfy the Trust's indebtedness as this will serve only to secure a personal benefit for the trustee such as extending his tenure in the property, which is impermissible.

---

[19] Rosner v Lydia Swanepoel Trust 1998 (2) SA 123 (W) in para 7, referring to *Mariola and Others v Kaye-Eddie NO and Others* 1995 (2) SA 728 (W) at 731C-F

[69] The *Nedbank* judgment is in conflict with the judgments in *Jaftha*, *Gundwana*, *Mokebe* and *Folscher* all of which considered that the constitutional protections are afforded to judgment debtors who are individuals and natural persons in danger of losing their homes and where it was held, specifically by the Full Bench constituted in *Mokebe* and *Folscher*, that these protections are not available to legal entities or trusts.

[70] Where the shareholder or trustee is not the beneficial owner of the property, no enquiry can be made into his/her personal circumstances when considering execution of a judgment debt obtained against a company or a trust of which they are a shareholder or trustee, respectively. In those circumstances, insisting on compliance with the provisions of rule 46A will be wholly misplaced as it would be aimed at protecting a right which the occupant of the property does not have as he/she is not the judgment debtor.

[71] 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. These are the implications of the decision in *Nedbank* and it is in conflict with the earlier judgments of higher authority which considered the *persona* of the judgment debtor to be an essential component in matters involving execution against the judgment debtor's property.

[72] As stated by Brand AJ (as he then was) and endorsing the principles in *Hahlo and Kahn*:

> *"The doctrine of judicial precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong."*[20]

[73] In my view, the decision in *Nedbank* is clearly wrong and this court is not bound to follow it. This court is bound by the decisions in *Jaftha*, *Gundwana*, *Mokebe* and *Folscher*. Therefore, in the present matter, the first issue is decided in favour of the applicant and the provisions of rule 46A are not applicable. The applicant was correct to proceed in terms of rule 46 to obtain execution against the immovable property of the Trust.

Has the debt been correctly calculated and fully discharged?

[74] The first respondent alleges that the applicant failed to account for the net proceeds received from the sale of the Eglin property in 2015 and that such proceeds are sufficient to extinguish the debt.

[75] When the judgment was granted on 9 February 2015, an amount of R13 242 075.26 was owed to the applicant. The Eglin property was sold and the proceeds paid to the applicant on 29 July 2015, in the amount of R3 182 000,00. This amount was erroneously omitted from the calculation set out in the founding affidavit but included in the revised calculation in the replying affidavit.

[76] The dividends received from the estate of Bridgeland amounted to R11 215 113.33 as set out in paragraph 28 of the founding affidavit. However, an error in calculation occurred as the dividend received by the applicant on 18 August 2016, in an amount of R300 000.00, was erroneously reflected in the founding affidavit as being an amount of R3 000 000.00.

---

[20] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4)

[77] This error was acknowledged in the replying affidavit and resulted in a recalculation of the capital and interest accruing. As at 21 October 2019, the balance due on the judgment debt was an amount of R4 937 856.72 which was erroneously reflected as an amount of R2 026 961.93 in the founding affidavit.

[78] The applicant's revised calculation takes account of all amounts received after the date of the judgment obtained on 9 February 2015, as appears from the transaction history extracted from the applicant's records. This amount will fluctuate with time until the judgment debt is finally satisfied as interest continues to accrue on the outstanding balance.

[79] As explained by the applicant, the amount reflected in the transaction history differs from the calculation set out in the founding and replying affidavits because the latter calculation is in accordance with the judgment which is based on simple interest calculated at the prime interest rate plus 5%.

[80] This court is satisfied that the outstanding balance of the judgment debt has been correctly calculated as revised by the applicant and the errors and omissions in the original calculation, as set out in the founding affidavit, have been fully explained in the replying affidavit.

[81] The first respondent took issue with the fact that the applicant did not produce a certificate of balance as *prima facie* proof of indebtedness and, instead, relied on its calculations as set out in paragraphs 19 and 20 of the replying affidavit.

[82] The applicant was not obliged to produce a certificate of balance. It has been held that:

SA 42 (CC) in para [28].

"[t]o the extent that a certificate of balance reflects the balance due as at the date of the hearing, it is merely an arithmetical calculation based on the facts already before the court that the court would otherwise have to perform itself."[21]

[83] Therefore, in the absence of a certificate of balance, the court must be satisfied that the calculation of the amount due is correct and this court is so satisfied.

Has the applicant impermissibly made out a new case in reply?

[84] The first respondent contends that the revised calculation in the replying affidavit amounts to making out a new case in reply which is impermissible.

[85] The applicant has made out a case, in the founding affidavit, for permission to execute against the Trust's property in order to satisfy the judgment debt. The replying affidavit merely corrects errors made in the founding affidavit in calculating the balance owing on the judgment debt.

[86] The first respondent has not alleged prejudice in relation to the revised calculation nor has she applied to strike-out any new matter or seek leave to file a further affidavit. A common-sense approach must be adopted, especially in the absence of prejudice, when deciding to allow further facts to be set out in a replying affidavit.[22]

[87] The applicant's errors were only discovered after being alerted thereto by the first respondent in the answering affidavit. Correcting those errors in the replying affidavit ensures, first, that the court is not misled and, second, that the applicant

---

[21] Rossouw and Another v Firstrand Bank Ltd 2010 (6) SA 439 (SCA) in para [48].

recovers no more and no less than what is actually due to it. In the circumstances, the revised calculation in the replying affidavit is not an attempt at making out a new case for the first time in reply and the first respondent's contentions to the contrary are without merit.

Other defences

The first respondent raised a few other defences as set out below.

The attempt at executing against the Trust's movable property was defective thus rendering this application irregular

[88] The first respondent alleges that the return in respect of the warrant of execution against the Trust's movable property is defective for the following reasons:

[88.1] the warrant of execution was addressed to Mr Fraser as trustee of the Trust and yet he had resigned as trustee on 14 May 2019, the day on which he was provisionally sequestrated. His wife, the first respondent, was appointed as trustee on 27 May 2019, the day on which Mr Fraser was finally sequestrated;

[88.2] the sheriff made demand on the first respondent, on 7 August 2019, to point out movable and/or immovable property of the Trust even though it was believed that Mr Fraser was still the trustee at that time; and

---

[22] *eBotswana (Pty) Ltd v Sentech (Pty) Ltd and Others* 2013 (6) SA 327 (GSJ) para [27] at 336G -H.

[88.3] the first respondent advised the sheriff that she was the new trustee but that she was not yet familiar with the affairs of the Trust.

[89] Although Mr Fraser is cited in his official capacity as trustee on the warrant of execution, the sheriff attended at the residence of Mr and Mrs Fraser, being the property, in order to execute the warrant.

[90] Only Mrs Fraser was available and she failed to point out any movable property belonging to the Trust and denied that the Trust owned any immovable property. Since Mrs Fraser was, in fact, the duly appointed trustee when the sheriff attended at the property, she was in a position to point out movable property and advise of any immovable property belonging to the Trust. This she failed to do.

[91] Prior to attending at their residence, the sheriff made several calls to Mr Fraser and, on each occasion, succeeded in contacting Mrs Fraser. As recorded in the sheriff's return in relation to these calls, Mrs Fraser consistently advised the sheriff that Mr Fraser was unavailable, she refused to divulge any information to assist the sheriff and she put the phone down on him. Mrs Fraser's attorney, Ms Marks, subsequently contacted the sheriff to advise him that Mr Fraser had emigrated to the United Kingdom.

[92] In terms of the common law and the rules, the execution creditor has no obligation to execute against movable assets where a judgment debtor fails to point these out and to make them available to the sheriff. If a debtor fails to point out movable property to satisfy the judgment debt, he behaves in a "*tricky manner and deliberately frustrates the creditor's efforts to obtain payment*".[23]

---

[23] *Nkola v Argent Steel Group (Pty) Ltd* 2019 (2) SA 216 (SCA) in para [11].

[93] As the applicant correctly contends, it was not obliged to proceed with execution against movable property because rule 46(1)(a) provides an election to either execute against movable property or to obtain an order of court declaring immovable property specially executable. The applicant attempted the former and now proceeds in terms of the latter.

[94] The first respondent's evasive conduct, as reflected in the sheriff's return, indicates that she behaved in a tricky manner to deliberately frustrate the applicant's efforts at satisfying the judgment debt. For instance, she was residing on the Trust's property but failed to mention this to the sheriff. In the circumstances, the applicant was entitled to proceed with this application for execution against the property.

Allegations of substantial assets available in Mr Fraser's estate

[95] The first respondent contends that the applicant had stated, in proceedings relating to the sequestration of Mr Fraser, that he had substantial assets available and that sequestration would be beneficial and, yet, in this application, the applicant alleges that proceeding against the Trust's property is the only way to obtain satisfaction of the judgment debt.

[96] The applicant denies the aforesaid and states that it sought the sequestration of Mr Fraser's estate as it would be to the advantage of creditors which is an essential averment to make in sequestration applications. I agree.

[97] The first respondent contends further that this application is premature as the applicant should have proceeded against the principal debtor and the other sureties before proceeding against the Trust. This is incorrect. The Trust bound itself as surety and co-principal debtor, with the debtor, in terms of the suretyship. Therefore,

the applicant was not required to excuss the principal debtor nor any other sureties as the Trust had, in effect, renounced the benefits of excussion and division.[24]

[98] For the reasons set out above, the first respondent's defences to the application are without merit and the applicant is entitled to execute against the Trust's property to satisfy the outstanding balance of the judgment debt.

[99] As to the costs of this application, there is no reason why costs should not follow the event. The applicant seeks the costs of two counsel, where so employed, and, in terms of clause 1.3.2 of the suretyship, on an attorney and client scale.

[100] The following order is made:

1. the immovable property described as Holding Number 103, Glenferness Agricultural Holdings, Registration Division J.R., Province of Gauteng, measuring 2, 5563 hectares, held by title deed no. T82703/2013, situated at 103 MacGillivray Road, Glenferness Agricultural Holdings is declared specially executable;

2. the registrar is directed to issue a writ of execution to enable the sheriff to attach and execute against the aforesaid immovable property in satisfaction of the balance outstanding in respect of the judgment debt, together with interest and costs;

3. the respondents are ordered to pay the costs of this application, including the costs of two counsel where so employed, on the attorney and client scale.

---

[24] *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 472B-D.

AJ LAPAN

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT:	JE Smit and PG Louw
APPLICANT'S ATTORNEYS:	Werksmans Attorneys
COUNSEL FOR THE FIRST AND SECOND RESPONDENTS:	Represented by Ms JS Marks Attorney with rights of appearance
RESPONDENTS' ATTORNEYS:	June Stacy Marks Attorneys
DATE OF HEARING:	25 February 2020
DATE OF JUDGMENT:	06 May 2020