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

CASE NO: 45317/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE 25 June 2024

SIGNATURE

In the matter between:

**SB GUARANTEE COMPANY (RF)
PROPRIETY LIMITED**

(Registration number: 2006/021576/07)

Plaintiff/Applicant

And

VESTGRO CAPITAL (PTY) LTD

(Registration number: 2016/333899/07)

1st Defendant/1st Respondent

MARIUS STRYDOM

(Identity number: 8[...])

IN HIS CAPACITY AS SURETY

2nd Defendant/2nd Respondent

**JUDGMENT: APPLICATION FOR SUMMARY JUDGMENT AND
RULE 46(1)(A) APPLICATION**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 25 June 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10h00 on 25 June 2024.

MNISI AJ

Introduction

- [1] This is an application for summary judgment in which the plaintiff seeks judgment against the first and second defendants, in the sum of R3,406,161.69 plus interests at the rate of 5.850% per annum, jointly and severally with costs as between attorney and client scale. The debt allegedly arises from the defendants' breach of a home loan agreement ("loan agreement") concluded between the parties on 27 August 2020. For the sake of convenience, I will refer to the 'parties' as they appeared in the main action.
- [2] The plaintiff also seeks an order in terms of Rule 46(1)(a)(ii) of the Uniform Rules of Court, declaring the property of the first defendant to be executable for the amounts and interest set out above and directing the Registrar of this Court to issue a Warrant of Execution against the property. It further prays for an order in terms of Rule 46A determining whether or not the property of the first defendant should be sold in execution with a reserve price.
- [3] At the commencement of the proceedings, Counsel for the defendants brought an application for postponement of the summary judgment application. Upon hearing the arguments from both sides, I issued an *ex tempore* ruling dismissing the application. I informed the parties that reasons for my ruling would be in my judgment for summary judgment

application. I immediately informed the parties to make submissions in respect of the summary judgment. I now proceed to deal with the reasons preceding the application for postponement.

Reasons on the refusal for postponement

[4] It is common cause that an application for postponement was served and filed on 4 March 2024, three days' shy of the summary judgment application. The reason for the postponement application by the defendants was that they filed a Rule 34(14) and requested certain documents to be furnished to them by the plaintiff. The documents include:

1. The resolution by the Bank to enter into the loan agreement.
2. The resolution by the Bank to authorise the person who signed the loan agreement on behalf of the bank to do so.
3. The authority given to the person who signed the loan agreement on behalf of the bank to do so.
4. The resolutions made by the Plaintiff and the bank to enter into the Common Terms Agreement.
5. The resolution made by the bank and the Plaintiff to authorise the persons who signed the agreement on their behalf.
6. The authorities given to the persons who signed the agreement on behalf of the bank and the Plaintiff to do so.

[5] It was argued on behalf of the defendants that the documents requested are important to them because if they did not exist, then this would bolster their defence as set out in their plea and that it may very well be fatal for the plaintiff's claim as the defendants will then amend their plea to plead the

non-existence of the documents in more detail than what is currently pleaded.

[6] It is a well-established legal principle that the party seeking postponement must proffer good and strong reasons thereof, and that the applicant must give a full and satisfactory explanation of the circumstances that give rise to the application.¹ The application itself must be *bona fide* and must not be used as a tactical endeavour to obtain an advantage to which the applicant is not entitled.

[7] In *Psychological Society of South Africa v Qwelane and Others*² (*Psychological Society*) the Constitutional Court held:

'In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.'

[8] In my view, the defendants did not only fail to make the application timeously, they also failed to proffer good and strong reasons for the postponement application. It was also my considered view that granting such an application would prejudice the plaintiff in the summary judgment application, and therefore it would not be in the interests of justice to grant it.

¹ See National Police Service Union fn 2 at 1112C-F; *Shilubana and Others v Nwamitwa* (National Movement of Rural Women and Commission for Gender Equality as Amicus Curiae) [2007] ZACC 14; 2007 (5) SA 620 (CC) at 624B-C;

² *Psychological Society of South Africa v Qwelane and Others* (CCT226/16) [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) para 31.

[9] I now turn to deal with the application for summary judgment.

Merits of The Summary Judgment Application

It appears from the joint practice note and the papers filed of record by the parties that the following are either common cause facts or they are not in dispute:

[10] The debt which forms the subject matter of the claim arises out of a written Home Loan agreement, a written Indemnity Agreement, a Guarantee Agreement, a Common Terms Guarantee Agreement and a Deed of Suretyship. The said loan agreement was concluded between Standard Bank and the first defendant for an amount of R2,963,013.16.

[11] All the amounts owing to Standard Bank in terms of the loan agreement would bear interest at variable interest rates and the Principal Debt would be repaid by the first defendant to the Bank in instalments of R25,787.80 per month.

[12] The relationship between the plaintiff and the Bank is governed by the Common Terms Guarantee Agreement, concluded between the parties on 1 March 2015, in terms of which the plaintiff undertook as the needs arose, to guarantee the obligations of the Bank's debtors under individual Home Loan Agreements.

[13] The parties further agreed that the Certificate signed by the Bank Manager, specifying the amount owed by the first defendant shall, on its mere production constitute sufficient proof of any amount due or owing by the first defendant in terms of the loan agreement, unless the contrary is proved.

[14] On 27 August 2020, the first defendant signed and executed the required Indemnity Agreement in favour of the plaintiff. In terms of the Indemnity Agreement, the first defendant acknowledged and agreed that if the first defendant became liable to pay any amount owed to the Bank in terms of the Guarantee provided to the Bank, the first defendant would immediately be

liable to the plaintiff in terms of the said Indemnity Agreement in the amount for which the first defendant was liable under the Guarantee provided to the Bank.

- [15] Pursuant to the conclusion of the loan agreement and the Indemnity Agreement, the first defendant caused a continuing covering Mortgage Bond to be registered over the immovable property in favour of the plaintiff. In terms of the Mortgage Bond, the first defendant acknowledged and declared itself to be lawfully indebted and bound to the plaintiff in the sum of R2,950,000.00, together with an additional sum of R737,500.00 as a continuing covering security for and in respect of every indebtedness or obligation of whatsoever cause and nature.
- [16] Moreover, on 27 August 2020, the second defendant signed a Deed of Suretyship in terms of which he bound himself as Surety and Co-Principal Debtor for the payment when due of all present and future indebtedness of the first defendant to the plaintiff, limited to a maximum aggregate amount of R2,950,000.00, inclusive of interest, costs, fees and charges that may be levied for which the first defendant may become liable to the plaintiff.
- [17] The first defendant failed to pay the monthly instalments, which resulted in the Bank notifying it on 6 March 2021, in writing that the failure to pay constituted a breach of the Loan Agreement. The plaintiff alleges in its particulars of claim that the defendants have breached the terms of the agreement in that they failed to pay instalments as reflected in the certificate of balance and statement of account.
- [18] The application for summary judgment is opposed by the defendants. The latter have filed an opposing affidavit in which they raised few grounds as the basis of opposition to the summary judgment application. They contend that the person who purported to sign the Loan Agreement, Mortgage Bond, Common Terms Agreement, Indemnity and the Deed of Surety (*“the agreements”*) on behalf of the Bank did not have the authority to do so.

- [19] They also contended that the denials do not constitute bare denials since they are made up of specified and individual denials and that the plaintiff must prove the denied allegations in order to succeed with the claim. The defendants also argued that they are not at this stage required to persuade the court that in view of the disputed facts, the probabilities are in their favour.

Applicable legal principles

- [20] It is trite that summary judgements enable a plaintiff to obtain judgment against a defendant without the necessity of going to trial when a defendant has no defence to a claim based on a liquid document, for a liquidated amount of money, for delivery of movable property, and for ejectment. The instant application for summary judgment is for breach of a loan agreement. In *Rich & Others v Lagerwey*³ the court concluded as follows:

“...if on a proper construction the document evidences by itself that the claim is one sounding in money, without extrinsic evidence required, such document would meet the test for summary judgment.”

- [21] With effect from the 01st of July 2019 an application for summary judgment can only be brought after a defendant has filed its plea, and in doing so the plaintiff must not only verify the cause of action and the amount claimed but must, in addition, also identify any point of law which it relies upon and the facts upon which its claim is based, and must also briefly explain why the defence which has been pleaded by the defendant does not ‘raise any issue’ for trial.

- [22] The defendant opposing summary judgment is required to set out a *bona fide* defence by affidavit disclosing fully the nature and grounds of the defence and the material facts relied upon. The defendant need not deal exhaustively with all the facts and evidence relied on to substantiate a

³ 1974 (4) SA 748 (AD) at 754.

defence, but the essential material facts on which the defence is based must be disclosed with sufficient completeness, particularly to enable the court to decide whether or not the affidavit discloses a *bona fide* defence.⁴ However a *bona fide* defence, is not scrutinised according to the strict standards of pleadings. In summary judgments, it is the material and factual defence and not the defendant which must be *bona fide*.

[23] In *Maharaj v Barclays National Bank Ltd*⁵ the court held that in determining whether the defendant has established a *bona fide* defence the court has to enquire whether the defendant has with sufficient particularity disclosed the nature and grounds of his defence and the material facts upon which his defence is based. It is expected of the applicant on the other hand to convince the court that he has made out a case for summary judgment.

[24] The court has an overriding discretion whether on the facts averred by the plaintiff, it should grant summary judgment or on the basis of the defence raised by the defendants, it should refuse it. Such discretion is unfettered. If the court has a doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused. The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met.⁶

[25] The test for the granting of a summary judgment is whether the defendant has satisfied the Court that he has a *bona fide* defence to the action in terms of Rule 32(3) of the Uniform Rules of Court. What this entails is whether the facts put up by the defendant raised a triable issue and a sustainable defence in law deserving of their day in court.

[26] While it is not incumbent upon the defendant to formulate his or her opposition to summary judgment application with precision that would be

⁴ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-E.

⁵ *Supra*.

⁶ *Mahomed Essop (Pty) Ltd v Sekhukhulu and sons* 1967 (3) SA 728 D

required in a plea, nonetheless when he or she advances his defence or her contentions in resistance to the plaintiff's claim, he or she must do so with sufficient degree of clarity to enable the court to ascertain whether he or she has deposed to a defence which, if proved at the trial, would constitute a good defence to the action. See: *Bretenbach v Fiat SA (Pty) Ltd* 1976 (2) SA 226(T); *Gilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C); *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W).

- [27] It is also trite that pure technical defences are not permitted. See *Liberty Life Group Limited v Sigh* 2012(5) 526 at 537G-538G.

Application of the legal principles to the facts

- [28] In the present case, the defendants contend that the person who purported to sign the agreements on behalf of the plaintiff, did not have the authority to do so. In addition, they contend that as a consequence the signed agreements are void and unenforceable.

- [29] If the defences raised by the defendants in this respect were *bona fide* I would have expected them to set out the material facts upon which they rely. The defendants should be able to demonstrate with a degree of exactitude what they are alleging to be defences in opposition of this application. The absence of such material facts leads one to conclude that the defence raised in this regard is bald. The lack of particularity fortifies the plaintiff's argument that the purported defences are bare denials which are premised entirely on pure speculation.

- [30] There is no dispute regarding the allegation that the defendants are indebted to the plaintiff for the amount as specified in the particulars of claim, and the fact that the dispute regarding the authority of the person who signed on behalf of the bank was not raised by the defendants prior to this litigation.

- [31] The issue of *bona fide* defences has occupied the attention of our courts on numerous occasions, and the authorities are quite clear as to the nature of a

defence which the defendant has to adduce in its resisting affidavit to escape the consequences of a summary judgment. The defence so raised should be inherently convincing and valid in law, and must be raised in such a manner that there is a reasonable possibility that the defence he or she advances may succeed at the trial⁷. The defendants in the present case have had ample time to raise a dispute concerning the lack of authority on the person who represented the bank when the aforementioned agreements were signed. No reasonable explanation has been proffered why such a simple exercise was not done.

[32] The 'grounds' as envisaged in sub Rule (3)(b), relates to the facts upon which the defence is based. There are no material facts alleged in the defendants' papers upon which this court can deduce the *bona fide* defence. In this regard I find support in *Lurlev (Pty) v Unifreight General Services* 1978 (1) SA 74(D) at 77. There, the court held that bare denial of correctness of amounts claimed does not constitute a defence⁸. Similarly, in this case, I hold the view that bare denials of the authority of the person who represented the bank does not constitute a defence. After looking at the matter at the end of the day and based on the documents properly before me, I therefore conclude that the defendants' defence falls short of the requirements of rule 32(3)(b).

Application in Terms of Rule 46(1)(a)(ii)

[33] Simultaneously with the application for summary judgment, the plaintiff also brings an application for an order declaring the property of the first defendant specially executable for the amounts and interest in terms of the summary judgment application. It prays that if the court orders the executability of the property then it must set a reserve price in the amount of R2,469,811.71.

[34] Rule 46(1)(a)(i)(ii) provides that:

⁷ Citibank NA, South Africa Branch v Paul NO 2003 (4) SA 180 (T) at 200J -201A.

⁸ Nichas and Son (Pty) Ltd Papenfus 1969 (2) SA 494 (O); Petlen Properties (Pty) Ltd v Boland Construction Co (Pty) Ltd 1973 (4) SA 557 (C).

“Subject to the provisions of Rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless –

- (i) A return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or (ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5)”.

[35] It is clear from the above, more particularly Rule 46(1)(a)(ii) that the requirement is that the property must be declared to be specially executable by the court before any writ of execution against the property can be issued and this is subject to the provisions of Rule 46A. Rule 46A provides that:

“(1) This rule whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2) (a) A court considering an application under this rule must –

(i) Establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) Consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that the execution against such property is warranted.”

[36] It is clear that according to Rule 46A, whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor this rule must be applied. Both Rule 46(1)(a)(ii) and Rule 46A refer to a “judgment debtor”.

[37] Prior to 22 December 2017, the position was that there was no procedural protection afforded under Rule 46A. Property owned by a company, close corporation, trust, even if such property was occupied for residential purposes by a natural person who happened to be a shareholder, member or beneficiary of the respective company, close corporation or trust, was not protected under Rule 46 until the inclusion of Rule 46A. A sale in execution of a residential immovable property is subject to the judgment debtor’s Constitutional right to have adequate housing in terms of section 26 of our Constitution.

[38] In *Petrus Johannes Bestbier and Others v Nedbank Ltd*,⁹ the Constitutional Court held that:

“It must be borne in mind that rule 46A applies not only to executions against “primary residential immovable property” but to residential immovable property of a judgment debtor. The factor pertaining to primary residence is just one of the factors a court must consider. The text is clear that the rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. When applying rule 46A(2)(a)(i), one of the factors that the court must consider is whether the residential immovable property is used as the primary residence of the judgment debtor.”

[39] In the recent judgment of *Bestbier and Others v Nedbank Limited 2023 (4) SA 25 (SCA) (13 June (2022))* the SCA held that:

⁹ [2024] ZACC 2 at para 81.

[25] The text of rule 46A(1) reveals that the rule applies whenever an execution creditor seeks to execute against residential immovable property of a judgment debtor. Notably, rule 46A(2) provides that a court considering an application in which a creditor seeks to execute against the judgment debtor's immovable property must consider various matters. Given that rule 46A(2) provides that a court 'shall not' authorise execution unless 'all relevant factors' have been considered, I can see no reason why the fact that the relevant immovable property is owned by a trust and occupied as a place of residence by the beneficiaries of that Trust should not be one of the factors to be taken into account. It is also noteworthy that rule 46A(3) requires that 'every notice of application to declare residential immovable property executable shall be . . . on notice to the judgment debtor and to any other party who may be affected by the sale in execution . . .'. (Own emphasis).

[26] It is clear from a plain reading of the entire text of rule 46A that it is important to have a preceding enquiry in all cases where the immovable property of the judgment debtor is used as residential immovable property. This preceding enquiry should be directed at establishing whether the persons occupying the immovable property in question are of the Jaftha kind. As I see it, a creditor seeking to execute against immovable property owned by a trust would have to establish whether beneficiaries of that trust occupy the immovable property in question. Where that has been established, rule 46A would have to be followed and, consequently, rule 33 of the Practice Directive would have to be complied with. I therefore disagree with the submission made by the respondent's counsel that the person to be protected by rule 46A is, in the tradition of Jaftha and Gundwana, a natural person and not a legal persona such as a company or a close corporation, nor an institution such as a trust, ' . . . even if the immovable property is the shareholder's, member's or beneficiary's only residence'. Clearly, a blanket approach that considers all immovable property held in the

name of a juristic person to fall outside the protection of rule 46A is too narrow.”

[40] In this case, the plaintiff included in its particulars of claim, averments regarding the applicability of Rule 46A(1). It further averred as follows:

*“Based on the contentions made by the second defendant, it is the plaintiff’s belief that the property sought to be executed is not the primary residence of the second defendant”.*¹⁰ (emphasis added).

[41] This averment was not denied by the defendants. The plaintiff went on to explain the provisions of section 26(1) of the Constitution to the effect that it accords everyone the right of access to adequate housing and that should the defendants claim that the order for eviction will infringe upon that right, it is incumbent upon them to place information supporting that claim before Court. Instead of grabbing this opportunity to address the Court regarding the above, the defendants responded by simply stating that *“this is noted”* in their plea. Counsel for the defendants did not even attempt to persuade this Court not to grant this order in favour of the plaintiff.

[42] I have no doubt in my mind that the circumstances which the defendants could have placed on record include inter alia: the circumstances about how the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.

[43] In light of the above, there was nothing placed on record by the defendants which prevents this Court to grant an order in favour of the plaintiff. The plaintiff’s Counsel submitted that given the amount due to the plaintiff by the defendants, it is unlikely that the defendants would be in a position to satisfy any judgment granted, either by way of payment or by way of attachment of

¹⁰ Particulars of Claim, para 55.

movable property as envisaged by Rule 46(1)(a)(i) of the Rules of this Court, and I agree.

[44] Having heard Counsels and having considered all the documents placed before me, I am inclined to agree with plaintiff's Counsel that an amount of no less than R2,469,811.71 is a fair amount for the determination of a reserve price.

[4] Accordingly, the following order is made:

1. The first and second defendants are directed to pay the plaintiff the sum of R3,100,161.69, jointly and severally, the one paying the other to be absolved.
2. Interest on the aforesaid sum at a rate of 5.850% per annum from 29 August 2021 to date of payment inclusive of both dates.
3. The immovable property described as: *PORTION 13 OF ERF. 3406 NORTHCLIFF EXTENSION, MEASURING 317 (THREE HUNDRED AND SEVENTEEN) SQUARE METRES; HELD BY DEED OF TRANSFER NUMBER" T[...] ("the property"); AND SUBJECT TO THE CONITIONS AS IMPOSED BY THE NORTHCLIFF RIDGE HOME OWNER'S ASSOCIATION NPC* be declared specially executable
4. That the property be sold in execution at a reserve price not less than R2,469,811.71.
5. The defendants shall pay the plaintiff costs of action on attorney and client's scale jointly and severally, the one paying the other to be absolved.
6. The defendants are also liable for the costs of the postponement application.

J Mnisi

Acting Judge of the High Court

Date of hearing: 7 March 2024

Date of Judgment: 25 June 2024

For the Applicant/Plaintiff: Adv JA du Plessis

Instructed by: Vezi & de Beer Incorporated

For the Respondents/Defendants: Adv E Coleman

Instructed by: McCarthy, Cruywagen Attorneys