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EXECUTING A DEBT AGAINST RESIDENTIAL PROPERTY: THE POTENTIAL APPLICATION OF RULE 46A OF THE *UNIFORM RULES OF COURT* BEYOND A LITERAL READING OF “PROPERTY OF A JUDGMENT DEBTOR”

SUMMARY

This article examines the field of application of rule 46A of the *Uniform Rules of Court*, which regulates the procedure for creditors seeking to execute a judgment debt against residential property. The central question concerns the categories of home occupiers covered by rule 46A. The literal wording of the rule appears to limit its application to situations where the property is the home of, and owned by, a “judgment debtor”. However, it is necessary to consider the possible application of the rule to at least two other scenarios. First, does rule 46A apply if the property is owned by a company, close corporation or trust, but is occupied for residential purposes by a natural person who is a shareholder, member or beneficiary of the respective company, close corporation or trust (described, for the purposes of this article, as a “beneficial owner”)? Secondly, must the rule be followed if the property is occupied as a home, not by the judgment debtor, but by a tenant in terms of a lease agreement?

1. INTRODUCTION

Rule 46A of the *Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa* (hereinafter, the *Uniform Rules of Court*)¹ is applicable “whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor”.² The term



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- 1 GN R48 Government Gazette 1965:999, as amended. Court rules are made by the Rules Board for Courts of Law, with the approval of the Minister of Justice and Correctional Services. See the *Rules Board for Courts of Law Act* 107/1985:sec. 6.
- 2 *Uniform Rules of Court*:rule 46A(1).

“property of a judgment debtor” appears to limit the field of application of rule 46A to a specific class of occupiers of residential property, namely the person who owes a debt to the creditor and who owns and occupies the property that is sought to be executed (the owner-occupier). However, the question is whether the rule also applies when the property is occupied for residential purposes by someone other than the judgment debtor (owner).

The rationale behind rule 46A is to provide procedural rules for the constitutional protection of a debtor’s home in cases where a debt is sought to be executed against the property. Therefore, it is necessary to ask a more fundamental question that transcends the technical interpretation of rule 46A. Which categories of occupiers are entitled to the protection of their constitutional housing rights in cases of sales in execution? With reference to the constitutional context of rule 46A, this article considers how wide or narrow the term “judgment debtor” should be interpreted to give effect to the purpose behind rule 46A. After briefly setting out the background to rule 46A, two contentious scenarios are investigated where the rule may be of potential application: first, where the property is used as a home by a shareholder, member or beneficiary of, respectively, the company, close corporation or trust that owns the property and, secondly, where the property is owned by the judgment debtor but occupied for residential purposes by a tenant in terms of a lease agreement.

2. BACKGROUND

Rule 46A, titled “Execution against residential immovable property”, was added to the *Uniform Rules of Court* with effect from 22 December 2017.³ The historical background to rule 46A can be traced to the 2004 judgment of the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz*.⁴ In this matter, the court held that execution against a home entails a limitation of the “right to have access to adequate housing”,⁵ which means that the infringement will only be constitutionally valid if it meets the requirements of the limitations clause.⁶ Essentially, for the limitation of the debtor’s housing right to be constitutionally compliant, there should be sufficient proportionality between the effect of execution and its debt-collection purpose. The loss of a home should be the last resort after it is clear that there are no reasonable alternative ways to satisfy the creditor’s rights.⁷ In light of this, the main import of the *Jaftha* judgment was the emphasis on the requirement of judicial oversight in all execution cases involving residential property. In other words, the court established the constitutional principle that a home may only be sold

3 GN R1272 Government Gazette 2017:41257. The equivalent new rule in the *Rules Regulating the Conduct of the Proceedings of the Magistrates’ Courts of South Africa* (hereafter, *Magistrates’ Courts Rules*) is rule 43A.

4 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC).

5 *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*): sec. 26(1).

6 *Constitution*:sec. 36(1). See *Jaftha v Schoeman; Van Rooyen v Stoltz*:par. 34.

7 See especially *Jaftha v Schoeman; Van Rooyen v Stoltz*:paras. 53-59.

if approved by an order of court (the Magistrates' Court *in casu*), which may only be granted after having considered all the relevant circumstances.

Many other judgments were delivered on this topic in subsequent years, most notably *Gundwana v Steko Development*.⁸ In the latter case, the Constitutional Court confirmed and clarified the law by finding that *Jaftha* applies not only in exceptional cases, but also in typical mortgage foreclosure cases brought before the High Courts.⁹ The *Uniform Rules of Court* were also amended in 2010 to make it an express requirement that residential property may only be sold in execution if this is authorised by a court having considered all the relevant factors.¹⁰ Nevertheless, uncertainties surrounding the sale in execution of homes persisted and the courts continued to hand down judgments on the intricacies of this issue. A problem that became particularly thorny was the common occurrence of homes being sold at auctions for amounts unreasonably lower than the market value.¹¹ The Rules Board of Court, therefore, deemed it fit to amend the *Uniform Rules of Court* again by adding a new rule, 46A, which contains a more comprehensive set of provisions dealing with various aspects concerning the sale in execution of residential property.¹²

The main idea underlying rule 46A is that, when a court hears an application for an execution order against a debtor's primary residence, the court must consider whether the debtor can satisfy the debt in an alternative way so as to avoid a sale of the debtor's home.¹³ Furthermore, the court should only order a sale in execution of the debtor's home if, considering all relevant factors, such execution is "warranted".¹⁴ To this end, rule 46A contains provisions pertaining to matters such as the form and content of the creditor's notice of application, the content of the supporting affidavit, information to be evidenced by supporting documents, service of the notice of application and supporting affidavit on the debtor and other affected persons, and the manner in which the debtor should respond to the application.¹⁵ The rule also stipulates the powers of the court hearing the application, including the novel power to set a reserve price at which the property should be put up for auction.¹⁶

For present purposes, it is not necessary to set out the detail of rule 46A, except to underline that it places certain procedural burdens on a creditor seeking execution against the residential property of a judgment debtor. Most notably, the creditor must supply the court with specific information and

8 *Gundwana v Steko Development* 2011 3 SA 608 (CC).

9 See especially *Gundwana v Steko Development*; paras. 41-49.

10 *High Court Rules of Court*: rule 46(1)(a)(ii), as formulated pre-2017. See GN R981 Government Gazette 2010:33689.

11 See, for example, *Nkwane v Nkwane* 2019 JOL 43796 (GP).

12 For more detail on the developments leading up to rule 46A, see Brits 2016:63-100 and other sources cited there.

13 *Uniform Rules of Court*: rule 46A(2)(a).

14 *Uniform Rules of Court*: rule 46A(2)(b).

15 *Uniform Rules of Court*: rule 46A(3)-(6).

16 *Uniform Rules of Court*: rule 46A(8)-(9).

documentation supporting these particulars, which information is to be used by the court in deciding whether a sale in execution is justified and, if so, what the reserve price should be. If rule 46A does not apply, the court does not have the power to set a reserve price.¹⁷ The rule also effectively places the onus on the creditor to convince the court, via the information provided, that an execution order will be justifiable on the facts of the case.¹⁸ Therefore, it is vital for a creditor to know in which situations compliance with rule 46A is required, because if the creditor was supposed to follow rule 46A, but did not do so, the court is likely to dismiss the application or, at best, postpone it. In other words, to avoid unnecessary time delays and expenses, creditors require certainty on the exact scope of application of rule 46A.

As mentioned earlier, rule 46A(1) provides that the rule applies, and must thus be followed, “whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor”. The precise meaning of this phrase is important, because the rule does not have to be followed if the facts of a particular case do not involve “residential immovable property of a judgment debtor”. From this statement it appears that the relevant property not only needs to be used for “residential”¹⁹ purposes and must be “immovable”²⁰ in nature, but should also be the residence of the person cited as the “judgment debtor”²¹ in terms of the judgment that is sought to be executed against the relevant property. The phrase “the property of” also indicates that the judgment debtor must be the registered owner of the property. However, the property in question does not have to be mortgaged to the creditor for rule

17 *Uniform Rules of Court*:rule 46, which applies to execution sales of immovable property in general, does not empower a court to set a reserve price. Instead, only preferent creditors, the local authority and the body corporate have the right to insist on a reserve price. See *Uniform Rules of Court*:rule 46(5).

18 See, for example, *Williams v Standard Bank of South Africa Ltd* 2019 JOL 45497 (WCC);par. 14; *Nedbank Limited v Nkosi* [2017] ZAGPPHC 900 (6 December 2017);par. 11.

19 The rule does not state that the property must be the *primary* residence of the judgment debtor in order for rule 46A to apply; the property should merely be residential in nature. However, whether the property is the debtor’s *primary* residence is one of the factors that the court must consider when deciding whether to grant the execution order. See *Uniform Rules of Court*:rule 46A(2)(a)(i).

20 Currently, no provision is made for situations where the residential property sought to be attached in execution is *movable* in nature, for example something like a caravan used as a home. Execution against movable assets is regulated by *Uniform Rules of Court*:rule 45 and *Magistrates’ Courts Rules*:rules 41-42, neither of which include special arrangements for situations where movables are used for residential purposes.

21 The phrase “judgment debtor” appears to suggest that rule 46A should only be followed if the creditor had already obtained a judgment that is to be executed against the property. However, in mortgage cases, it remains possible for a creditor to apply for a judgment and an execution order together, in which case such application must comply with rule 46A, even though the respondent is not a *judgment* debtor yet. See *Absa Bank Limited v Mokebe* 2018 6 SA 492 (GJ);par. 23.

46A to apply. This entails that the rule must be followed regardless of whether or not the property is burdened as security for the debt.²²

The most thorny aspect of the deceptively simple wording of rule 46A(1) is arguably the phrase “property of a judgment debtor”, because it appears to narrow the field of application of rule 46A to a specific category of cases, namely where the debtor him- or herself occupies (as owner) the property for residential purposes. However, the question that arises is: What is the position if the judgment debtor (owner) does not use the property for residential purposes, but instead the property is occupied as a home by someone other than the owner/debtor? Examples include where the property is occupied by a tenant or family member²³ of the judgment debtor, or where the property is owned by a juristic person (such as a company or close corporation) or trust, but occupied by a shareholder or member of the juristic person or a beneficiary (and/or trustee) of the trust. Indeed, it is not uncommon for natural persons to own their homes via trusts, companies or close corporations to enable them to enjoy certain benefits such as insulating the property against attachment by the personal creditors of the natural person.

A literal interpretation suggests that rule 46A does not apply if the debtor and the occupier are two different persons. However, there is some disagreement in case law regarding the interpretation of “judgment debtor” and thus the application of rule 46A. Therefore, the following sections of this article investigate two prominent scenarios more closely: First, where the property is occupied by a company shareholder, close corporation member or trust beneficiary and, secondly, where the property is occupied by a tenant.

In this discussion, it is important to bear in mind that court rules do not and cannot create substantive law. Court rules can restate existing substantive law and provide procedural mechanisms to give effect to existing substantive law, but they cannot be used to create, amend or add to substantive law.²⁴ Therefore, if there is (or appears to be) a conflict between a court rule and the substantive law that it is meant to implement, the substantive law must prevail. In this context, the relevant substantive law is sec. 26 of the *Constitution* and the case law regarding the application of sec. 26 to sales in execution of residential property. The result is that rule 46A must be interpreted in line with the constitutional norms deriving from sec. 26.²⁵

22 *Absa Bank Limited v Mokebe*:par. 28.

23 The issue of family members occupying the judgment debtor’s property came up in, for example, *Nedbank Limited v Molebaloa* [2016] ZAGPPHC 863 (12 August 2016):par. 22, but this aspect is not considered in this article. For a discussion, see Brits 2018.

24 *Standard Bank of South Africa Limited v Hendricks* [2019] 1 All SA 839 (WCC):paras. 25-28, 57; *United Reflective Converters (Pty) Ltd v Levine* 1988 4 SA 460 (W):463; *Ex parte Christodolides* 1953 2 SA 192 (T):195.

25 The relevant provisions hereof are discussed in 3 and 4 below.

3. SCENARIO 1: WHERE THE PROPERTY IS OCCUPIED BY A COMPANY SHAREHOLDER, CLOSE CORPORATION MEMBER OR TRUST BENEFICIARY

3.1 Case law under rule 46(1)(a)(ii)

As mentioned above, for about seven years before rule 46A was introduced, rule 46(1)(a)(ii) fulfilled a similar purpose by virtue of a proviso inserted in 2010. Before its amendment in 2017, the proviso to rule 46(1)(a)(ii) provided that “where the property sought to be attached is the primary residence of the judgment debtor, no writ [of execution] shall [be issued] unless the court, having considered all the relevant circumstances, orders execution against such property”.

The key phrase regarding the application of this rule, namely “primary residence of the judgment debtor”, is similar to the wording of the current rule 46A(1). In a handful of court cases, the question was asked whether the judicial oversight requirement in rule 46(1)(a)(ii) applied if the judgment debtor (and owner of the property) was a company, close corporation or trust, but where a shareholder, member or beneficiary occupied the property for residential purposes. It is useful to refer to these cases decided in terms of rule 46(1)(a)(ii), since it is conceivable that the reasoning expressed by the respective judges could apply equally to the almost identical wording of rule 46A(1).

In *Nedbank Ltd v Fraser*,²⁶ two of the four matters before the court concerned properties owned by juristic persons, one a company and the other a close corporation. However, in each instance, the properties were occupied as homes by a shareholder and member of the company and close corporation, respectively. The court noted that, although the proviso to rule 46(1)(a)(ii) referred to “the primary residence of the judgment debtor”, the judgment of the Constitutional Court in *Gundwana* focused on “the home of a person”,²⁷ which wording is also reflected in sec. 26(3) of the *Constitution*.²⁸ Therefore, the court in *Fraser* found that the factor triggering protection in terms of sec. 26 of the *Constitution* is not the status of the judgment debtor as such, but rather that the property is someone’s home. In view of this, the court concluded that, in circumstances where a home is owned via a company, close corporation or trust, the constitutional protection extends to shareholders, members and beneficiaries of such companies, close corporations and trusts,

26 *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ):par. 12.

27 *Nedbank Ltd v Fraser*:par. 12, citing *Gundwana v Steko Development*:paras. 1, 18, 23, 34, 49, 50, 55, 65.

28 *Constitution*:sec. 26(3): “No one may be evicted from their *home*, or have their *home* demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions” (emphasis added).

provided that these natural persons live in the property and can be regarded as the “beneficial owners”²⁹ of the property.³⁰

The court in *Firststrand Bank Ltd v Folscher*³¹ took a different approach. It relied on *Standard Bank of South Africa Ltd v Saunderson*³² to find that a “judgment debtor” for purposes of rule 46(1)(a)(ii) refers to “an individual, a person”.³³ Accordingly, the court concluded that the judicial oversight required by the proviso to the aforementioned rule does not apply if the property is owned by a company, close corporation or trust in situations where the member, shareholder or beneficiary is a “beneficial occupier”, even if the property is the only residence of that shareholder, member or beneficiary.³⁴

In *Firststrand Bank Limited t/a RMB Private Bank v 1301 Myrtle Road, Fourways Gardens CC*,³⁵ the court agreed with the *Folscher* court’s interpretation and added that the term “judgment debtor” in the proviso to rule 46(1)(a)(ii) “can only refer to a natural person as only a natural person can have a primary residence”.³⁶ However, in this case, the creditor also sought judgments against two sureties who were natural persons and occupied the property for residential purposes. Thus, because the sureties were judgment debtors, the judicial oversight requirement also applied to them.³⁷

From the above survey of cases, it is clear that there were conflicting judgments on the interpretation of “judgment debtor” under rule 46(1)(a)(ii). The courts in *Folscher* and *Myrtle Road* focused on the literal wording of the proviso to rule 46(1)(a)(ii) and the logic that only a natural person can occupy property as a primary residence, meaning that the judgment debtor has to be a natural person for the judicial oversight requirement to kick in. Conversely, the court in *Fraser* interpreted rule 46(1)(a)(ii) within its constitutional context, namely sec. 26 of the *Constitution* and the Constitutional Court’s judgment in *Gundwana*. It concluded that the reason for the judicial oversight requirement

29 The phrase “beneficial owner” is used in some of the judgments under discussion and it, therefore, appears several times in this article. However, it should be noted that, although the phrase is sometimes used in certain contexts, the concept of a “beneficial owner” does not formally exist in South African property law. This article should also not be read as endorsing the adoption of this concept in general. Instead, it is used in a functional sense to indicate the person behind the legal entity that formally owns the property.

30 The interpretation in *Nedbank Ltd v Fraser* was supported by Van der Walt & Brits 2012:324. See also Brits 2018:354.

31 *Firststrand Bank Ltd v Folscher* 2011 4 SA 314 (GNP).

32 *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA):par. 3.

33 *Firststrand Bank Ltd v Folscher*:par. 31.

34 *Firststrand Bank Ltd v Folscher*:par. 32.

35 *Firststrand Bank Limited t/a RMB Private Bank v 1301 Myrtle Road, Fourways Gardens CC* [2015] ZAGPJHC 270 (17 November 2015):paras. 37-52.

36 *Firststrand Bank Limited t/a RMB Private Bank v 1301 Myrtle Road, Fourways Gardens*:par. 46.

37 *Firststrand Bank Limited t/a RMB Private Bank v 1301 Myrtle Road, Fourways Gardens*:paras. 47, 52-53. See also *Assetline South Africa (Pty) Ltd v Manhattan Delux Properties (Pty) Ltd* [2020] ZAGPJHC 97 (10 May 2020):paras. 12, 14.

is not the legal status of the judgment debtor – as the literal wording of the rule seemed to suggest – but the fact that the property is occupied as a home.

3.2 Case law under rule 46A

In *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*,³⁸ the court was faced with the interpretation of the term “judgment debtor” in rule 46A(1). The creditor argued that it did not have to follow rule 46A in order to execute against the property, because the mortgaged property was registered in the name of the trust.³⁹ Although one of the trustees and his children used the property as their primary residence, the argument was that the creditor did not have to follow rule 46A, because the trust – as debtor, owner and mortgagor – was a “juristic person” and because rule 46A does not apply to juristic persons.⁴⁰

The respondents (the trust and the various trustees) acknowledged that rule 46A only applies where the judgment debtor uses the property as a “dwelling or shelter for humans” and thus not where the property is occupied by entities other than human beings for non-residential purposes.⁴¹ However, the respondents argued that, if the property is registered “nominally” in the name of a legal person or trust, but is used as a home by a trustee or beneficiary, rule 46A must be followed when a creditor seeks to execute against the property and when the legal person or the trustees in their official capacity are the judgment debtors.⁴²

The court confirmed the trite principle that, unless a statute determines otherwise, a trust is not a juristic person, but a *sui generis* legal institution. Although assets and liabilities can be held collectively in a trust estate as a separate entity, the trust estate does not have legal personality. The assets and liabilities instead vest in the trustees in their official capacity.⁴³ Therefore, the court concluded that the trust, in this case, was not a legal person for purposes of rule 46A.

The court then referred to a statement made in *Mokebe*,⁴⁴ a full bench decision concerning rule 46A, namely that “this matter concerns and applies only to those properties which are primary homes of debtors who are individual consumers and natural persons”. However, the court in *Mthunzi* explained that the present case was not impacted by this statement from *Mokebe*,

38 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust* [2019] ZAGPPHC 336 (9 July 2019).

39 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 8.

40 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 8.

41 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 9.1.

42 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 9.2, citing Van Loggerenberg 2019:D1-632Q.

43 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 10, quoting from *Land and Agricultural Development Bank of SA v Parker* [2004] 4 All SA 261 (SCA):par. 10.

44 *Absa Bank Limited v Mokebe*:par. 59.

because the present case did not concern a juristic person. The court thus found that, because the trust *in casu* was not a juristic person, rule 46A was indeed applicable.⁴⁵

The court in *Mthunzi* subsequently considered the application of sec. 26 of the *Constitution* to sales in execution as per the Constitutional Court's judgment in *Jaftha*. From the latter judgment, the court in *Mthunzi* surmised that "the emphasis is [on] immovable property that is used as a primary residence" and that "[t]he test is the purpose for which the property is acquired and used", not "[t]he *persona* used to acquire the property".⁴⁶ Consequently, because the second respondent lived in the property with his children, the matter fell within the ambit of the *Jaftha* judgment.⁴⁷

The court acknowledged that rule 46A does not apply if the property in question is not used as a dwelling or shelter for human beings.⁴⁸ However, the court went further by agreeing with the contention that rule 46A also applies if the property is

merely nominally registered in the name of a legal person or trust but used as a dwelling by the shareholders or trustee or trust beneficiaries ... 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.⁴⁹

The court expanded upon its reasoning as follows:

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 judgement (*sic*) debtor is of no significance. It is immaterial whether the judgment debtor is a juristic person or a natural person.⁵⁰

In fact, the court held that it was "of paramount importance" that the property was used by one of the trustees (who was also a trust beneficiary) for residential purposes and that, therefore, because sec. 26 of the *Constitution* was implicated, rule 46A had to be followed.⁵¹ The judge also stated, in

45 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 12. Not much can be read into the quoted statement from *Absa Bank Limited v Mokebe*, since the court in that case was merely stating that the facts of the case before it dealt with natural persons and thus that its decision did not apply to other situations. The statement cannot be read as establishing a general rule that excludes all debtors who are not natural persons. Moreover, the statement was an *obiter dictum*, since the court in *Absa Bank Limited v Mokebe* was not called upon to decide on the definition of "judgment debtor", nor did the statement have any bearing on the outcome of that case.

46 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 14.

47 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 15.

48 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 19, citing Van Loggerenberg 2019:D1-632Q.

49 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 18.

50 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 19.

51 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:paras. 27-28.

passing, that the same would be the case if the property was owned by a company, but occupied by a shareholder.⁵²

3.3 Discussion

The handful of judgments decided under rule 46(1)(a)(ii) and rule 46A(1) do not provide a conclusive answer to the question posed in this scenario. However, the most recent judgment (*Mthunzi*) arguably represents the current state of the law. *Mthunzi* is probably also accurate in light of the constitutional principles that rule 46A was designed to implement. I would nevertheless emphasise the qualification added in *Fraser*, namely that the property must be occupied for residential purposes by a natural person who, in reality, is the beneficial “owner” of the property that is formally owned via a juristic person or trust.

It is undeniably the case that the rationale behind rule 46A – and its predecessor, the proviso to rule 46(1)(a)(ii) – is the need for a court to exercise judicial oversight whenever debt enforcement action may lead to the loss of, or eviction from a home. This judicial oversight requirement is based on sec. 26(1) and (3) of the *Constitution*. Sec. 26(3) pertinently reflects the constitutional imperative that “[n]o one may be evicted from their home ... without an order of court made after considering all the relevant circumstances”. Therefore, the need for judicial oversight is firmly founded on this constitutional provision and requires of a court to consider all the relevant circumstances of the case before making the relevant order authorising the eviction. Sec. 26(1), in turn, provides more substance regarding the standard against which a court would measure the facts of a case. The subsection states that “[e]veryone has the right to have access to adequate housing”.⁵³ The primary purpose of this right is to place a positive duty on the state, in terms of sec. 26(2), to progressively provide homeless persons with access to housing. However, case law makes it clear that sec. 26(1) also entails a negative right, meaning that a compromise of someone’s existing access to housing also amounts to a limitation of the right in sec. 26(1).⁵⁴ Such an infringement will be unconstitutional, unless it can be justified in terms of sec. 36(1) of the *Constitution*, which in essence requires proportionality between the purpose of the infringement (settlement of a debt) and the impact on the occupier.⁵⁵ Accordingly, the core function of judicial oversight is to ascertain whether the facts of a case reveal an unjustifiable infringement of the right to adequate housing.⁵⁶ In other words,

52 *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust*:par. 20, citing Van Loggerenberg 2019:D1-632Q.

53 For more detail on the application of sec. 26(1) and (3) of the *Constitution* in the context of sales in execution, see Brits & Van der Walt 2014:290-294.

54 See, for example, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC):par. 34; *Jaftha v Schoeman*; *Van Rooyen v Stoltz*:par. 34.

55 See especially *S v Makwanyane* 1995 3 SA 391 (CC):par. 149 on the proportionality test in general. See *Jaftha v Schoeman*; *Van Rooyen v Stoltz*:paras. 36, 40-42 and *Gundwana v Steko Development*:par. 34 on proportionality in the debt enforcement context.

56 See, for example, *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA):paras. 20, 26.

the court is called to determine whether the loss of the debtor's home would be a proportionate solution under the circumstances of the particular case. For instance, as rule 46A also stipulates, the court must consider whether there are reasonable alternatives to the sale in execution of the home, so as to avoid a loss of the home while giving effect to the creditor's rights, while the court must also ensure that a sale in execution is only authorised if this course of action is the last resort.⁵⁷

In view of the above, and particularly given the sound reasoning in cases such as *Mthunzi* and *Fraser*, it is hard to arrive at any conclusion other than that rule 46A must, in principle, be applicable in cases of so-called "beneficial ownership". This is confirmed by the wording in the *Constitution* itself, as well as by the judgments of the Constitutional Court in *Jaftha* and *Gundwana*. It is incontrovertible that the protection contemplated by the housing clause and the jurisprudence around it is not limited to owners or persons who are formally cited as judgment debtors. The term "judgment debtor" in rule 46A must, therefore, be interpreted broadly and purposefully to include an occupier who is a "beneficial owner" via a legal entity or trust, for to do otherwise would not pass muster under sec. 26 of the *Constitution*. Indeed, there appears to be no convincing reason to exclude such occupiers from protection during execution proceedings.

The implication is that, whenever a creditor seeks to execute against property belonging to a corporate entity or trust, it must establish whether the property in question is occupied by the "beneficial owner" behind the entity or trust. If this is indeed the case, the creditor must follow rule 46A when applying for the execution order. In the case of banks, this position is not as cumbersome as it may seem, since banks in any event are required to maintain information regarding the beneficial ownership of all of its clients so as to comply with anti-money laundering legislation.⁵⁸ I, therefore, do not foresee the application of rule 46A in cases of "beneficial owners" to be problematic for banks. However, non-bank creditors, who do not have similar due diligence measures in place when it comes to the natural persons behind their corporate debtors, may experience greater difficulty determining whether or not rule 46A must be followed in cases where the debtor is a legal person or a trust. Notwithstanding, this burden on creditors is arguably not sufficient reason to deny such occupiers the protection afforded by rule 46A and, more importantly, sec. 26 of the *Constitution*.

4. SCENARIO 2: WHERE THE PROPERTY IS OCCUPIED BY A TENANT

4.1 Case law

How should situations be dealt with where the judgment debtor does not occupy the property, but instead leases it to a tenant who uses the property

⁵⁷ See especially *Uniform Rules of Court*:rule 46A(2).

⁵⁸ See the *Financial Intelligence Centre Act 38/2001*:sec. 21B.

as a home? Should rule 46A be followed and should, for instance, the tenant be joined in the creditor's application for an execution order and be given an opportunity to make representations? The underlying question is whether a tenant, in principle, enjoys protection under the housing clause in the event that the leased property is subject to an application to have it sold in execution at the instance of the landlord's judgment creditor. While a small number of cases have touched on this issue, they have not provided definitive guidance regarding the application of the former rule 46(1)(a)(ii) and the current rule 46A in the tenancy context. As will become apparent in the discussion that follows, the considerations in the case of tenants are not exactly the same as those that are pertinent to the instances of "beneficial ownership" examined under the preceding scenario.

In *Fraser*, which dealt with the proviso to rule 46(1)(a)(ii), the court found (arguably in an *obiter dictum*, because the matter did not deal with a tenant, but with a beneficial owner, as discussed earlier) that the judicial oversight requirement does *not* apply to a tenant of the property that is sought to be attached in execution, because the interest of the tenant is not akin to that of a homeowner. Moreover, the court held that tenants are adequately protected by the common-law "*huur gaat voor koop*" rule⁵⁹ and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (hereinafter, the *PIE Act*).⁶⁰ I return to these two aspects further below.

In *Body Corporate of Oakmont v Awah*,⁶¹ the court found that rule 46A was not applicable in a case where the judgment debtor (owner) did not use the property for residential purposes. The property at issue was occupied by a tenant, but this factor was not taken into account by the court. The inference is that rule 46A does not apply if the property is occupied by a tenant. However, in *Absa Bank Limited v Schuurman*,⁶² a point *in limine* was raised by the respondent (owner/debtor) regarding the fact that the tenant was not joined in the application despite having a legal interest in the matter. The court upheld the point *in limine* and postponed the application *sine die* on the basis that the tenant's rights under sec. 26 of the *Constitution* were implicated. In fact, the court regarded the non-joinder of the tenant as fatal to the bank's application.⁶³

If the court in *Schuurman* was correct, this may have serious implications for applications to have immovable property declared executable, because rule 46A would not only need to be followed if the property is occupied for residential purposes by the judgment debtor (owner), but also where it is the home of a tenant. In addition, the tenant would have to be joined in all such applications and thus given the opportunity to participate in the proceedings. In turn, the court would also have to consider the tenant's position and arguments when deciding whether to grant the execution order. In view of such implications, it is necessary to investigate more closely whether rule 46A

59 See 4.2 below.

60 Act 19/1998. See *Nedbank Ltd v Fraser*:par. 12.

61 *Body Corporate of Oakmont v Awah* [2019] ZAGPJHC 362 (20 September 2019).

62 *Absa Bank Limited v Schuurman* 2019 JDR 0353 (GP).

63 *Absa Bank Limited v Schuurman*:par. 26.

does (or should) apply in such situations. More fundamentally, does sec. 26 of the *Constitution* warrant special protection for a tenant in a situation where the occupied property is sought to be attached and sold in execution by the landlord's creditor?

4.2 “*Huur gaat voor koop*”

In the lease context, the central question is whether tenants need the protection offered by rule 46A. In other words, will a sale in execution compromise the housing rights of a tenant as it does in respect of an owner-occupier (or beneficial owner)? The more specific question is whether the change in ownership (and thus the replacement of the landlord) has an impact on the tenant's rights to occupy the leased property – and hence the tenant's constitutional housing rights.

The answer lies in the so-called “*huur gaat voor koop*” rule.⁶⁴ Under Roman law, if the landlord sold and transferred ownership of the leased property, the new owner could demand that the tenant vacate the property in light of the fact that there was no contractual relationship between the tenant and the new owner.⁶⁵ In Roman-Dutch law, however, the harsh effect of this position was alleviated with the development of the “*huur gaat voor koop*” rule, which essentially means that “lease enjoys preference over sale”.⁶⁶

The general theory underlying the “*huur gaat voor koop*” rule is that the new owner steps into the shoes of the previous owner when it comes to the rights and duties in terms of the lease agreement.⁶⁷ In other words, the new owner must respect the terms of the lease agreement as if he or she was the original landlord who concluded the contract with the tenant. From the tenant's perspective, therefore, the point is that he or she has nothing to fear from a sale of the leased property. The tenant's right to occupy is not extinguished and will continue as normal according to the terms of the original lease agreement. It follows that the sale of the property does not threaten the tenant's constitutional rights under the housing clause either. Because the tenant's occupation remains lawful – and does not become unlawful due to the sale – there is no talk of an eviction, while his or her access to adequate housing is also not compromised. If the new owner wants to evict the tenant, the owner would first have to cancel the lease agreement lawfully, which would have nothing to do with the sale as such. Significantly, the “*huur gaat voor koop*” rule applies not only to normal sales, but also to forced judicial sales, such as those in terms of an execution order.⁶⁸

64 In general, see Muller *et al* 2019:515-518.

65 See De Wet 1944:74-75, citing D 19.2.25.1; D 19.2.32; D 30.120.2 and C 4.65.9.

66 See especially Voet 19.2.17 (as discussed in Gane 1956:422-425).

67 See *Mignoel Properties (Pty) Ltd v Kneebone* 1989 4 SA 1042 (A):1050-1051; *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 2 SA 926 (A):939.

68 See Voet 19.2.17 (as discussed in Gane 1956:422-425). See also *Fichardt & Co and Schekel v Webb* (1889) 6 CLJ 258:259.

The above exposition applies to both short-term and long-term leases, with one exception. A long-term lease is defined in the *Formalities in Respect of Leases of Land Act*⁶⁹ as one “entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods, which, together with the first period of the lease, amount in all to not less than ten years”. The *Act* provides that a long-term lease will not be valid against third parties (such as the creditors and successors-in-title of the landlord), unless (i) the lease is duly registered against the title deed of the leased land, or (ii) the third party knew about the lease when he, she or it transacted with the landlord.⁷⁰ In the context of the “*huur gaat voor koop*” rule, the effect is that, if the period of the original lease is for more than 10 years, the new owner will not be bound to accept the tenant’s occupation after the first 10 years of the lease term has expired, that is, if the lease is unregistered. However, if the lease was registered against the title deed of the leased property prior to transfer of ownership to the new owner, or if the new owner knew about the lease when he or she acquired ownership, the new owner will be bound to accept the occupation of the tenant for the full term of the registered lease.

Despite the general position regarding the “*huur gaat voor koop*” rule discussed above, there is some variance in situations where the leased property is sold in execution at the instance of a mortgagee. The “*huur gaat voor koop*” rule ordinarily protects tenants when the property is sold, also in sales in execution, and thus no protection under sec. 26 of the *Constitution* or rule 46A is necessary. However, there is one situation where the tenant potentially will not be protected by the “*huur gaat voor koop*” rule. In this regard, a distinction should be drawn between situations (1) where the lease agreement preceded the mortgage and (2) where the lease agreement was concluded after the mortgage bond was registered.

Regarding the first situation, because the tenant’s right to occupy was created before the mortgagee’s security was established, the rule is that the property must be put up for auction and sold subject to the lease.⁷¹ This is also the position in the case of a long-term lease registered prior to the registration of the mortgage bond. In other words, the “*huur gaat voor koop*” rule applies as usual and, therefore, the sale in execution does not negatively impact the tenant’s housing rights. As a result, there is no point in expecting rule 46A to be followed in such cases.

However, in the second situation, the tenant’s right to occupy came into existence after the mortgagees’ security right (a limited real right in the property) was created. Thus, technically, the mortgagee’s right outranks the tenant’s right. This would also be true where a long-term lease was registered

69 *Formalities in Respect of Leases of Land Act* 18/1969:sec. 1(2).

70 *Formalities in Respect of Leases of Land Act* 18/1969:sec. 1(2)(a).

71 See *In Re H Moncrieff v FHP Moncrieff, Ex Parte Miller Bros* (1902) 23 NLR 66:67; *Shell Rhodesia (Pvt) Ltd v Eliasov NO* 1979 3 SA 915 (R):917; *Absa Bank Ltd v Sweet* 1993 1 SA 318 (C):324.

after registration of the mortgage bond. The general rule is that, unless the mortgage bond stipulates otherwise,⁷² the mortgagor/owner is entitled to let the mortgaged property to a tenant in terms of a lease agreement, without having to obtain the mortgagee's permission, provided that the mortgagee's rights to the property are not compromised by the lease agreement.⁷³ The mortgagee also does not have to consent to the registration of a lease against the title deed of the mortgaged land,⁷⁴ but similarly, because the mortgage bond precedes the registered lease, the mortgagee's rights will enjoy precedence over those of the tenant.⁷⁵ Consequently, if the mortgagee's security is called up due to the debtor's default and the mortgaged property is attached to be sold in execution, the existence of the lease, whether registered or unregistered, may not operate to the mortgagee's prejudice.

In this situation, we thus observe a conflict between the "*huur gaat voor koop*" rule (operating between the tenant and the new owner/purchaser) and the *prior in tempore potior in iure* rule ("[the who is] first in time is preferred in right")⁷⁶ that operates between the mortgagee and the tenant.⁷⁷ According to the former rule, the tenant's right should prevail over the buyer's, but, in accordance with the latter, the mortgagee's position may not be prejudiced by the existence of the lease created subsequent to the mortgage. The compromise that has developed in case law is first to put up the property for auction subject to the lease. If the highest bid is not enough to satisfy the mortgagee's claim in full, the property must be put up for auction again, but this time free of the lease.⁷⁸ If the first auction results in the mortgagee's claim being settled in full, he or she (or it) has nothing to complain about if the tenant's right to occupy remains intact, since this has no impact on the mortgagee's interests. However, if the first auction did not result in a high enough price and thus a second auction is, therefore, conducted, the lease is terminated in order to give effect to the mortgagee's preferent right. Effectively, therefore, a two-step approach must be followed.

72 The implications of a lease agreement concluded in contravention of a term in the mortgage bond falls outside the scope of this article.

73 See *Dreyer's Trustee v Lutley* (1884-1885) 3 SC 59:61; *Reed's Trustee v Reed* (1885-1887) 5 EDC 23:30; *Barnard v The Colonial Government* (1887-1888) 5 SC 122:126; *Absa Bank Ltd v Sweet*:324.

74 *Deeds Registries Act* 47/1937:sec. 77(2).

75 See Muller *et al* 2019:447.

76 Hiemstra & Gonin 1992:260

77 See Kritzinger 1996:211.

78 See *Dreyer's Trustee v Lutley*:61; *Reed's Trustee v Reed*:31; *Barnard v The Colonial Government*:126; *Albertyn v Van der Westhuyzen* (1887-1888) 5 SC 385:386; *Fichardt & Co and Schekl v Webb*:259; *In Re H Moncrieff v FHP Moncrieff, Ex Parte Miller Bros*:68; *SA Mutual Life Assurance Society v Rubens* (1912) 33 NP 233:237-238; *Becker's Trustee v Laruffa* 1921 TPD 457:459; *Timm v Kay* 1954 4 SA 585 (T):586-587; *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 3 SA 841 (D):845; *Shell Rhodesia (Pvt) Ltd v Eliasov*:917; *United Building Society Ltd v Du Plessis* 1990 3 SA 75 (W) 80; *Absa Bank Ltd v Sweet*:324; *Sheriff for the District of Wynberg v Jakoet* 1997 3 SA 425 (C):427-428, 129. See also Brits 2016:60-61.

There is some authority in case law for the proposition that the two-step approach does not necessarily have to be followed as an absolute rule in all such cases. It appears that it may be acceptable for the first step to be skipped in some situations, such as when it is clear from the outset that a sale subject to the lease will prejudice the creditor's rights in that it will not achieve a suitable price.⁷⁹ In addition, it might be acceptable to skip the first step if the tenant fails to object to a sale free of the lease, since the failure to object might create an impression on the part of the mortgagee that there is no lease, while it may also estop the tenant from objecting to such a sale after the fact.⁸⁰ If the first step is skipped and the tenant objects thereto later, it is possible for a court to sanction the sale free of the lease. For instance, such a sanction could be given if the sale free of the lease did not achieve a high enough price to settle the debt; this is based on the assumption that to arrange a new sale (this time subject to the lease) will likely not achieve a higher price, thus rendering a new sale pointless.⁸¹ If the tenant wants the court to undo the sale free of the lease and thus to order a new sale subject to the lease, the tenant would have to show that there is a reasonable prospect that the new sale subject to the lease will yield enough to settle the mortgagee's claim in full.⁸²

Therefore, in the scenario where the property could not be sold subject to the lease while satisfying the mortgagee's claim in full, the sale in execution would terminate the lease and render the tenant's occupancy unlawful, thereby subjecting him or her to eviction proceedings. As a result, in such situations, the execution order would have negative consequences for the tenant's rights under sec. 26 of the *Constitution*, and consequently one might argue that rule 46A should be applicable so that a court can consider the tenant's position before sanctioning the sale in execution. However, this proposition is easier said than done. How would a court exercising its duties under rule 46A be in a position to know whether the auction will be subject to or free from the lease? An aspect of rule 46A that might speak to this matter is that, when a court decides on the reserve price at which the property should be put up for auction, one of the factors to be considered is who the occupiers are as well as the circumstances of their occupation.⁸³ This factor appears to foresee the situation where the presence of occupiers might have an impact on the sale price. Conceivably, if there are tenants in the house, the court might have to consider what the sale price would be if the lease were to remain intact as opposed to if the property were to be sold free from the lease. However, it will be difficult to predict how the sale price will be impacted by the presence or absence of a lease. In some cases, the highest bid may be lower as a result of an existing lease, in others it may be higher, while in others it might make no

79 See *Reed's Trustee v Reed*:31; *Moldenhauer v De Beer* 1959 1 SA 890 (E):892; *Velcich v Land and Agricultural Bank of South Africa* 1996 1 SA 17 (A):20-21.

80 See *Wiber v Mahodini* (1904) 21 SC 645:647; *Oosthuizen v MC and PG Human* 1911 EDL 273:280.

81 See *Wiber v Mahodini*:647; *Velcich v Land and Agricultural Bank of South Africa*:20-21.

82 See *Oosthuizen v MC and PG Human*:280.

83 Rule 46A(9)(b)(vi).

material difference. All would depend on the subjective intentions of those who bid at the auction and how they feel about the presence or absence of tenants.

Accordingly, in my assessment, it makes little sense to allow for the future prospects of a tenant to influence the court in its decision whether or not to grant the execution order as such (although the presence or absence of tenants and other occupiers might have an impact on the reserve price). It is also difficult to conceive of a situation where a court will decline to grant an execution order based solely on the risk of a tenant being left homeless, especially where the factors surrounding the owner-debtor justify the granting of an execution order. After all, there is no legal relationship between the creditor and the tenant, while the tenant is also not a “beneficial owner”⁸⁴ of the property. It does not appear realistic to expect the mortgagee to be content with a compromise of its rights so as to protect the tenant’s housing rights. The tenant has a contractual relationship with the owner and hence must seek his or her remedies or defences against that person, whether it be the original owner (with a cause of action based on a breach of the warrantee against eviction) or the new owner (with a defence against eviction proceedings in terms of the *PIE Act*).

Nevertheless, there is another aspect of rule 46A in terms of which a tenant could be granted some protection, since the court may potentially take the tenant’s position into account in the way that the execution order is formulated. When the court grants an execution order, it is authorised in terms of rule 46A(8)(a) to make the sale subject to any conditions that the court deems appropriate. Conceivably, therefore, it may be possible for a court to include a provision in the conditions of sale that the property should be sold subject to the lease, even if the highest bid is not enough to satisfy the mortgagee’s claim. Although the latter would mean a departure from the normal approach, it might be justifiable if it is necessary to protect the constitutional housing rights of the tenant. However, for rule 46A(8)(a) to apply, it must first be settled whether rule 46A as a whole should be followed if there are tenants in the property.

Should it in all instances be expected of creditors to investigate whether the property is occupied for residential purposes by a tenant? And if so, must the creditor then follow rule 46A to seek execution against the property, even if the judgment debtor owns the property without actually residing on it? More fundamentally, does sec. 26 of the *Constitution* demand the application of rule 46A in such cases to give effect to the constitutional housing rights of tenants? As explained below, the protection afforded in terms of the *PIE Act* is probably sufficient to give effect to the tenant’s constitutional housing rights in cases where execution might lead to an eviction, that is, in those instances where the common-law “*huur gaat voor koop*” rule does not protect the tenant’s right to continued occupation.

84 See fn. 29.

4.3 The *PIE Act*

If rule 46A is not applicable (or if it is but the court decides not to make it an absolute condition to sell the property subject to the lease), then the possibility exists that the tenant's right to occupy will be terminated if the first auction did not attract a high enough bid to cover the mortgagee's claim. In such cases where the "*huur gaat voor koop*" rule does not protect the tenant, the tenant will become an unlawful occupier and, therefore, can be evicted. However, this does not mean that the tenant (or former tenant) will not receive protection of his or her constitutional housing rights. Instead, the eviction proceedings will be subject to the *PIE Act*, which was designed to protect unlawful occupiers against evictions that unjustifiably violate their housing rights.⁸⁵ The *PIE Act* is an extension of sec. 26(3) of the *Constitution*, which provides as follows: "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."⁸⁶ The *PIE Act* confirms this principle by providing that "[n]o person may evict an unlawful occupier except on the authority of an order of a competent court".⁸⁷

The *PIE Act* applies to all matters whereby "an owner or person in charge of land" seeks to evict an "unlawful occupier" of a home.⁸⁸ An unlawful occupier is defined by the *Act* as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land".⁸⁹ Although the definition does not say so expressly, it is settled that "unlawful occupier" includes a person whose occupation is unlawful but who previously occupied lawfully, such as a former owner whose ownership has ended (for instance, due to a sale in execution) or a former tenant who is holding over after his or her right to occupy has been terminated.⁹⁰ The new owner of the property, who purchased it at the auction, may of course apply to have the unlawful occupier evicted and must then comply with the *PIE Act*. However, the question is whether the sheriff has *locus standi* to bring the eviction application to enable him or her to sell the property free from the lease. It seems likely that this is indeed the case. The sheriff is the person who attaches the property (that is, takes legal control of it) on the authority of a writ of execution, while the sheriff is also the person

85 See especially *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC):par. 11. On the *PIE Act* in general, see Smith 2019:ch. 3; Muller *et al* 2019:751-760.

86 See also the preamble to the *PIE Act*.

87 *PIE Act*:sec. 8(1).

88 *PIE Act*:sec. 4. Other instances of eviction are covered by secs. 5 and 6, namely urgent evictions and evictions by an organ of state, respectively.

89 *PIE Act*:sec. 1 s.v. "unlawful occupier".

90 See especially *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 1 SA 113 (SCA). See also the *Rental Housing Amendment Act* 35/2014:sec. 7, which, when it becomes operational, will add sec. 4B to the *Rental Housing Act* 50/1999. In sec. 4B(9) (d)(ii), specific provision is made for a landowner's right, upon termination of the lease, to apply for an eviction order in terms of the *PIE Act* if the former tenant fails to vacate voluntarily.

mandated to arrange and conduct the sale in execution.⁹¹ In light of this, it is safe to conclude that the sheriff qualifies as a “person in charge” of the attached property for purposes of bringing an eviction application in terms of the *PIE Act*.

In addition to the procedural steps that must be followed to evict the unlawful occupier (former tenant),⁹² the crux of the *PIE Act* is the rule that the court “may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women”.⁹³ If the person has occupied the property for more than six months at the time when the eviction proceedings are initiated, an additional factor must be considered, namely “whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier”.⁹⁴ Yet, this additional factor is not relevant “where the land is sold in a sale of execution pursuant to a mortgage”.⁹⁵ If the court is satisfied that the relevant requirements have been met and that the unlawful occupier has not raised a valid defence against the eviction application, the court “must” grant the eviction order.⁹⁶ Further, having regard to all relevant factors (including how long the occupier and his or her family have lived on the property), the court must set a just and equitable date on which the property should be vacated as well as the date on which the eviction order should be enforced in the event that the occupier has not vacated voluntarily.⁹⁷ The court may also make the eviction subject to reasonable conditions, which conditions may, on good cause shown, be varied by the court.⁹⁸

Besides the normal eviction proceedings summarised above, the *PIE Act* also provides for urgent evictions, an order for which can be granted on an interim basis pending the final determination of the matter.⁹⁹ The potential relevance of the urgent eviction procedure is that one of the grounds for granting such an order is where “the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted”.¹⁰⁰ Therefore, in theory at least, it is possible for a sheriff to apply for, and be granted an urgent interim eviction order if, for instance, putting the property up for auction with occupiers therein, will be more prejudicial to the judgment debtor and/or prospective buyer (both being “affected person[s]”) than the effect that the eviction would have on the occupiers.

91 See, for example, *Uniform Rules of Court*:rule 46(2) and (4).

92 *PIE Act*:sec. 4(2)-(5).

93 *PIE Act*:sec. 4(6).

94 *PIE Act*:sec. 4(7).

95 *PIE Act*:sec. 4(7).

96 *PIE Act*:sec. 4(8).

97 *PIE Act*:sec. 4(8)-(9).

98 *PIE Act*:sec. 4(12).

99 *PIE Act*:sec. 5.

100 *PIE Act*:sec. 5(1)(b).

4.4 Concluding remark regarding tenants

A final answer must still be given by the courts regarding whether a creditor must comply with rule 46A when it seeks to execute against property that is occupied not by the judgment debtor but by a tenant who uses it as a home. The *Schuurman* case appears to suggest that it is indeed necessary to do so and, in fact, to join the tenant as respondent in the application to have the property declared executable. Even if it is correct that tenants should be joined in the application in accordance with the normal rules of joinder, this does not presuppose that rule 46A should be applicable to such cases. In the first place, one cannot plausibly interpret the term “judgment debtor” to include a tenant that has no relationship with the creditor (not even via involvement with a corporate entity that owns the property). Rule 46A concerns the enforcement and execution of debt, not the eviction of unlawful occupiers. Consequently, if there is no debt relationship between the occupier and the creditor (not even indirectly, as is the case with “beneficial owners”), then rule 46A is not the appropriate mechanism to protect the occupier’s rights. If, as a consequence of the sale in execution, the tenant is required to vacate the property – which will not necessarily be the case in light of the “*huur gaat voor koop*” rule – then the tenant will find protection by virtue of the provisions of the *PIE Act*.

The core principle stemming from the *PIE Act* is that the court may only order the unlawful occupier to vacate the property if, considering all the circumstances, it is just and equitable to do so. This mandate of the court in eviction cases is very similar in substance to the one given in terms of rule 46A in execution cases, which makes sense in view of the fact that both are premised on protecting the same constitutional right. These statutory mechanisms have roughly the same purpose but operate in different contexts. Each is also tailored to the unique issues in its own context. Rule 46A protects debtors who are owners or beneficial owners, while the *PIE Act* protects unlawful occupiers (including former tenants).

The difference between tenants and owner-occupiers (or beneficial owners) is that the latter have a relationship (either directly or indirectly) with the creditor, while there is no relationship (not even indirectly) between a tenant and the owner’s creditor. In the case of an owner-occupier, execution will have an impact on the ownership (or beneficial ownership) of the occupier. Such ownership is worthy of protection, since the right to occupy – and thus enjoyment of the right to housing – is accessory to, and hence dependent on, continued ownership. It is, therefore, appropriate for rule 46A to be applicable, also because the *PIE Act* is not designed to protect ownership as such, while rule 46A is. On the other hand, in the case of a tenant-occupier, his or her right to occupy – and thus his or her constitutional housing right – is not compromised by a change in ownership following a sale in execution. The only exception, apparently, is if there is a prior mortgage and the auction does not achieve a highest bid that will cover the mortgagee’s claim in full, in which event the lease will be terminated and the occupier will be expected to vacate the premises.

Regarding the latter situation, one can probably assume that the tenant-occupier is not in breach of the lease agreement and, therefore, can afford to move elsewhere if a termination of the lease were to become necessary to give effect to the mortgagee's rights. If the tenant-occupier is able to find and afford alternative accommodation, it arguably renders the need for special protection less urgent, since the risk of homelessness is low. If the tenant-occupier is in breach of the lease agreement, for example by having fallen behind with rental payments, then the landlord (whether the former or new owner) can cancel the lease and apply for an eviction order under the *PIE Act*. In these cases, the eviction might lead to homelessness, due to the defaulting tenant-occupier's financial difficulties, thus potentially requiring special protection. However, this potential for homelessness will have nothing to do with the sale in execution or the creditor's rights, meaning that rule 46A is not relevant.

5. CONCLUSION

The sale in execution of residential property has always been, is and will remain a complicated matter. It is never an easy task to decide whether it is justified for someone to lose his or her home due to unpaid debt. Courts are called upon to strike a delicate balance between all the interests involved. Although there is clearly a constitutional imperative to avoid unjustifiable limitations of the right to housing, this has made debt enforcement more cumbersome for credit providers. As important as it is to extend protection to vulnerable debtors, it is equally important that there should be legal certainty for creditors regarding exactly what is expected of them and what the standards are against which the courts will test the validity of their applications for execution orders. After all, these creditors are seeking to enforce their legitimate contractual and proprietary rights, and any limitations on the enforcement of these rights should be reasonable and predictable.

Rule 46A provides relatively clear, albeit cumbersome, instructions to credit providers on how these applications should be brought, while it also provides information regarding the standards to be applied and the outcomes to be expected. However, it is essential that creditors are provided with clarity regarding precisely when it is required of them to follow rule 46A. It is furthermore crucial for rule 46A to accurately reflect the substantive law with respect to the types of cases in which special protection for housing rights is constitutionally required.

The provision concerning the field of application of rule 46A, namely sub-rule (1), uses the phrase "property of the judgment debtor". It is undisputed that rule 46A must be followed if the creditor seeks an execution order pertaining to residential property belonging to the judgment debtor, since that would be the most common category of cases in this context. Executing against the home of the judgment debtor is also the least complex class from the creditor's perspective, since the creditor has a direct contractual relationship with the judgment debtor, knows who he or she is and probably will be able to provide most of the necessary information to the court with relative ease. Nevertheless, as illustrated in this article, there are situations in which rule

46A might have to be followed to give sufficient effect to the requirements of the housing clause, but where the occupier of the home technically is not the judgment debtor. The main example is where the judgment debtor is a juristic person or trust in whose name the property is registered, but where the occupier – a natural person who uses the property as a home – is a shareholder, member or beneficiary of the juristic person or trust. Thus, the natural person can be regarded as the “beneficial owner” of the property that he or she occupies, which property he or she “owns” or controls through the vehicle of a juristic person or trust. Since these natural persons, as beneficial owners and effectively the true debtors, cannot be denied constitutional protection of their homes, it is necessary for rule 46A to be followed in such cases as well. The most recent case law on this question appears to support this proposition in a convincing manner.

A second example of an instance where the property is used for residential purposes by someone other than the judgment debtor (owner) is where it is used as a home by a tenant in terms of the lease agreement. It is apparent that housing rights protection is not relevant in as far as the judgment debtor is concerned, since he or she does not use the property as a home. Although a tenant is in general constitutionally protected against arbitrary evictions from his or her home, it is not clear that rule 46A should be followed by a creditor when seeking an execution order against the landlord as debtor. Because tenants receive protection in terms of both the common-law “*huur gaat voor koop*” rule and the *PIE Act*, it appears that it is not necessary to extend protection to tenants via rule 46A. Nevertheless, it is advisable that tenants are joined in applications for execution orders brought against their landlords. Otherwise, the risk remains that the debtor will raise a point *in limine* regarding the non-joinder of the tenant and that the court will then postpone the application in order for the creditor to join the tenant before continuing with proceedings.¹⁰¹

In conclusion, therefore, it is relatively clear that rule 46A must be followed in cases where the property is occupied by a natural person who “owns” the property via a company, close corporation or trust, that is, as “beneficial owner”. It is one thing to find that rule 46A applies in these cases, essentially because it is necessary to give effect to the housing rights of these occupiers, but it may be easier said than done in practice. The greatest difficulty could arise in situations where it is hard, or even impossible, for a creditor to know about the relationship between the legal entity and the occupier. As pointed out, a bank would have such knowledge in the normal course of complying with anti-money laundering laws, but non-bank creditors might not have such knowledge or be able to acquire it easily. Notwithstanding, it is now incumbent upon all creditors to acquire and maintain information about the occupation of all residential properties related to their credit transactions, even if the creditor’s client (the judgment debtor) is a legal person who does not use the property as a home. Although, as argued in this article, rule 46A does not apply to tenants as such – since this category of occupier is protected adequately by the “*huur gaat voor koop*” rule and the *PIE Act* – it would similarly be advisable for creditors to know about the presence of tenants on

101 See, for example, *Absa Bank Limited v Schuurman*, as discussed in 4.1 above.

residential properties belonging to their debtors and to join these tenants as respondents to the application for an execution order. Despite the cost and time implications of this course of action, it would be even more expensive and time consuming if the court were to postpone the matter solely as a result of the tenant's non-joinder.

It makes sense for creditors to exercise due diligence regarding all kinds of occupation of the residential properties of their debtors, since such information influences the risk profile of the debtor. This is particularly true if the property is mortgaged to the creditor, considering that the occupation of the property is a factor that might influence the value of the creditor's security. Moreover, as shown in this article, the nature of the occupation of the property could have a direct impact on the procedure that the creditor must follow to enforce its security via a sale in execution. However, even if the property is not mortgaged to the execution creditor, it is also required of the latter to obtain information regarding the occupiers and their relationship to the debtor before commencing with execution proceedings against the property.

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