IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

CASE No.: **6038/2023**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	**Applicant**
and	
DEON CORNELIUS MAREE N.O.	**First Respondent**
JOHANNA GERTRUIDA MAREE N.O.	**Second Respondent**
PETRUS JOHANNES UYS N.O.	**Third Respondent**
GOLDENSANDS 31 TRADING CC	**Fourt Respondent**

JUDGMENT BY: VAN RHYN, J

HEARD ON: 14 MARCH 2024

DELIVERED ON: 24 MAY 2024

THE PARTIES AND THE RELIEF CLAIMED.

[1] The applicant, Standard Bank of South Africa Limited ("Standard Bank") seeks to enforce the terms of a settlement agreement reached between the parties and, as a consequence,

judgment against the respondents, jointly and severally, the one paying the other to be absolved including executability of their immovable property. The application is based upon a settlement agreement concluded with the trustees of the DC Maree Trust IT1195/95 and the sole member of Goldensands 31 Trading CC.

[2] The trustees of the DC Maree Trust, namely Deon Cornelius Maree ("Mr Maree"), Johanna Gertruida Maree ("Mrs Maree") and Petrus Johannes Uys ("Mr Uys"), have been cited as the first, second and third respondents in their representative capacities ("the DC Maree Trust") and Goldensands 31 Trading CC ("Goldensands") as the fourth respondent. The DC Maree Trust and Goldensands are referred to as the respondents. The respondents pray for the dismissal of the main application as set out above, alternatively, as set out in a counter application, a stay of the main application pending the final determination of the respondents' action instituted in the Gauteng Division of the High court, Pretoria, further alternatively, a referral of the matter to be heard by way of action.

[3] Standard Bank seeks an order in the following terms:

1. Judgment against the DC Maree Trust and Goldensands, jointly and severally, the one to pay the others to be absolved, in terms of the Settlement Agreement including an acknowledgement of indebtedness, for the following amounts together with further interest, as more fully set out in paragraph 1.1 - 1.16 of the Notice of Motion:

1.1 R31 380,852.56 in respect of account no[…];

1.2 R325,207.99 in respect of account no[…];

1.3 R189,213.70 in respect of account no […];

1.4 R189,213.70 in respect of account no[…];

1.5 R681,898.36 in respect of account no[…];

1.6 R239,594.41 in respect of account no[…];

1.7 R239,594.41 in respect of account no[…];

1.8 R249,885.91 in respect of account no[…];

1.9 R1,134,186.02 in respect of account no[…];

1.10 R3,742,954.61 in respect of account no[…];

1.11 R2,207,900.08 in respect of account no[…];

1.12 R983,340.54 in respect of account no[…];

1.13 R672,952.00 in respect of account no[…];

1.14 R5,208,902.21 in respect of account no[…];

1.15 R400,000.00 in respect of account no[…];

1.16 R7,000,000.00 in respect of account no[…].

2. Alternatively, Standard Bank moves for judgment against the DC Maree Trust for the following amounts plus further interest:

2.1 R38,570,000.00 as guarantor;

2.2 R400,000.00 on a medium term loan;

2.3 R7 000,000.00 on a medium term loan.

2.4 and against Goldensands in the total amount of R26,000,000.00 as guarantor.

3. Standard Bank furthermore moves for an order that various properties as more fully described in paragraph 3.1 to 3.5 in the notice of motion (the "farms"), registered in the name of the D C Maree Trust as well as in the name of Goldensands, be declared specially executable.

BACKGROUND FACTS.

[4] The DC Maree Trust entered into two medium term loan agreements with Standard Bank at Harrismith on 30 September 2014 and on 17 October 2019 respectively. The outstanding balances on these loan agreements amount d to R400 000.00 and R7 000 000.00 on 18 September 2023. The DC Maree Trust furnished Standard Bank with the following guarantees for the due, punctual and full payment of all debts of Mr Maree:

4.1 on 17 March 2017 for the amount of R15 000 000.00 (with interest and costs) as is evident from Annexure "G1" to the founding affidavit;

4.2 on 18 March 2019 for the amount of RS 000 000.00 (with interests and costs) as is evident from Annexure "G2" to the founding affidavit;

4.3 on 27 October 2019 for the amount of R18 570 000.00 (with interests and costs) as is evident from Annexure "G3" to the founding affidavit.

[5] Goldensands furnished Standard Bank with the following guarantees for the due, punctual and full payment of all debts of Mr Maree:

5.1 On 17 March 2017 in the amount of R12 000 000.00 (with interests and costs) as is evident from annexure "11";

5.2 On 17 October 2019 in the amount of R14 000 000.00 (with interests and costs) as is evident from annexure "12".

[6] Apart from the commercial and contractual relationship between the parties it is apposite to refer to, *inter alia,* the following litigious history: On 30 June 2023 Standard Bank obtained a *rule nisi,* granted in this court by Mhlambi J, on an urgent *ex parte* basis (the "perfection application") against Mr and Mrs Maree (in their personal capacities) calling upon them to show cause on 3 August 2023 why the notarial covering bond (BN4976/2022) by Mr and Mrs Maree in favour of Standard Bank should not be perfected to the maximum sum of R10 000 000.00 and the additional sum of R2 500 000.00 and that the Sheriff be authorized and directed to attach all movable property situated on 5 farms referred to in the said order.

[7] The *rule nisi* furthermore included the following: the notarial special covering bond (Bond No 2753/2017) by Mr and Mrs Maree in favour of Standard Bank be perfected to the maximum amount of R2 000 000.00 and the additional sum of R500 000.00 and that the Sheriff be authorized and directed to attach the listed assets in paragraph 2.4.1 to 2.4.5 of the said order, which assets were kept on the Farm Werda.

[8] In terms of the *rule nisi* Standard Bank and its duly appointed agent were granted access to certain properties of Mr and Mrs Maree to monitor the harvesting and sale of maize crops. Standard Bank was also authorized to keep in its possession such movable property and effects as a pledge and as security for all amounts due by the respondents, pending finalization

of any application or action to be instituted by Standard Bank against Mr and Mrs Maree. In terms of paragraphs 2.7 to 2.11 of the said order of 30 June 2023, Standard Bank (or its agent) was authorized to monitor the harvesting, delivery and sale of Mr Maree's maize crop, to attend to the harvesting thereof in the event of Mr Maree failing to do so, that the sale and delivery of the maize crop may only be to an approved third party (with the purpose to ensure the annotation of the Standard Banks' cession) and to ensure that such third party to which the crop is sold, pay the proceeds thereof to Standard Bank in settlement of or in partial settlement of Mr and Mrs Maree's indebtedness to Standard Bank.

[9] The order so obtained was executed and the Sheriff took possession of the movable assets of Mr and Mrs Maree. The assets were not removed from the farms. A collateral manager was appointed by Standard Bank to guard the assets. Shortly after the perfection order was executed Mr Van Wyk of Cloete & Neveling Incorporated, the attorneys acting on behalf of the respondents at Harrismith, contacted Mr Otto of Phatshoane Henney Incorporated, Bloemfontein, Standard Bank's attorney of record, and requested an urgent meeting to take place at the offices of Mr Van Wyk at Harrismith on 5 July 2023.

[10] Present at the meeting were Mr Malan Conradie (as a member of Credit, Standard Bank), Mr C J Muller (as a member of the Agricultural Division, Standard Bank), Mr T Ramdin, .Sharmilee Sitharam, (Manager Business Support and Recoveries, Credit Division, Standard Bank, who is also the deponent to Standard Bank's founding and replying affidavits), the Collateral Manager of Standard Bank and Mr Otto. From the respondents' side, Mr and Mrs Maree and their attorney, Mr Van Wyk were present. Discussions took place and Mr and Mrs Maree were requested to advance their proposals as to how the indebtedness to Standard Bank would be serviced.

[11] On 11 July 2023 Mr Van Wyk furnished Mr Otto with written proposals for consideration by Standard Bank. The proposals made by the respondents were accepted by Standard B nk and a settlement agreement (the "Settlement Agreement") was then drafted _by Mr Otto and dispatched to Mr Van Wyk for perusal. Mr and Mrs Maree, the trustees of the D C Maree Trust and Mr Maree in his capacity as the sole member of Goldensands signed the Settlement Agreement on 17 July 2023 at Harrismith in the presence of witnesses. The Settlement Agreement was signed on behalf of Standard Bank on 8 August 2023 at Durban.

[12] On 9 August 2023 the respondents' current attorney, Mr Van den Bout of Arnaud van den Bout Incorporated ("Mr Van den Bout") became the attorneys of record in the perfection application as well as the attorneys of record for Mr and Mrs Maree. The confirmation of the perfection application was opposed on a number of grounds. However, eventually, on 7 December

2023 Loubser J confirmed the *rule nisi* with costs to be paid by Mr and Mrs Maree on the scale as between attorney and client, such costs to include the costs of two counsel. On 16 February 2024 the application for leave to appeal by Mr and Mrs Maree was heard by Loubser J and on 22 February 2024 judgment was delivered in terms whereof the application for leave to appeal was dismissed with costs.

[13] In their answering affidavit in the perfection application, Mr and Mrs Maree stated that the court process was abused and the *rule nisi* in the perfection application was used to force them to enter into the Settlement Agreement with Standard Bank. The relief sought by Standard Bank in this matter is the relief contemplated by Standard Bank in its replying affidavit in the perfection application. The action envisaged by Mr and Mrs Maree in their answering affidavit in the perfection application pertaining to the alleged duress under which the Settlement Agreement was signed, has since been instituted under case number 2024/15983 in the Gauteng Division of the High Court, Pretoria.

[14] The application for judgment, firstly based upon the Settlement Agreement, does not include Mr and Mrs Maree in their personal capacities. Standard Bank has commenced with sequestration proceedings against Mr and Mrs Maree in their personal capacities, which application is opposed and is pending.

[15] Standard Bank contends that the respondents repudiated the Settlement Agreement and it was indicated in the answering affidavit to the perfection application that they do not regard themselves to be bound by the Settlement Agreement. Whereas the respondents undertook to settle the full outstanding balances due to Standard Bank within four months from date of the last signature thereof, being 8 August 2023, the respondents did not comply with the agreement. During the hearing of this matter Mr Zietsman SC, counsel on behalf of Standard Bank, confirmed that no payments were made by the respondents as agreed to in the Settlement Agreement.

[16] The respondents raised, *inter alia,* the following defences;

16.1 The application ought to be dismissed insofar as it relates to the relief claimed based upon the Settlement Agreement, in that Standard Bank was aware that a material dispute of fact regarding the validity and enforceability of the Settlement Agreement existed, which dispute of fact is incapable of being resolved by way of motion proceedings;

16.2 In the event that the Settlement Agreement is found to be valid and enforceable by the court, the relief claimed on the basis thereof as well as on the basis of the guarantees, the two term loans and the order for special executability, is premature;

16.3 The application in terms of Rule 46(1)(a)(ii) ought to be declined, inter alia, on the basis that two of Mr and Mrs Maree's sons with their families reside on two of the farms, being the farm Toekomst and the farm Werda and one of their foreman also resides on the farm Werda. Furthermore, farmworkers and their families reside on two of the farms and 91 farm workers are employed in the farming operations. Should a forced sale of the farms take place pursuant to an order declaring the farms specially executable, these employees will lose their employment with devastating consequences.

16.4 Because of the dispute regarding the validity and/or enforceability of the Settlement Agreement the respondents issued an action in the Gauteng Division of the High Court, Pretoria whereby the respondents, amongst others, move for a declaratory order that the Settlement Agreement be declared void and/or unenforceable. The combined summons in the Gauteng division was served upon Standard Bank on 21 February 2024.

THE APPLICABLE LEGAL PRINCIPLES AND DISCUSSION.

[17] The issue for determination is how the Settlement Agreement came about and whether ,Mr and Mrs Maree signed the Settlement Agreement as a result of any duress having been exerted upon them. In their answering affidavit the respondents referred to the contents of the opposing affidavit filed in the perfection application in an endeavour to explain the argument that the court process was abused and the perfection application was used to force a settlement agreement upon them: According to Mr and Mrs Maree the Settlement Agreement was intended to circumvent due process, to take away the court's judicial oversight as well as Mr and Mrs Maree's right to a fair process.

[18] The respondents contend that the following events, which gave rise to the signing of the Settlement Agreement, are significant: On 1 July 2023 representatives of HTA Auctioneers, namely Mr Jan Hugo, Mr Dewald van den Berg and Mr Japie Minnaar arrived at the Maree residence in Harrismith and requested Mr. Maree to sign for the receipt of a voluminous pack of documents. He refused. The representatives of HTA Auctioneers then started to write up and put a value on his caravan and two motor vehicles. There after they requested Mr Maree to accompany them to the farms to enable them to list and put up values on all movable farming equipment.

[19] Mr Maree accompanied the said representatives to the farms and for the rest of the day they

listed and appraised all the movable farming equipment. The Sheriff was not present. At the time, Mr and Mrs Maree were unaware of the perfection application and only became aware of the *rule nisi* when same was served and executed on 3 July 2023 by the Sheriff. On 17 July 2023 Mr. and Mrs. Maree, in their capacities as trustees of the D C Maree Trust, as well as in their personal capacities, signed the Settlement Agreement. Reference is made to paragraph 2.5 to 2.7 of the opposing affidavit in the perfection application and quoted in the answering affidavit in the matter at hand. These paragraphs reads as follows:

> "2.5 We were told to sign the settlement agreements or cease trading and we were consequently forced to sign, because we have 40 fixed employees, about 300 temporary employees, several monthly commitments and several other considerations that left us with no other option than to sign their settlement agreements.
>
> 2.6 The details of the duress applied to induce the agreements are detailed below and will be fully ventilated in action proceedings to follow in due course.
>
> 2.7 We could not merely cease trading due to the Applicant's impatience."

[20] Counsel appearing for the respondents, Mr Van Loggerenberg SC, with reliance upon Rule 6(5)(g) and **Wightman t/a JW Construction v Headfour (Pty) Ltd[1],** submitted that it is impossible to determine the question whether Mr and Mrs Maree signed the Settlement Agreement freely and voluntarily or under duress on the papers without the parties having an opportunity to adduce oral evidence and to cross-examine any witnesses during a trial. He proposed, on that basis, that the matter be referred for trial in accordance with the relief claimed in a draft order handed up at the hearing of the matter.

[21] Mr Van Loggerenberg SC argued that the respondents have seriously and unambiguously addressed the duress under which they signed the Settlement Agreement in their answering affidavit for, amongst others, the following reasons:

21.1 the alleged duress is clearly not an afterthought or an opportunistic scheme designed by the respondents in a mala *fide* way;

21.2 as far back as 3 August 2023, Mrs Maree raised their concerns with the Banking Ombudsman, recording, specifically, that they did not have a choice in signing the

[1] 2008 (3) SA 371 (SCA) at [12] and [13].

Settlement Agreement as they could not continue to harvest because the silos were full. They were harvesting in a high risk fire area. The crop could be destroyed by fire due to the fact that they were prevented by Standard Bank from delivering the harvested crop to AFGRI.

21.3 the allegations in the particulars of claim in the action instituted in the Pretoria High Court (which are not addressed at all by Standard Bank) are of a serious and unambiguous nature.

[22] The Settlement Agreement came about after Mr and Mrs Maree were confronted with the consequences of the perfection application sought on 30 June 2023 and the order granted by Mhlambi J. Mr Van Wyk, who evidently acted on their instructions, approached Mr Otto and requested an urgent meeting to be held on 5 July 2023. Subsequent to the meeting, a further telephonic conversation took place between the two attorneys where after Mr Otto addressed a letter with annexures thereto, dated 10 July 2023, to Mr Van Wyk. In a letter addressed by Mr Van Wyk to Mr Otto, dated 11 July 2023, it is stated that after consultation with his clients, the following proposal to settle the debt due to Standard Bank is made:

"1. That our client proceeds to deliver the maize to Afgri in terms of contact numbers

1.1. […] (dated 17 October2022);

1.2. […] (dated 17 October2022);

1.3. […] (dated 1 November 2022); and

1.4. […] (dated 1 November 2022).

2. That Afgri be allowed to retain the amount of ±R11 800 000.00. The current balance on the Afgri account is ±R13 400 000.00. Our instructions are that our client already delivered the maize which covers the difference between the aforementioned amounts. It appears that Afgri has not, as yet, delivered said maize due to the session *(sic)* dispute with your client;

3. Afgri will pay the balance of the proceeds of the contract referred to above, after collecting the outstanding amount due to them, directly to The Standard Bank of South Africa Limited for the credit of our client's overdraft facility;

4. Our client pays the creditors as listed in the attached schedule of creditors. Writer confirms that, according to Mr Henk Strydom, Pannar perfected a session *(sic)* signed by our client for the amount due to them as shown in the schedule of creditors. According to our instructions, this session *(sic)* was only signed about two weeks ago and will therefore rank behind The Standard Bank of South Africa Limited's session(sic) that was perfected on the 3rd of July, 2023.

5. It is our instruction that our client intends to cease his farming activity and sell his farms, water rights, machinery & equipment and cattle. Our instructions are that the total proceeds will amount to R180 000 000.00. We attach hereto a schedule draft by our client showing the value of the farms, water rights, machinery & equipment and cattle as calculated by him. Our instructions are that three interested parties have already made contact with our client without our client starting to actively market the properties. Our client believes that he will be able to sell the farms, water rights, machinery & equipment and cattle without much difficulty.

   Our client therefore proposes that your client grants our client the opportunity to market and sell the property within a period of four months after they delivered the maze harvested. Should our client not to be able to market and sell the properties within the specified time, The Standard Bank of South Africa Limited will have the right to market and sell the property on his behalf in order to settle their outstanding debt.

6. The Standard Bank of South Africa Limited makes it a condition to Afgri that Afgri must deliver the 2 600 (two thousand, six hundred) tons of maize before the end of the month. Our client has already harvested 1360 tons (one thousand, three hundred and sixty) tons of maize which is kept at his storage facility on the farm Toekomst, which amounts to 40 (forty) loads of 34 (thirty four) tons each, valued at ±R6 256 000.00. It is imperative that this maze be dispatched from the farm and delivered to Afgri within the next two weeks.

7. Our client also has five loads of non-GMO white maize in his storage facility on the farm Werda. Our client requests that he be immediately authorized to deliver this maze in order to free the stories facility on Werna *(sic)* to stall yellow maize.

   Our client is convinced that his proposal is tantamount to a working proposal that will be to the benefit of all parties. Our client therefore requests that your client considers his proposal favourably."

[23] On 13 July 2023 the Settlement Agreement, drafted by Mr Otto, was sent to Mr Van Wyk. On 15 July 2023, at the request of Mr and Mrs Maree, without any attorneys being present, they held

a further meeting with Mr Ramdin of Standard Bank. On 17 July 2023 Mr Van Wyk addressed a letter to Mr Otto and annexed thereto was the Settlement Agreement duly signed by Mr and Mrs Maree. Appended to the replying affidavit filed by Standard Bank, is a copy of a WhatsApp message from Mr Uys, the third trustee of the DC Maree Trust, confirming that, as far as he is concerned, the D C Maree Trust is satisfied with the contents of the settlement agreement.

[24] The following are, *inter alia* the terms of the Settlement Agreement:
In clause 4 thereof, Mr and Mrs Maree, the D C Maree Trust and Goldensands (the "parties") acknowledged that they are in default in terms of the agreements on the accounts mentioned in clause 4.1 to 4.16 (which corresponds with the mounts and the account numbers set out in the Notice of Motion apart from a few accounts in respect of which payments had been made after conclusion of the Settlement Agreement). Under the heading "Special Conditions" it is recorded that Standard Bank grants permission that the total crop harvested and to be harvested be delivered to Afgri in terms of the relevant grain contracts subject to the condition that written confirmation from Afgri be provided to Standard Bank that the debt owed has been paid and that the surplus crop income will be paid to Standard Bank.

[25] Any proceeds from the sale of livestock must be credited to the SBSA (presumably Standard Bank) account in reduction of the exposure. It was furthermore agreed that the *rule nisi* dated 30 June 2023 be confirmed on 3 August 2023 and that the parties are liable for all taxed attorney and client legal costs. In the event of the parties failing to settle the full outstanding balances as stipulated in clause 4.1 to 4.16.3 within 4 months from 8 August 2023 or to pay the legal costs within 7 days after the taxed account has been furnished by email to them and to rectify the default after 7 days written notice, the full outstanding balances together with interest thereon as per clause 4.1 to 4.16.3 as well as all taxed costs will immediately become due and payable.

[26] In the event of non-compliance with the terms of the Settlement Agreement, Standard Bank may immediately proceed with the sale of the perfected assets and/or will be entitled to sell the properties mentioned in clause 6.3 and 6.4, being the 5 farms referred to in the Notice of Motion, or may proceed to obtain judgment against the parties for the full outstanding balances and proceed to obtain a warrant of execution.

[27] In terms of clause 8 of the Settlement Agreement it was agreed that the Settlement Agreement be made an order of court. A non-variation agreement is contained in clause 9 and it was agreed, in terms of clause 7, that a certificate signed by any of Standard Bank's managers, whose appointment would not be necessary to be proved as to the indebtedness of the parties, including interest, the rate of .interest and the method of calculation of interest, would be prima

facie evidence of such indebtedness.

[28] Further advances were requested by Mr Maree during the period after the signing of the Settlement Agreement. On 28 July 2023, after Standard Bank initially declined to provide any further financial assistance due to a deviation of the expected crop- income and the level of the exposure, agreed to make available "additional operational expenses" and to adjust the overdraft limit to make available an amount of R528 000.00 for certain critical expenses namely wages/salaries. According to Standard Bank the further advances were made in an endeavour to assist the respondents in continuing the farming operations in the light of the Settlement Agreement and respondents' undertaking to sell the farms, cease farming activities and to repay Standard Bank within four months from the last date of signature of the Settlement Agreement.

[29] On 24 July 2023 and 25 July 2023 Mr Maree requested further financial assistance in the amount of R60 000.00 in respect of, *inter alia,* diesel, wages for domestic worker(s), groceries, payments on credit cards and for medical expenses, (alleged to have been caused by stress). After Standard Bank declined to provide further financial assistance, Mrs Maree submitted a complaint with the Banking Ombudsman on 3 August 2023. The complaint to the Banking Ombudsman refers to the presence of bank officials on the farm to monitor "everything that go in and out of the farm" and the actions of the auctioneer who listed all the movable assets to cover the notarial bond. It is stated that "... we need to sign a settlement agreement before we court start delivery maize again to Afgri". In paragraph 4, the complainant had to state what the objective of the complaint was. The following was recorded:

> "Interest of Afgri because we were late in paying them. All the costs for the people/attorneys. Stress and suffering for all my people working for me and ourselves. Defamation of our names. Interest of SB because we were late with the delivery of the maize we could not pay them back."

[30] On 9 August 2023, Mr Van den Bout confirmed that he is substituting Mr Van Wyk as the attorneys appearing on behalf of the·respondents and on 10 August 2023 (the extended return day of the perfection application) the respondents indicated that they intend opposing the perfection application and their counsel indicated that the respondents are repudiating the Settlement Agreement. On 18 August 2023, Mr Maree in a further email to Standard Bank requested a further advance in the amount of R250 000.00. Standard Bank declined any further advances.

[31] Despite the complaint lodged with the Banking Ombudsman that he was unfairly treated by

Standard Bank and that he signed the Settlement Agreement under duress, Mr Maree made contact with Standard Bank to obtain approval to sell assets which form part of Standard Bank's security under its perfected notarial bond On 6 September 20i3 the respondents slaughtered 22 lambs and on 1 October 2023 a further 44 lambs, in order to utilise the proceeds to pay certain of the respondents' creditors, employees and/or service providers. This ocqurred notwithstanding the agreement reached that any proceeds will be utilised to credit the Standard Bank account. The slaughtering of the livestock was admitted by M and Mrs Maree.

[32] On 17 October 2023 a notice in terms of clause 6 of the Settlement Agreement was dispatched by Mr Otto to the respondents, more specifically to the agreed email address of Mr Maree, referring Mr Maree to the contents of the Settlement Agreement and the non-compliance with the terms thereof. The respondents were requested to rectify the default within 7 days, failure of which, Standard Bank intends to proceed with the necessary legal action. The respondents did not reply to the demand. Thereafter the application for judgment was issued on the 8th of November 2023.

[33] Motion proceedings concern the resolution of legal issues based on common cause facts. There is an increasing practice to proceed by way of motion rather than action proceedings due to the fact that the scope of the application procedure has been greatly extended and, secondly, because an application procedure is less costly and more expeditious than a trial action. Application procedure is not appropriate for the purpose of deciding real and substantial disputes of fact. In **Wightman t/a JW Construction v Headfour (Pty) Ltd** Heher JA reiterated that"... an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or so are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers".[2]

[34] A real dispute of fact arises most obviously when the respondent denies material allegations made by the applicant and produces positive evidence to the contrary. [3] In **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd[4]** it was held that in certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact and in the event of the court being satisfied as to the inherent credibility of the applicant's factual averments, it may proceed on the basis of the correctness thereof and include this fact among those upon which it

[2] 2008 (3) SA 371 (SCA) at [12].
[3] Room Hire Co (Ply) Ltd v Jeppe Street Mansions (Ply) Ltd 1949 (3) SA 115 at 1165-1166; Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 431A.
[4] 1984 (3) Sa 623 (A).

determines whether the applicant is entitled to the final relief it seeks.[5]

[35] I have mentioned the steps taken prior to and subsequent to the meeting that occurred on 5 July 2023 at Harrismith and the period that culminated into the drafting and signing of the Settlement Agreement. At no stage did Mr Maree, Mrs Maree or their attorney at the time, Mr Van Wyk raise any concerns or objections against the Settlement Agreement or its validity or enforcement. Only once the request for further advances on the overdraft facility were denied and after the present attorneys of record for the respondents came on board, did Mr and Mrs Maree raise the objections that they had been treated unfairly and signed the Settlement Agreement under duress.

[36] The attorney who represented the respondents during the settlement negotiations, Mr Van Wyk, is a senior attorney who has been practising within this court's jurisdiction for a considerable period of time. When I take into consideration the full assistance of Mr and Mrs Maree by their former attorney and the exchange of correspondence, which I had referred to as well as the time lapse from 5 July 2023 to 13 July 2023, it is difficult to match the vague and unsubstantiated allegations in the answering affidavit of duress with the preceding facts. Mr Zietsman SC argued that the respondents were called upon to grapple with the issue of duress in their answering affidavit, which they failed to do.

[37] Mr Van Loggerenberg SC, counsel on behalf of the respondents, with reference to paragraph 44 of the answering affidavit, argued that the circumstances surrounding the conclusion of the Settlement Agreement are fully set out in the particulars of claim of the action in tituted in the Gauteng Division and that it will be fully dealt with by means of evidence, discovery and cross-examination in the intended action.

[38] As is evident from the dates referred to herein the Settlement Agreement was signed by Mr and Mrs Maree approximately 17 days after the hearing of the urgent, *ex parte* perfection application. I agree with the argument on behalf of Standard Bank that the issue of duress ought to have been dealt with fully in the answering affidavit. There is no indication in any of the interactions between the representatives of Standard Bank and Mr and Mrs Maree, while represented by Mr Van Wyk, that undue influence by the officials of Standard Bank or the attorney(s) was exerted or, in fact, that any demand was made by Standard Bank. In fact, the proposal for settlement came from the respondents and was pursued through their attorney who had full and extensive time to consult with Mr and Mrs Maree and to consider the matter.

[39] The respondents were provided with an opportunity to peruse the Settlement Agreement,

[5] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Ply) Ltd (supra) at 634H-635B.

obtain legal advice and consider the implications of the contents there9f. The result is that the Settlement Agreement was signed by Mr and Mrs Maree on 17 July 2023, the 4th day after they had received the same. Loubser J found as follows pertaining to the conclusion of the Settlement Agreement:

> "[19] Now it is patently clear on the papers before me that the proposals which eventual y culminated in the settlement agreement, came from the respondents themselves and their attorney at the time. Those proposals were accepted by the applicant (Standard Bank), and, it thereafter drafted the document for signature by all the parties. The parties signed the agreement, and there is no evidence before the court that the respondents signed the agreement with the proverbial barrel against the head. If there was such evidence, it would have been surprising, to say the least, in view of the fact that the agreement consisted of terms initially proposed by the respondents themselves."[6]

[40] In **Medscheme Holdings (Pty) Ltd and another v Bhamjee**[7] Nugent JA rejected the idea of economic duress as a basis to escape a settlement agreement. The facts can concisely be summarised as follows: Dr Bhamjee claimed from Medscheme, which Medscheme alleged were inflated claims, and would then pay back to his patients the monies received from Medscheme. The result was that Medscheme paid him more than what was owed to him. When confronted with overcharging, Dr Bhamjee agreed he owed Medscheme money. He signed two acknowledgements of debts, the first on 23 June 1998 and the second on 17 February 2000, to pay back the agreed amounts.

[41] After Dr Bhamjee signed the acknowledgements, Medscheme decided it would no longer accept claims from Dr Bhamjee on behalf of his clients. Dr Bhamjee would have to recover his charges directly from his patients (the members of Medscheme) and thereafter the members would in turn be reimbursed by Medscheme to the extent of the prescribed tariffs. This change resulted in many patients leaving Dr Bhamjee, and soon thereafter this culminated in his practice to collapse.

[42] After the collapse of his medical practice, Dr Bhamjee disputed the validity of the two acknowledgements of debt, alleging they were signed under duress. Dr Bhamjee claimed that the duress was the threat of economic hardship - as his failure to sign the acknowledgements would have put his practice at risk. The Supreme Court of Appeal held that economic pressure is not recognised as duress –

> "English and American law both recognise that economic pressure may, in

[6] Standard Bank of south Africa Limited v Maree and Another (3372/2023) (2023) ZAFSHC 241 (7 December 2023).
[7] 2005 (5) SA 339 (SCA).

inappropriate cases, constitute duress that allows for the avoidance of a contract. As pointed out by Van den Heever AJ in *Van den Berg* & *Kie Rekenkundige Beampte v Boomprops 1028 BK 1999 (1) SA* 780 *(T)* that principle has yet to be authoritatively accepted in our law. While there would seem to. be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, such cases are likely to be rare For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in *Van den Berg* & *Kie Rekenkundige Beamptes* at 795E-796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more -which is absent in this case - would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress."[8]

[43] In **Trident South Africa (Pty) Ltd and Another v Taylor and Others**[9] the court held that the respondent ("Mr Taylor"), who contended that a settlement agreement was entered into under duress, relies upon a legal foundation which has been expressly rejected[10], riot only by Van der Westhuizen J in an urgent application brought by Mr Taylor, but also by the Supreme Court of Appeal in the **Medscheme v Dr Bhamjee** matter. Mr Taylor claimed that part of the duress is the emotional state he was placed in as a result of the litigation and the implementation of a settlement agreement which had been made an order of court. Mr Taylor argued that the order was executed whilst he was at work, people pounded on the doors, and drawers and cupboards were emptied. De Vos AJ held as follows:

"This contends Mr Taylor shows the presence of "evil", which Counsel for Mr Taylor submits he needs to prove to show Mr Taylor was under duress. It cannot be, at the level of principle and legal policy, that a litigant can escape a settlement agreement on the basis of duress if the "evil" which exerted the pressure was litigation itself or the lawful execution of a court order.

[48] Litigation is confrontational; it is, however, also part of the exercise of a right to access courts. It cannot be that being exposed to litigation is sufficient for a claim of duress."

[44] With reference to the matter of **Medscheme and Dr Bhamjee,** De Vos AJ held as follows:

[8] Id at para 18
[9] (B2149/23) [2024] ZAGPHC 122 (6 February 2024).
[10] At [46].

"The sting of this finding is that it is not duress to cause economic harm or even ruin to another. As it is not unlawful to drive a hard bargain, it cannot be the basis of duress."[11]

[45] It is trite that an attorney or counsel has the authority to compromise an action or reach a settlement in any matter unless he has received instructions to the contrary. Our courts encourage parties to deal with their disputes in this way. When concluded, such a compromise disposes of the proceedings[12]. Mr Maree (who was born in 1965) and Mrs Maree, it is assumed, have been farming for a considerable period taking into account the date of transfer of the farm Toekomst during 1996 as well as the other farms (transferred during 2009, 2010 and 2014). As is evident from the scale of their farming activities, which has been alluded to in the particulars of claim in the action instituted in the Gauteng Division, it is clear that Mr and Mrs Maree have been involved in commercial dealings and have concluded several agreements with, *inter alia,* Standard Bank, Afgri and Pannar (as is evident from the emails appended to the papers).

[46] I agree with the finding by Loubser J that the respondents have entered into a valid settlement agreement and that they are bound by the terms thereof, irrespective of whether the agreement was made an order of court or not.[13]. Loubser J already found that the defence (cause of action) relied upon by the respondents not to be a defence (cause of action) in the perfection application. The subsequent application for leave to appeal lodged by the respondents was dismissed by Loubser J on 22 February 2024.

[47] I am satisfied that there is no material dispute of fact that is such as to warrant that the case be referred for trial. It would be appropriate, it seems to me, to apply the 'robust common sense approach' and deal with the matter on the papers.[14] I therefore find that the respondents have not raised a bona fide and real dispute of fact and that the allegations are such that they can be rejected out of hand on the papers.

[48] A further aspect raised on behalf of the respondents is the argument that the relief claimed by Standard Bank is premature in that there must be a breach by all the respondents of clause 5 of the Settlement Agreement, alternatively a default to comply with clause 5 must have occurred by the respondents, the respondents must have 7 clear days written notice to rectify the breach/default and the respondents must fail to rectify the breach/default "after" the 7 days

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[11] Trident (Supra) at [36].
[12] Hlobo v Multilateral Motor Vehicle Accident Fund 2001 (2) SA 59 (SCA) at [10].
[13] Standard Bank of South Africa Limited v Maree and Another (3372/2023) [2023] ZAFSHC 241 97 December 2023) at [23].
[14] Soffiantini v Mould 1956 (4) SA 150 (E) at 154G - H

written notice. It is furthermore argued that the notice which was sent per email to Mr Maree on 17 October 2023, was not addressed to Mr and Mrs Maree in their personal capacities as parties to the settlement agreement. Furthermore, that the contents thereof are vague and the notice did not stipulate the respects in which the parties to whom it was addressed failed to comply with the terms and conditions of the Settlement Agreement.

[49] On behalf of the respondents it is contended that the full outstanding balances together with interest thereon as per the Settlement agreement were, on Standard Bank's own version, not yet due and payable when it brought the application. It is thus argued that having regard to the prematurity the application should be dismissed. The basis of the respondents' contention, if understood correctly, is that in terms of the Settlement Agreement the time for performance is a period of 4 months from the last date of signature by Standard Bank, thus before 8 December 2023. The application was issued on 8 November 2023.

[50] However, by 3 August 2023 the respondents indicated their intention to oppose the return date of the perfection application on 10 August 2023. On the same date, Mrs Maree submitted the complaint to the Banking Ombudsman as more fully dealt with herein above.. The newly appointed attorneys on behalf of Mr and Mrs Maree filed a notice of substitution as attorneys of record on 9 August 2023, where after the opposing affidavits in the perfection application was filed on 23 August 2023. On- 6 September 2023 the first of several lambs were slaughtered in contravention of the terms of the Settlement Agreement.

[51] Repudiation is primarily a question of the intention of the party alleged to have repudiated an agreement. The respondents did not attempt to comply with the terms of the Settlement Agreement subsequent to the notice issued by Mr Otto. Repudiation therefore took place before the date on which performance was due and thus constitutes an anticipatory breach upon which Standard Bank may take action if it so elects.[15] I agree that the application was not issued prematurely and the defence in this regard cannot be sustained.

[52] Apart from the monetary judgment, Standard Bank s eks an order declaring the farms, over which mortgage bonds are registered in its favour, specifically executable, together with ancillary relief. The respondents oppose the relief claimed and contend that the farms are occupied by family members and minor children of Mr and Mrs Maree and by farmworkers.

[53] Rule 46A(1) applies "whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor". Rule 46A(2) provides that a court considering "an application under this rule" - that is, an application in which a creditor seeks to execute against

[15] Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A) at 652G

the judgment debtor's immovable property - must consider various matters. Rule 46A(3) (9) are framed with reference to an application brought by a creditor seeking leave to execute against the judgment debtor's immovable property.

[54] On behalf of Standard Bank it was contended that the provision of Rule 46A do not find application on the basis that the farms are registered in the name of the DC Maree Trust and/or Goldensands. It is common cause that the subject farms are used as the primary residence of Mr and Mrs Maree's sons and their families as well as by numerous farm employees. The argument that the provisions of Rule 46A do not apply to residential property registered in the name of a trust or a legal entity has been the subject of litigation. In **Bestbier and Others v Nedbank Limited**[16] the Supreme court of Appeal held that:

> "... 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"[17]

[55] Accordingly and in light of the subsequent finding by the Constitutional Court in **Bestbier and Others v Nedbank Limited,**[18] that "any other party" that may be affected by the sale in execution of immovable property registered in the name of the D C Maree Trust or Goldensands includes the family members of Mr and Mr Maree and their employees who reside on any of the farms, I am of the view that the issue of the specially executablity of the said farms be addressed at a later stage.

[56] As to costs, I see no reason to depart from the general rule that costs should follow the result.

[57] **ORDER:**

1. Judgment is granted against the First to Third Respondents in their capacities as trustees of the D C Maree Trust, IT 1195/95 and the Fourth Respondent, jointly and severally, the one to pay the others to be absolved, in terms of a Settlement Agreement, annexure "B" dated 8 August 2023 for the following amounts:

   1.1 In respect of account number […]the amount of R31,380.852.56 together with interest at Applicants prevailing prime rate as determined from time to time, which rate is currently 11.75% per annum plus1.95% calculated on the first R30

[16] (Case No 150/2021) ZASCA 88 (13 June 2022).
[17] Bestbier(Supra) at [27].
[18] (CCT 181/22) [2024) ZACC 2 (12 April 2024)

000,000.00 and thereafter at Applicant's prevailing rate as determined from time to time, which rate is currently 11.75% per annum plus 4.45% calculated on the remaining balance thereafter from the 25th August 2023 to date of payment both days inclusive;

1.2 On account number […], the amount of R 325,207.99 together with interest thereon at the prime rate calculated from 18 September 2023 to date of payment, both days inclusive;

1.3 On account number […], the amount of R189,213.70 plus interest thereon at the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.4 On account number[…] the amount of R189,213.70 plus interest thereon at prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.5 On account number […] the amount of R681,898.36 plus interest thereon at the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.6 On account number […] the amount of R239,594.41 plus interest thereon at the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.7 On account number […] the amount of R239,594.41 plus interest thereon at the prime rate plus 0.7% per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.8 On account number […] the amount of R249,2885.91 plus interest thereon at the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.9 On account number […] the amount of R1, 134,186.02 plus interest thereon at the. prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.10 On account number […] the amount of R3, 742,954.61 plus interest thereon at the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive; .

1.11 On account number […] the amount of R2, 207,900.08 plus interest thereon at• the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.12 On account number […] the amount of R983,340.54 plus interest thereon at the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.13 On account number […] the amount of R672,952.00 plus interest thereon at the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.14 On account number […] the amount of R5, 208,902.21 plus interest thereon at the prime rate per annum calculated from 18 September 2023 to date of payment, both days inclusive;

1.15 On account number […] the amount of R400,000.00 plus interest thereon at the Applicant's prevailing prime rate which is currently 11.75% per annum calculated on the aforesaid R400 000.00 from 25 August 2023 to date of payment, both days inclusive;

1.16 On account number […] the amount of R7 000,000.00 plus interest at the Applicant's prevailing prime rate which is currently 11.75% per annum 1.3% calculated on the first R7,000.000.00 as from the 25th of August 2023 to date of payment, both days inclusive;

2. The counter application by the respondents is dismissed with costs.

I VAN RHYN

JUDGE OF THE HIGH COURT,

FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant:	**ADV. P ZIETSMAN SC**
Instructed by:	PHATSHOANE HENNEY INC BLOEMFONTEIN
On behalf of the Respondent:	**ADV. D VAN LOGGERENBERG SC** **ADV N MULLER**
Instructed by:	BLIGNAUT ATTORNEYS BLOEMFONTEIN