

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: 7270/2023 and 7516/2023

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED: YES/NO
DIAMOND AJ	
SIGNATURE	DATE

14/03/2025

In the matter between:

NEDBANK

PLAINTIFF

and

LUCAS AND ANDRE
VAN DER WESTHUIZEN (PTY)LTD

FIRST DEFENDANT

LUCAS AND LOUIS
VAN DER WESTHUIZEN (PTY)LTD

SECOND DEFENDANT

LUCAS MARTHINUS
VAN DER WESHUIZEN

THIRD RESPONDENT

JUDGMENT

DIAMOND A J:

- [1] The two above applications were all simultaneous since the two applications deal with substantially the same questions of fact and law.
- [2] The Plaintiff, NEDBANK extended finance to the First and Second Defendants and the this Defendant entered into suretyship for the indebtedness of the first and Second Defendants towards Nedbank.
- [3] There were various loan agreements entered into at various dates and the specific details thereof are not important. What is important is that the indebtedness of the First and Second Defendants are properly secured by way of mortgage bonds over several portions of farms, and relevant for purposes of this judgement several portions of the farm called Mooiwater Estates 145, K.R. Limpopo.
- [4] It is common cause that the First and Second Defendants fell into arrears with their repayment obligations in terms of the loan agreements.
- [5] The Plaintiff issued summons against the Defendants for judgement of the amounts outstanding in terms of the loan agreement as well as an order that the immovable properties securing the indebtedness in terms of the loan agreement, are to be declared executable.

[6] The Defendant entered appearance to defend the action and filed a plea whereupon the Plaintiff applied for summary judgement.

[7] It appears from the papers that the parties tried to come to some kind of an understanding regarding the arrears, however the attempts failed, and the summary judgement proceedings proceeded on 5 March 2025.

[8] The Plaintiff also filed an application in terms of rule 46(1) and Rule 46A.

[9] The Plaintiff relied on the usual certificates of indebtedness, which in terms of the contract between the Plaintiff and the Defendants served as prima facie evidence.

[10] In defence to the certificates of indebtedness, the Defendants pointed very vaguely to an alleged uncertainty on the certificates and stated that the Plaintiff needed to clarify these aspects and that consequently reliance cannot be placed on the certificates.

[11] On the date of the hearing counsel for the Defendants abandoned reliance on this ground of defence. In my view, this abandonment was well justified. There is a wealth of authority that such an approach to trying to resist the *prima facie status* is ill-conceived. In the light of this abandonment, I do not elaborate on this aspect any further in this judgement.

- [12] Counsel for the Defendant indicated that the opposition to the summary judgement and the applications in terms of rule 46 and 46A, are opposed based on the fact that in terms of authority, an application for summary judgement as well as an application for rule 46 and 46A, have to be enrolled and adjudicated upon simultaneously, that application for both should be dismissed, since the properties cannot be declared executable based on the fact that the farm Mooiwater is the primary residence of the son of the third Plaintiff as well as some farmworkers.
- [13] In its application to declare the immovable property executable, and in its attempt to comply with the stipulations of rule 46A, the Plaintiff states that despite attempts to establish whether any of the portions of properties served as the primary residence of the type of person/s who is/are protected by rule 46A, they could not establish that and they simply were unable to play such facts before the court.
- [14] In response to this allegation, the Defendants states that it is simply not sufficient for the Plaintiff stated they could not establish the section 46A status of the farms.
- [15] The Defendants allege that the farm Mooiwater serves as the primary residence of a number of farmworkers as well as the son of the third Defendant and his family.

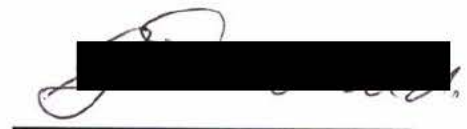
- [16] Now, to start with the allegation that the farm serves as primary residence of the farmworkers: This allegation cannot assist the Defendants. In my view the same considerations apply in this case as the considerations referred to in *Bestbier and others v Nedbank Limited*¹. In terms of that Constitutional Court judgement, in circumstances like these, the security of residents of farmworkers is secured by Extension of Security of Tenure Act, 1997 (Act 62 of 1997). The court stated that an order to declare immovable property executable does not infringe on any constitutional rights to housing of farmworkers.
- [17] That leaves the allegation with regard to the fact that relatives of the third Plaintiff use the farm Mooiwater as residence.
- [18] In my view this allegation does not assist the Defendants either. The Plaintiff alleges explicitly that they tried to establish the section 46A status of the properties but was unable to do so.
- [19] In response to this statement of the Plaintiff, the Defendants simply state that the relative of the Third Defendant use the farm Mooiwater as residence. This statement is a very vague statement, given the fact that there are several portions of Mooiwater and there is no explanation as to which portion the claim is made.

¹ [1] [2024] JOL 64354 (CC) P. 84 – 87.

[20] As is also clear from the Supreme Court of Appeal decision of *Petrus Johannes Bestbier and Others v Nedbank Limited*², in which the court indicated that Rule 46A, was not applicable to that case because the Defendants failed to show that they fall under the category of persons whose interests are protected by section 46A. I do not understand this remark necessary to mean that the Defendant has an onus to prove that Rule 46A is applicable, however, it means at the very least that given the status of allegations before the court, there can be an evidentiary duty on the Defendants to produce credible evidence that would point to a conclusion that Rule 46 A is applicable and that its stipulations should be complied with.

[21] In this case, the Defendants failed to place such evidence before this court, and I am of the view that Rule 46A is not applicable to this case.

[22] I consequently order as is prayed for in the prayers of the summons of the Plaintiff.



G DIAMOND AJ

ACTING JUDGE OF THE HIGH COURT,

² (Case No. 150/2021) [2022] ZASCA 88 (13 June 2022) Par 32.

LIMPOPO DIVISION: POLOKWANE

APPEARANCES:

FOR THE PLAINTIFF : ADV. J.P. MORTON

**INSTRUCTED BY : BALOY SWART & ASSOCIATES
INCORPORATED**

FOR THE DEFENDANT : ADV. Z.A. TEPERSON

INSTRUCTED BY : JJ JACOBS ATTORNEYS

DATE OF HEARING : 05 MARCH 2025

DATE OF JUDGMENT : 14 MARCH 2025