REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

HCA CASE NO: HCAA 31/2023
***A QUO* CASE NUMBER: 3931/2021**
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.
DATE: 22.01.2025
SIGNATURE:

In the matter between:

J & R HARTMAN BOERDERY CC **(REG. NO: 1998/023403/23)**	**FIRST APPELLANT**
RENE ELIZABETH HARTMAN **(ID NO: 6[…])**	**SECOND APPELLANT**
GERHARDUS LOURENS HARTMAN **(ID NO: 7[…]))**	**THIRD APPELLANT**

JOHAN CHRISTIAAN RUDOLF HARTMAN **FOURTH APPELLANT**
(ID NO: 4[…])

-and-

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA **RESPONDENT**

Delivered : **22 January 2025.** This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down of the judgment is deemed to be **22 January 2025** at **10h00.**

Coram : M. G. Phatudi JP *et al.* Diamond AJ, Bresler AJ

JUDGMENT

BRESLER AJ:

Introduction:

[1] The matter came before court as an Appeal against the judgment and order of the court *a quo* delivered on the 26th of January 2023.

[2] The Appellants raised *inter alia* the following grounds of Appeal:

2.1 There is a material factual dispute in relation to the account claimed;

2.2 The Respondent failed to comply with prescripts of Uniform Rule 46A and, therefore, the court a qua failed to provide the necessary judicial oversight in a matter where rights in terms of Section 26(1) of the **Constitution** are implicated. Consequently, the Court *a quo* found that the

Third Appellant will still therefore be able to accommodate the Second and Fourth Appellants and they will not be rendered homeless if the execution is ordered, without any primary factual evidence from which the inference could be made.

2.3 The Respondent failed to prove its *locus standi* in that the "*written sale agreement regarding the sale, cession and delegation by Suidwes*" has not been evidenced and the "*duration of the sale agreement*" has not been provided.

[3] The Appeal is opposed by the Respondent. An application to reinstate the appeal was launched by the Appellants. The Respondents recorded that the application to reinstate the Appeal is not opposed, and as such the order reinstating the appeal was accordingly granted.

Issues that require determination:

[4] This Court is called upon to determine if the Respondent was entitled to the relief granted by the Court *a quo* having regard to the grounds raised by the Appellants in their Notice of Appeal. More specifically, this Court must determine if sufficient consideration were given to the procedural requirements of Uniform Rule 46A, and if the Respondent's version should have been preferred on a balance of probabilities.

In the Court *a quo*:

[5] In the court *a quo* the Respondent applied for judgment to be granted against the Appellants, jointly and severally for:

5.1 Payment in the amounts of respectively R15,002,558 together with interest at a rate of 9.5% per annum from the 31st of March 2021, R911,968.51 together with interest at a rate of 10.75% from 31 March 2021 and R1,152,497.31 together with interest at a rate of 9.75% from 31 March 2021.

5.2 An order in terms of which the immovable properties registered in the name of the First Appellant better known as:

5.2.1 Portion 7 (a portion of Portion 3) of the Farm Mooigelegen 140, registration Division K.S., Limpopo Province, measuring 124,7561 hectares, held by Deed of Transfer T129641/1998; and

5.2.2 Remaining Portion of Portion 2 of the farm Mooigelegen 140, registration Division K.S., Limpopo Province, measuring 267,2217 hectares, held by Deed of Transfer T129641/1998

be declared specially executable in favour of the Respondent.

5.3 An order in terms of which the immovable property registered in the name of the Third Appellant better known as:

5.3.1 Portion 9 (a portion of Portion 3) of the Farm Mooigelegen 140, registration Division K.S., Limpopo Province, measuring 77,0879 hectares, held by Deed of Transfer T 129640/1999

be declared specially executable in favour of the Applicant.

5.4 That the property referred to in paragraph 2 and 3 above be sold by the Respondent or its appointed agent in conjunction with the Sheriff of Court by public auction or private treaty;

5.5 Costs of suit on a scale as between attorney and client.

The Facts:

[6] The Respondent's claim is essentially premised on the following averments:

6.1 On the 26th of August 2013, the Respondent concluded a written sale agreement regarding the sale, cession and delegation by Suidwes of its right, title and interest in and to its existing and future book debts. This included the debt owed by the Appellants to Suidwes.

6.2 During or about October 2017, the First Appellant applied for, and was granted, a long-term loan with the predecessor of the Respondent (Suidwes). It was agreed that certain immovable properties will be held as security for the due fulfilment of the obligations in terms of the long-term loan.

6.3 The First Appellant was obliged to repay the long-term loan in annual installments of R1,830,469.63, of which the first installment was payable on or before 31 July 2018 and thereafter annually on the corresponding day, with the last payment to be made on or before 31 July 2031.

6.4 Subsequent to the conclusion of the long-term loan agreement and the registration of the required securities, Suidwes loaned and advanced, alternatively, made credit facilities available to the First Appellant, in the amount of R11,600,000.00 in order to consolidate its then existing credit facilities.

6.5 During or about September 2018, the First Appellant, represented by the Second Appellant, duly authorized thereto, applied for a postponement in respect of the then outstanding balance of the installment that was due on 31 July 2018 in terms of the long term loan agreement. The First Appellant's application for postponement (or carry term loan) was granted.

6.6 During or about October 2018, the First, Third and Fifth Appellants, duly represented and in person, applied for a summer production credit facility in respect of the First, Third and Fifth Appellants' 2019 summer production input costs. A summer production credit facility was accordingly granted to them.

6.7 Subsequent to the conclusion of the aforesaid agreement and the provisions of the required securities, Suidwes loaned and advanced, alternatively made credit facilities available to the First, Third and Fifth Appellants in the amount of R1,300,000.00.

6.8 The First Appellant failed to make payment of the installments that were due and payable by itself in terms of the provisions of the long-term loan agreement and as at 1 April 2021, it was in arrears in the amount of R 3,776,326.86.

6.9 The First Appellant also failed to make payment of the carry term loan. This was due on or before 31 December 2018 and as at 1 April 2021, the amount of R911,968.51, remained outstanding.

6.10 The First Appellant in addition also failed to repay its 2019 summer production credit facilities on or before 1 October 2019 and as at 1 April 2021, the amount of R1,152,497.31 remained outstanding.

6.11 Written letters of demand were dispatched to the First Appellant. Notwithstanding demand, the alleged breach was not rectified, and the Respondent was therefore entitled to claim judgment against the Appellants.

6.12 As to the executability against the immovable properties of the First and Third Appellants, the Respondent stated that the properties registered in the name of the First Appellant, being a juristic entity, cannot per se be regarded as a primary residence. The Respondent however *ex abudante cautela* dealt with various aspects as contemplated in Rule 46A of the Uniform Rules of Court, including but not limited to the value of the properties, the determination of a reserve price, if the property constitutes a primary residence, the particulars of the occupants and their circumstances, the payment history of the Appellants and the potential alternative methods of collecting the debt.

[7] The Appellants' Answering affidavit was delivered on the 4th of November 2021. The Answering affidavit raises the following crisp issues relevant to the current proceedings:

7.1 The Respondent relies on several written agreements in the Founding affidavit, such written agreements not being annexed to the Founding affidavit. As such the cause of action is incomplete.

7.2 The Appellants failure to make payment timeously is undisputed. They denied having received statements from Suidwes and can therefore not verify the correctness of the outstanding balance.

7.3 The properties that the Respondent sought to declare specially executable constitutes the primary residences of the Second and Fourth Appellants (Portion 9) and the Third Appellant (Portion 7). The Respondent was therefore obliged to provide evidence on the market value, the local authority valuation, the amount owing to the local authority and to serve the application on the Local Authority. The application is therefore materially defective.

7.4 The First Appellant conducts business as a commercial farm. It has continuing farming activities and expects to obtain substantial yield in respect of its current crops in the near future. The amount owed to the Respondent (insofar as they may be found to be owing) may be liquidated within a reasonable time.

7.5 The prejudice to be suffered by the First Appellant is immense. It would entail the loss of numerous jobs and also the residences of farm workers. In addition, the Second and Fourth Respondents have no alternative accommodation and will be left homeless as a result of this order.

[8] In reply, the Respondent submitted inter alia that no serious disputes of fact are raised and any uncertainty about the outstanding balance is addressed by means of the updated Certificate of Balance.

[9] It is apposite to note that the matter was argued in the court *a quo* on the 23rd of November 2022. Judgment was delivered on the 25th of January 2023.

[10] The following appears from the judgment of the Court *a quo*:

10.1 The Court *a quo* correctly noted the history of the matter, the respective agreements concluded between the parties and the mortgage bonds registered over the immovable properties.

10.2 The Court *a quo* correctly stated that the Appellants in their answering affidavit admitted they did not make payment in terms of the agreement.[1] The learned Judge, furthermore, correctly found, with reference to the terms of the agreement that the respective certificates of balance serves as prima facie proof of the amount of liability.[2]

10.3 The Court *a quo* stated the following in paragraph [19] that is of particular importance herein:

> *'[19] For a period of almost two years the First Respondent did not make payments towards its loan agreements, did (not) complain to the applicant or Suidwes that it was not receiving monthly statements. The first respondent in its answering affidavit is merely making a bare denial of its indebtedness towards the applicant. It had failed to disclose fully the nature and grounds of its defence, and the material facts relied upon'.*

10.4 The Court *a quo* furthermore explicitly considered the consequences of Section 26(3) of the **Constitution** *in lieu* of declaring the immovable properties specially executable. The learned Judge concluded that the Appellants failed to submit sufficient evidence to trigger the protection of Section 26(3). This includes the fact that there is no indication that the Second

[1] Paragraph (14] of the judgment
[2] Paragraph (16] of the judgment

and Fourth Respondents are indigent[3] and that no evidence was placed before court that they are poor.[4] It is furthermore evident that the learned Judge found the explanation with regards to the alleged substantial yield in respect of the current crops to be unsubstantiated as more than a year has passed, and no payment was made.

[11] As there was also no evidence before court that the Respondent is abusing the process, judgment was accordingly granted. On a thorough analysis of the judgment, it is clear that the Appellants fell short of what is required from them in rebuttal of the Respondent's claim.

The Applicable Legal Principles:

[12] On the 13th of June 2022 the Supreme Court of Appeal (SCA) delivered judgment in the seminal decision of ***Bestbier and Others NNO v Nedbank Ltd***.[5] The critical importance of this decision is the approach taken by the SCA on the application of Rule 46A of the Rules to properties owned by a Trust. To appreciate the applicability of the ***Bestbier*** decision to the facts *in casu*, a succinct analysis of the reasoning of the SCA is appropriate.

[13] The **Constitution** makes provision for justiciable socio-economic rights that includes the right to have access to adequate housing enshrined in Section 26 thereof. The underlying rationale of Rule 46A is to create a procedural structure to give effect to this constitutional right. The rule consequently came into effect on the 22nd of December 2017, in response to the conflicting decisions rendered by the respective Courts as to the factors that should be considered when exercising judicial oversight over orders of execution against residential immovable properties.

[14] The Supreme Court of Appeal explicitly stated that the aim of the rule is to assist the Court in considering whether the Section 26 Constitutional rights of a judgment debtor would be violated if his/her house is sold in execution. The rule,

[3] Paragraph [25] of the Judgment
[4] Paragraph [28] of the Judgment
[5] 2023 (4) SA 25 (SCA)

after all, only lays the procedural groundwork and is not substantive law. The requirement of judicial oversight must be seen against a history of forced removals and racist evictions during apartheid and the consequent need to protect security of tenure.

[15] Of particular importance to the facts *in casu* is the following extract from the reasoning of the SCA:

> *'[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. '*

[16] And further:

> *'[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 provisions of rule 46A, I can see no reason why the trust beneficiaries who fall into the Jaftha kind category and occupy the trust's immovable property as a primary residence (and are thus likely to be affected by an 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.'*

[17] The SCA then aptly summarises the *crux* as follows:

> *'[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 the 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 homeowner. 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. It is for this reason that the appeal falls to be dismissed with costs.'

[18] Essentially, in this Court's view, the Appellants were obliged to show, in the first instance, that they are of the *Jaftha*-kind before the provisions of Rule 46A would have to be considered bearing in mind that, at the time of the issuing of the proceedings, the ***Bestbier*** decision had not yet seen the light. As no indication were given, save for an unsubstantiated allegation that they would be rendered homeless, insufficient evidence served before the Court *a quo* to find that the said Appellants enjoyed the protection envisioned by the ***Bestbier*** decision. The Appellants had furthermore failed to show that, had the procedural prescripts of the rule been applied strictly, judgment would not have been granted against the Appellants.

[19] This must be understood against the backdrop that it is evident from the judgment of the court *a quo* that the protection envisioned in Section 26(3) of the **Constitution** was indeed considered and due thought were given to the prescripts of Rule 46A. In our view, the court *a quo* was not remiss in their duty in this regard.

[20] This ground of appeal must, therefore, fail. Much of what was argued by the Appellants related to non-compliance with the procedural aspects of the rule. In this Court's view, no substantial prejudice has however been shown to exists flowing from the alleged non-compliance in as far as the SCA pertinently stated that Rule 46A merely govern the procedural aspects. As stated herein before, at the time of the delivery of the Judgment, the SCA judgment was the prevailing authority on matters of this nature. The Appellants clearly failed to show that they fall within the vulnerable group of persons that should enjoy constitutional protection. Sufficient consideration were given as to the procedural aspects of the Rule and the exercise of the Court *a quo* 's discretion in this regard cannot be faulted. This Court is bound to follow existing precedent in matters of principle and the law.

[21] It stands to be noted that the findings of the SCA pertaining to the category of persons that Rule 46A aims to protect, was consequently confirmed by the Constitutional Court in the matter of ***Bestbier and others v Nedbank Limited***[6]. Noticeably, the Constitutional Court also stated that sufficient protection exists in law in respect of farm workers and tenants. This Court is therefore satisfied that, even if the current prevailing precedents are considered, the Appellants' appeal on this ground cannot succeed.

[22] The remaining grounds of appeal relates to the allegation that the Respondent lacked the requisite *locus standi* to institute the proceedings before the court a quo and the alleged dispute regarding the outstanding balance.

[23] Having regard to the version of the Appellants set out in their Answering affidavit delivered in the Court *a quo*, neither of these issues raised a bona fide dispute of fact. The Court a quo correctly referred to the well-known decision rendered in the case of ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another***[7] where the following was stated:

> *'A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can be expected from him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily process knowledge of them and be able to provide an answer (or countervailing evidence) if they be true or accurate, but instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from the broader matrix of circumstances all of which needs to be borne in*

[6] 2024 JDR 1551 (CC)
[7] 2008 (3) SA 371 (SCA) at para 13

mind when arriving at a decision. A litigant may not necessary recognise or understand the nuances of a broad or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view on the matter.'

[24] The Court *a quo* observed that the Appellants did not allege that their failure to service the loans for almost two years was in protest of not receiving monthly statements. Their unsubstantiated denial was thus deemed a delaying tactic. This Court is in agreement with the view expressed by the Court *a quo*. The repayment terms of the loan agreements were within the knowledge of the Appellants, and they could have presented a calculation as to the amount that they allege were due. This was not done. The court *a quo* thus correctly accepted the evidence presented by the Respondent by means of the certificate of balance.

[25] As to the allegation of lack of *locus standi*, again the Appellants elected to merely allege that it is not within their knowledge. If there was a genuine concern, one would have expected that reasonable steps would have been taken to procure the physical documents. The Appellants did not do so. The court *a quo* therefore correctly took the 'robust approach' and accepted that the Respondent had the requisite *locus standi.* No basis was laid in the evidence creating a reasonable assumption that the *locus standi* of the Respondent is denied on factual grounds.

[26] Premised on the aforesaid analysis of the parties' versions and the applicable legal prescript, it is clear that the Appellants' appeal cannot succeed, and stands to be dismissed.

Costs:

[27] There is no reason why the cost order should not follow the outcome of the proceedings. In this case, the Appellants failed in their bid to overturn the judgment *a quo* they sought to appeal against.

Order:

[28] In the result the following order is made:

27.1 The Appeal is dismissed with costs of two Counsel on Scale C where so employed.

M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I concur,

MG PHATUDI JP
JUDGE PRESIDENT OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I concur,

G DIAMOND AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

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