

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 042994/2023

- 1. REPORTABLE: NO
- 2. OF INTEREST TO OTHER JUDGES: NO
- 3. REVISED: NO

DATE: 18 JUNE 2024

SIGNATURE OF JUDGE:

In the matter between:

NEDBANK LIMITED

Applicant

and

ALTIVEX 15 (PTY) LTD

First Respondent

AS BENADE

Second Respondent

WM EKSTEEN

Third Respondent

ORDER

1. The application for summary judgment is dismissed.
 2. Costs of the application shall be costs in the main action
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JUDGMENT

K. STRYDOM, AJ

INTRODUCTION

1. The facts of this matter echo those of countless summary judgment applications that serve before the Court daily: The Second and Third Respondents (“the Respondents”), being the directors of the First Respondent, in 2006, bought a house in the name of the First Respondent. For purposes of securing the home loan, the Respondents signed a deed of surety for the debts of the First Respondent.
2. It is common cause that the First Respondent fell in arrears with the repayments of the home loan amounts. The Applicant has instituted action for the recovery of the total outstanding amount and has relied on the suretyship to obtain payment from the Respondents.
3. Subsequent to the Respondents’ plea, this application for summary judgment, combined with an application in terms of Rule 46(A), was launched and duly opposed by the Respondents.
4. With regards to the summary judgment application, the Respondents have raised two points *in limine* relating to the affidavit in support of summary judgment and one substantive argument in terms of their purported *bona fide* defence.
5. With regards to the Rule 46A application, the Respondents allege that the Applicant has not complied with the provisions of Rule 46A.

SUMMARY JUDGMENT APPLICATION

First point *in limine*: Remote commissioning of the affidavit in support of summary judgment

6. The Applicant has placed reliance on the judgment in *Firststrand Bank Limited v Briedenhann*¹ as authority for its submission that this Court should ‘condone’ the virtual commissioning of the affidavit. It was submitted that this Court should, on the basis of *Briedenkann*, exercise its discretion based primarily on considerations of substantial compliance with the provisions of the

¹ *Firststrand Bank Limited v Briedenhann* (3690/2021) [2022] ZAEQBHC 6; 2022 (5) SA 215 (ECG) (5 May 2022) “*Briedenhann*”

Justices of the Peace and Commissioners of Oaths Act, No. 16 of 1963 ("the Justice of the Peace Act").

7. It has become almost par for the course, for large institutions such as banks, in these types of applications, to have such affidavits commissioned remotely. Justices of the Peace and Commissioners of Oaths Act, No. 16 of 1963 ("herein after referred to as the Commissioners Act").
8. I disagree with the submission that *Briedenhann* is authority for the position that as long as there has been substantial compliance, the non-compliance with the Justices of the Peace Act should be 'condoned.' In *Briedenhann* as well as the cases referred to therein, Goosen J made it abundantly clear that the exercise of the Court's discretion in that matter was based on the relevant factual matrix presented to him by the Applicant as explanation for the non-compliance:
"[52] In the Knuttel case the need to protect persons from infection with Covid 19 precluded the appearance of the deponent before the commissioner. In the Munn, Sopete and Mtembu matters, all of which involved criminal prosecutions, the non-compliance was inadvertent and related to form. That was also the case in the other instances I have highlighted. When a court is asked to exercise its discretion to condone non-compliance, the reasons advanced for such non-compliance are plainly relevant. I doubt that a court would readily accept that an affidavit substantially complies with regulated formalities in circumstances where the non-compliance is as a result of a deliberate choice. In my view, to do so would countenance a situation of self-help."
9. Since the decision in *Briedenhann*, it has almost become par for the course in the motion courts (of this division, at least) for large institutional litigants (such as banks), to depose to affidavits in support of summary judgment virtually and then, on the strength of *Briedenhann*, to simply ask for condonation at the hearing of the application. However, contrary to the widely held opinion that substantial compliance trumps form, in *Briedenhann*, the exact opposite was stated:
"[51] The advantages of the system used by the plaintiff are, however, not a basis upon which an existing Regulation may be ignored. It is, in my view, not open to a person to elect to follow a different mode of oath administration to that which is statutorily regulated. That is true even if in doing so every effort is made to substantially comply. The regulations stipulate that the

declaration is to be signed in the presence of the commissioner. Unless that cannot be achieved, the Regulations must be followed. The fact that the Regulation is directory does not mean that a party can set out to achieve substantial compliance with such regulation rather than to comply with its requirements." [Underlining my own]

10. Whilst it might be so that the Applicant would have deposed to the exact same affidavit and have placed the same facts before this Court (regardless of the method of commissioning) and whilst it may equally be so that remote commissioning would be more expedient, the simple fact of the matter is that, since *Briedenhann*, no legislative changes have been made to the Justices of the Peace Act or the Regulations.
11. One of the major legal advancements, since 1963, was the crystallisation of the doctrine of separation of powers in the Constitution. Incumbent to the doctrine is that the Judicial branch should not, under the guise of a general discretion or in the interest of justice, circumvent the authority of the legislature by condoning non-compliance with laws or regulations simply because said law or regulation may be considered archaic or outdated.
12. Simply put, discretions need to be exercised judicially. If there are no facts placed before a Court upon which to exercise its discretion, it cannot make a generalised finding on the commonly held views of litigants (or even the Court itself) as to what is expedient and in keeping with the latest technological advancements.
13. Under the circumstances, for a Court to exercise its discretion in favour of Applicants in each instance where virtual commissioning is used, regardless of a proper explanation for such non-compliance, would constitute impermissible judicial overreaching.
14. I am fortified in this view by the findings of Swanepoel J earlier this year, where he too was called upon to interpret the provisions of the Regulation 3 of the *Regulations Governing the Administering of an Oath or Affirmation*,² in view of *Briedenhann*. In declining to uphold a broad

² Regulations Governing the Administering of an Oath or Affirmation, published under Government GN 1258 in GG 3619 dated 21 July 1972

interpretation of the words “*in the presence of*” in favour of remote commissioning, he stated as follows:

“[19]However, to find for applicant would require me to ignore the clear meaning of the words in the Regulations. In so doing I would be 'crossing the divide between interpretation and legislation', as Wallis JA warned of in Endumeni. It is not for a Court to impose its view of what would be sensible or businesslike where the wording of the document is clear.”³

Point *in limine* 2: Failure of the commissioner to state his designation

15. In direct contrast to their approach to non-compliance *supra*, when it came to the second objection by the Respondent, the Applicant appreciated that some explanation would be due before a Court could exercise its discretion in condoning such non-compliance.
16. The commissioner of oaths has deposed to an affidavit confirming that the failure to fully set out his designation was a bona fide oversight. I am satisfied that it would be appropriate to exercise my discretion in favour of the Applicant in this regard.

Respondents' defence: *iustus error*

17. With regards to *iustus error* defence, the Respondents submit that it was not their intention to be bound as sureties, that the Applicant failed to draw their attention to the suretyship agreement and failed to explain the nature and financial implications thereof to them.
18. To succeed with the defence of *iustus error*, the Respondents would have to prove more than their own unilateral mistake. In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*⁴, the approach to determining *iustus error* defences was set out as follows:

‘. . . [D]id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a threefold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that

³ *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Correctional Services* (2023-010096) [2024] ZAGPPHC 446 (29 April 2024)

⁴ *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 119.

representation; and thirdly, was the last party misled thereby? . . . The last question postulates two possibilities: Was he actually misled, and would a reasonable man have been misled?"

19. Does the failure to pertinently draw a party's attention to the nature and consequences of a contract, constitute 'misrepresentation'? Decidedly not. As was held in *Slip Knot Investments 777 (Pty) Ltd v Du Toit*:⁵

'A contracting party is generally not bound to inform the other party of the terms of the proposed agreement. He must do so, however, where there are terms that could not reasonably have been expected in the contract. The court below came to the conclusion that the suretyship was "hidden" in the bundle, and held that the respondent was in the circumstances entitled to assume that he was not personally implicated. I can find nothing objectionable in the set of documents sent to the respondent. Even a cursory glance at them would have alerted the respondent that he was signing a deed of suretyship . . . Slip Knot was entitled to rely on the respondent's signature as a surety just as it was entitled to rely on his signature as a trustee. The respondent relied entirely on what was conveyed to him by his nephew through Altro Potgieter. Slip Knot made no misrepresentation to him, and there is no suggestion on the respondent's papers that Slip Knot knew or ought, as a reasonable person, to have known of his mistake.'

20. Likewise, *in casu*, there is no suggestion there was misrepresentation on the part of the Applicant. The Respondents have failed to set out material facts which constitute a "...*triable issue and a sustainable defence in law deserving of their day in Court.*"⁶

Findings on summary judgment application

21. In summation therefore, there is a non-compliant affidavit in support of summary judgment on the one hand and a lack of a *bona fide* defence on the other. At first glance, it would seem that Respondents' points *in limine* are more "form over substance" and that the lack of a defence should outweigh any non-compliance by the Applicant. The Applicant's contention, that the Court should have regard to substantial compliance in exercising its discretion to allow the affidavit into evidence, is alluring.

⁵ *Slip Knot Investments 777 (Pty) Ltd v Du Toit* [2011] ZASCA 34; 2011 (4) SA 72 (SCA) para 12.

⁶ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), para. 32

22. However, such an approach would, proverbially, be putting the cart before the horses. Before the question of substantial compliance comes into play, the Court must first be placed in possession of the case specific facts that underlie the need to consider whether there has been substantial compliance. This is where the facts of this matter diverge from those in *Briedenhann*. Whilst in *Briedenhann*, Goosen J had the benefit of an explanation as to the reasons for non-compliance, *in casu*, the Court has not been furnished with any.
23. As a result, there is no basis for this Court to exercise its discretion in favour of allowing the non-compliant affidavit in support of summary judgment to stand as an affidavit for purposes of compliance with the provisions of Rule 32. On this basis alone the application for summary judgment stands to be dismissed.

THE RULE 46A APPLICATION

24. Having already found that the summary judgment application stands to be dismissed, an evaluation of the Rule 46A application itself is unnecessary. However, insofar as the objections raised to the Rule 46A application also constitute possible defences or objections for purposes of the summary judgment application, I consider it prudent to address the most pertinent submissions made in this regard.
25. In its particulars of claim, the Applicant drew the Respondents' attention to S26 of the Constitution. In the event that they allege there are factors relevant to the Court's determination regarding the special executability of the property, the Respondents were called upon "*...to place such information and/or circumstances before the above mentioned Honourable Court.*" In terms of the particulars of claim, the Applicant denied any knowledge of whether the property constituted a primary residence or not. The Respondents, in their plea, indicated that it was in fact their and/or their extended family's primary residence.
26. In the founding affidavit to the summary judgment, the deponent submitted that as the Respondents had failed to provide specificity regarding their family members or financial

position, “...(o)n the preponderance of information before this Honourable Court at present the Second and Third Respondents' right to adequate housing as contemplated by Section 26 of the Constitution will not be unduly infringed if execution is granted in these circumstances.”

27. As evidence in action proceedings is not contained in the plea, the complaint of lack of specificity (at the stage of pleading) is unwarranted. The position however changed after the summary judgment application (encompassing a Rule 46A application) was served. As was stated in *NPGS Protection and Security Services CC and Another v FirstRand Bank Ltd* (“NPGS”):⁷

“[55] From this review of the relevant jurisprudence, it is clear that in a case of an application for default judgment, a court, in its discretion, needs to ensure that it is possessed with adequate information to enable it to grant a remedy which complies with these requirements. In the case of an application for summary judgment, provided the creditor has complied with the requirements of rule 46(A), there is an onus on the debtor, at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionality between the execution and other possible means to exact payment of the judgment debt.”

28. The Applicant, in its heads of argument, again, contended that the Respondents have not provided sufficient information to the Court regarding their claim that the property constitutes a primary residence. The Court was referred to the following extract from paragraph 67 of *NPGS*:
*“.....In imposing an obligation upon a court in this case when one vague and unspecified mention of a personal residence without more suffices as a defence or even a justification for remitting a case back to the court a quo, would in my view, cause significant uncertainty, and arguably serious damage to the efficient provision of credit in the economy.”*⁸

29. The factual matrix in *NPGS*, however, is distinct from that *in casu*. In *NPGS*, the issue of primary residence was not raised in the plea or in the affidavit opposing summary judgment. The submission was vaguely made from the bar during argument in the court *a quo*. This contextualisation becomes self-evident when paragraph 67 of *NPGS* is cited in full:

⁷ *NPGS Protection and Security Services CC and Another v FirstRand Bank Ltd* (314/2018) [2019] ZASCA 94; [2019] 3 All SA 391 (SCA); 2020 (1) SA 494 (SCA) (6 June 2019)

⁸ *NPGS* at para 67

“[67] On the facts of this case, the complete failure by the second appellant to avail himself of rights which were expressly drawn to his attention in the summons issued by the respondent dictates to the contrary. It bears repeating that there was a specific prayer in the summons requesting an order of execution. In imposing an obligation upon a court in this case when one vague and unspecified mention of a personal residence without more suffices as a defence or even a justification for remitting a case back to the court a quo, would in my view, cause significant uncertainty, and arguably serious damage to the efficient provision of credit in the economy.” [Underlining my own]

30. The aforementioned was stated as explanation for the majority’s disagreement with the minority’s finding that, whilst the appeal against the granting of summary judgment was dismissed, the prayer for execution against the second appellant’s immovable property should be remitted to the court a quo, “...for it to conduct an enquiry envisaged in s 26(3) of the Constitution...”⁹
31. NPGS was therefore primarily concerned with whether a case had been made out which would necessitate an enquiry as envisaged by S26(3) and, by implication, Rule 46A.
32. *In casu*, the Respondents have on each occasion presented, availed themselves of their rights per S26. In their affidavit opposing summary judgment they have under oath stated that the property is their primary residence. In their supplementary affidavit,¹⁰ they also confirmed that they are in the process of raising funds through an investor, in order to satisfy the indebtedness of the First Respondent to the Applicant, but that, due to the illness of the investor, they have been unable to raise same before the application was heard. Admittedly, the supplementary affidavit does not state when the funds would be obtained or the exact amount to be raised. However, at summary judgment stage:
- “...the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant

⁹ NPGS at para 44

¹⁰ Admitted by virtue of the discretion as contained in R46A(8)(c)

*appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be:*¹¹

33. The facts raised by the Respondents are, in my view, sufficient to engage the Court's judicial oversight function and to necessitate an enquiry as envisaged by Rule 46A. In view of this determination and as, in this division, so-called "money orders" and executability orders under R46A are not to be decided separately,¹² I would in any event have been disinclined to have granted summary judgment.

34. As a result, the following order is made:

ORDER

1. The application for summary judgment is dismissed.
2. Costs of the application shall be costs in the main action



K STRYDOM
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA

¹¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-C

¹² See: Practice Manual of the Gauteng Local Division paragraph 10.17

Judgment reserved: 14 May 2024

Judgment delivered: 18 June 2024

Appearances:

For the Applicant:

Adv JH Jooste

Instructed by: Hack Stupel & Ross

For the Respondents:

Adv R Botha

Instructed by: Johan Victor Attorneys