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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 1127/2024

In the matter between:

FIRSTRAND MORTGAGE COMPANY (RF) (PTY) LTD

Plaintiff

and

CHARMAINE PRETORIUS

Defendant

JUDGMENT DELIVERED ON 11 MARCH 2025

VAN ZYL AJ:

INTRODUCTION

1. The plaintiff seeks summary judgment against the defendant, as well as an order in terms of Rule 46A of the Uniform Rules of Court, declaring the defendant's immovable property specially executable so as to settle the judgment debt.

2. The plaintiff's monetary claim is for the payment of R1 804 608,13 pursuant to monies lent and advanced by Firststrand Bank Limited ("the lender") to the defendant under a loan agreement. The plaintiff, in turn, executed a guarantee in favour of the lender, and an indemnity bond was registered over the defendant's immovable property in favour of the plaintiff as security for the defendant's indebtedness under an indemnity agreement concluded between the plaintiff and the defendant. The foreclosure on the defendant's property is sought in terms of the indemnity bond, because of the defendant's failure to comply with the terms of the loan agreement.

3. The defendant is the registered owner of the immovable property known as Section 3[...] M[...], 3[...] C[...] Road, Fish Hoek. The property is the defendant's primary residence.

THE DEFENCES SET OUT IN THE DEFENDANT'S SPECIAL PLEA, PLEA, AND ANSWERING AFFIDAVITS

4. From the defendant's special plea, plea on the merits, and the opposing affidavits delivered in the two applications, it appears that the following is not disputed:

4.1. the conclusion of the loan agreement and the guarantee issued by the plaintiff in favour of the lender;

4.2. the conclusion of the indemnity agreement between the plaintiff and defendant, and the registration of the indemnity bond;

4.3. the fact that the defendant defaulted on her payment obligations in terms of the loan agreement; and

4.4. the fact that the plaintiff sent a notice in terms of section 129 of the National Credit Act 34 of 2005 ("NCA") to the address "Section 3[...] M[...], 3[...] C[...] Road, Fish Hoek, 7975", which is the *domicillium* address for the purposes of the loan agreement.

5. The defendant raises various defences to the applications. The plaintiff argues in relation to the summary judgment application that the defendant's special plea and plea on the merits fail to set out facts which, if proven at trial, will constitute *bona fide* defences to the plaintiff's claim: they fail genuinely to raise issues for trial.¹ These defences are, in brief, the following.

6. The defendant's primary defence (raised by way of special plea) is that the plaintiff failed to comply with section 129(1) of the NCA because, she argues, the so-called section 129 notice had been sent to the wrong address. The parties devoted most of their argument to this defence because, if it is upheld, the proceedings have to be postponed to allow the plaintiff to remedy the error.²

7. Second, the defendant denies that the deponent to the verifying affidavit in the summary judgment application has sufficient personal knowledge of the facts.

8. Third, the defendant contends that the plaintiff has not "*sufficiently demonstrated that all conditions precedent for the enforcement of the indemnity agreement have been met*" or that she has breached the terms of the indemnity agreement.³

9. Fourth, the defendant disputes the amount claimed by the plaintiff.

10. Fifth, the defendant alleges that she had applied to a debt counsellor to be placed under debt review, and had advised the plaintiff of this on 29 April 2024. She therefore contends that the plaintiff was not entitled to institute these proceedings.

11. Finally, in relation to the Rule 46A application in particular, the defendant

¹ See *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para [12].

² In terms of section 130(4)(b) of the NCA: "(4) In any proceedings contemplated in this section, if the court determines that ... (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), ... the court must-
(i) adjourn the matter before it; and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed; ..."

³ This defence is not raised in the plea, but is mentioned in the affidavit opposing the summary judgment application.

contends that her rights in terms of section 26(1) of the Constitution of the Republic of South Africa, 1996, would be infringed should her property be declared executable.

THE APPLICATION FOR SUMMARY JUDGMENT

The applicable legal principles

12. The object of Rule 32 is to prevent a plaintiff's claim, when based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court. The plaintiff is allowed to apply for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from placing his or her defence before the court.⁴

13. Rule 32(3)(b) provides that a defendant in summary judgment proceedings may “*satisfy the court by affidavit ..., or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor*”.

14. In *Breitenbach v Fiat SA (Edms) Bpk*⁵ the Court held as follows in relation to the defendant's affidavit:

“... no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement

⁴ *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–G.

⁵ 1976 (2) SA 226 (T) at 228D–E. Emphasis added.

of bona fides”.

15. The defendant who elects to deliver an affidavit in opposition to a summary judgment application must thus show that they have a *bona fide* defence to the action. They must fully disclose the nature and grounds of the defence, and the material facts relied upon and which they genuinely desire and intend to adduce at trial. The facts should not be inherently and seriously unconvincing and should, if true, constitute a valid defence.⁶

16. A *bona fide* defence is accordingly one that is good in law, and that is pleaded with sufficient particularity.⁷

17. In considering the now amended Rule 32, the Court in *Tumileng Trading CC v National Security and Fire (Pty) Ltd*⁸ held that:

“... Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (ie an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment, therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant”.

18. The word “may” in Rule 32(5) confers a discretion on the Court, so that even if the defendant’s affidavit does not measure up fully to the requirements of subrule

⁶ See *Breitenbach supra* at 227G-228B; *Standard Bank of South Africa v Friedman* 1999 (2) SA 456 (C) at 461I-462G.

⁷ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-D.

⁸ *Supra* at para [13]. Emphasis added.

(3)(b), the Court may nevertheless refuse to grant summary judgment if it thinks fit.⁹ The discretion is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he or she ought to have such relief.¹⁰

19. If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant.¹¹ If, on the material before it, the Court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant.¹²

20. The defences raised by the defendant are considered against this background. The defendant's primary defence will be dealt with first, and the rest of the defences will be considered thereafter.

The defences raised

The plaintiff's compliance with section 129 of the NCA

21. As indicated, the defendant's primary defence is that the plaintiff failed to comply with section 129(1) of the NCA by failing to send the section 129 notice to the correct address. As a result, she did not receive the notice prior to the institution of the action. This defence has three legs:

21.1. First, the defendant contends that the notice was sent to her outdated work email address, despite her having "updated" her email address in April 2023.

21.2. Second, the defendant avers that in March 2023 she sent an email to the plaintiff notifying it of her change of physical address.

21.3. Third, the defendant states that on 23 June 2023 and 3 November

⁹ *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180D–E.

¹⁰ *Jill v Firststrand Bank Ltd* 2015 (3) SA 586 (SCA) at 591B.

¹¹ *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305C–F.

¹² *First National Bank of South Africa Ltd v Myburgh supra* at 184H.

2023, she submitted a Distressed Debt Application to the plaintiff (an application for the renegotiation of her payment terms), in which she updated her *domicilium* address.

22. Notably, the *domicilium* address set out in the loan agreement, and thus used for the purposes of the section 129 notice, is the same address that the defendant claims she had notified the plaintiff of as her new address. In the loan agreement, read with the defendant's declaration entitled "*Confirmation of my details, post registration*", the defendant chose the following address as her *domicilium* address: "*Section 3[...] M[...], 3[...] C[...] Road, Fish Hoek Western Cape, 7975*".

23. This is the physical address of the mortgaged property to which the section 129 notice was sent in October 2024. It is also the address used by the Sheriff to serve the summons during January 2024.¹³ It is where the defendant's resides.

24. The defendant states that she updated her address to the "*correct address*", namely "*Door 1*" instead of "*Section 36*." In other words, the defendant states that she changed the description of the physical address by referring to her door number instead of the relevant section number (the property forms part of a sectional title scheme).

25. The fact remains that these descriptions refer to the same address, namely that of the mortgaged property. In fact, in the valuation report submitted by the plaintiff in support of the Rule 46A application, the address of the mortgaged property is listed as "*Door 1 / section 36*."

26. As stated at the outset of this discussion, the defendant argues that the section 129 notice was sent to her outdated work email address, despite her having "updated" her email address in April 2023. This may be so, but the plaintiff's compliance with section 129 of the NCA is not dependent on the delivery of the notice to the defendant's email address. Rather, the notice must be delivered to a physical address - her chosen *domicilium* address. This may be done by way of pre-

¹³ The defendant's father, who lives with her, accepted service of the summons on the defendant's behalf.

paid registered mail in terms of section 129(5)(a).

27. In *Kubyana v Standard Bank of South Africa Ltd*¹⁴ the Constitutional Court held that a credit provider has no positive duty to ensure that the section 129 notice in fact reaches the consumer:

“[31] ... First, there is no general requirement that the notice be brought to the consumer's subjective attention by the credit provider, or that personal service on the consumer is necessary for valid delivery under the Act. ... Thus, while the s 129 obligation on the credit provider is to 'draw the default to the notice of the consumer in writing', this obligation is discharged, in the words of s 65(2), by '[making] the document available to the consumer'. This accords with s 130(1)(b)(i), which provides that a credit provider may seek to enforce its rights if a consumer has not responded to a s 129 notice. While a credit provider must take certain steps to ensure that a consumer is adequately informed of her rights, such a credit provider cannot be non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided. In other words, it is the use of an acceptable mode of delivery — the taking of certain steps to apprise the consumer of the notice — which the statute requires of the credit provider, not the bringing of the contents of the s 129 notice to the consumer's subjective attention.

[32] Second, one of the acceptable modes of delivery is by means of the postal service:

'(W)here the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. . . . But the mishap that afflicted the Sebolas' notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

When a consumer has elected to receive notices by way of post, the credit

provider's obligation to deliver thus ordinarily consists of (a) respecting the consumer's election; (b) undertaking the additional expense of sending notices by way of registered rather than ordinary mail; and (c) ensuring that any notice is sent to the correct branch of the Post Office for the consumer's collection.

[33] Third, the steps that a credit provider must take in order to effect delivery are those that would bring the s 129 notice to the attention of a reasonable consumer. As the court explained in Sebola, for there to have been delivery under the Act it must be the case that 'it may reasonably be assumed . . . that notification of [the] arrival [of the section 129 notice at the Post Office] reached the consumer and that a reasonable consumer would have ensured retrieval of the item'."

28. Regarding her second contention, namely that in March 2023 she had sent an email to the plaintiff notifying it of her change of physical address, the defendant has been unable to provide any such written notification demonstrating compliance with the formalities stipulated in the loan agreement and the indemnity agreement, both of which require the defendant to give the plaintiff ten days' written notice of any change to her *domicilium* address. Both agreements contain non-variation clauses. There is no evidence on record to support the defendant's contention that she had formally changed her address in terms of these agreements at any time before 29 October 2023, when the section 129 letter was sent. It must be remembered, too, that her physical address never actually changed – she merely wished to change the description of her address from “Section 36” to “Door 1”

29. The defendant's third contention is that on 23 June 2023 and again on 3 November 2023, she submitted Distressed Debt Applications to the plaintiff, in which she indicated her “correct” address. The Distressed Debt Application she submitted on 13 November 2023 unfortunately does not support the defendant's case, as the plaintiff had delivered the section 129 notice before that date, on 29 October 2023.

30. Her reliance on the Distressed Debt Application submitted on 23 June 2023 is equally unhelpful, as that application did not constitute a written notice of change of

her *domicilium* address as required by the relevant clauses of the loan agreement and the indemnity agreement, respectively. The Distressed Debt Applications were private, internal mechanisms for the purposes of resolving the difficulties that the defendant was experiencing in complying with her obligations under the loan agreement. They were, effectively, part of settlement negotiations between the parties, and were clearly not intended as notification of a change of *domicilium*. There was nothing in either of the applications to warn the plaintiff that the defendant intended to change her formally recorded *domicilium* by means of those applications. The defendant simply gives her address, where required, as “M[...] No. [...], 3[...] C[...] Road, Fish Hoek” on the relevant application form.

31. The Constitutional Court in *Kubyana*¹⁵ held:

“[35] If the credit provider complies with the requirements set out in [31] – [33] above and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement.

[36] As set out earlier, even if the s 129 notice has been dispatched by registered mail and the Post Office has delivered the notification to the consumer's designated address, valid delivery will not take place if the notice would nevertheless not have come to the attention of a reasonable consumer. But if the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to her attention and the reasons why it did not.”

32. The plaintiff in the present matter sent the section 129 notice to the defendant's *domicilium* address, which she expressly confirmed during the loan agreement and mortgage registration process. There is no evidence supporting her allegation that she had formally changed her *domicilium* prior to October 2023. It is common cause on the papers that the section 129 notice reached the appropriate

¹⁵ *Supra* at paras [35]-[36]. Emphasis added.

post office, being the Fish Hoek Post Office. In terms of section 129(7) of the NCA, proof of delivery of the section 129 notice is satisfied by written confirmation from the postal service that the item was delivered to the relevant post office.¹⁶ The content of the track-and-trace report on record evidences delivery in the present matter. It is clearly indicated as “*In Delivery Office*”.

33. I have sympathy with the defendant’s frustration when she states that she has attempted to negotiate with the plaintiff on numerous occasions to no avail, that she has had extensive email communications with the plaintiff, and that she feels that the plaintiff acted unfairly in nevertheless instituting these proceedings. Counsel for the plaintiff is, however, correct in submitting that sympathy for the defendant should not prevent compliance with and enforcement of the defendant’s contractual obligations. This present matter is not one which allows for interference in the parties’ contractual relationship on the basis of public policy approach.

34. In all of these circumstances, I am satisfied that the plaintiff has established delivery of the section 129 notice as required by section 129(7) of the NCA.

The deponent's ability to depose to the verifying affidavit

35. Rule 32(2) requires that the person deposing to the affidavit delivered in support of a summary judgment application “*can swear positively to the facts*”.

36. The question whether the deponent has the necessary personal knowledge to “*swear positively to the facts*” as required by Rule 32 enjoyed pertinent attention in the judgments in *Rees and another v Investec Bank Limited*¹⁷ and *Stamford Sales and Distributions(Pty) Ltd v Metraclark (Pty) Ltd*.¹⁸ In both matters, the deponent to the verifying affidavit stated that he or she had acquired personal knowledge of the necessary facts by means of relevant documents under his or her control. It was

¹⁶ “(7) Proof of delivery contemplated in subsection (5) is satisfied by-
(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
(b) the signature or identifying mark of the recipient contemplated in subsection (5) (b).”

¹⁷ 2014 (4) SA 220 (SCA) at paras [5]-[15].

¹⁸ [2014] ZASCA 79 (29 May 2014) at paras [8]-[15].

held in both matters that the affidavit in question complied with the requirements of Rule 32(2).

37. In *Stamford Sales*¹⁹ the Supreme Court of Appeal summarized the legal position as follows

“[10] ... ‘As stated in Maharaj, “undue formalism in procedural matters is always to be eschewed” and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj....’ In my view, as long as there is direct knowledge of the material facts underlying the cause of action, which may be gained by a person who has possession of all of the documentation, that is sufficient.

[11] The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is sufficiently reliable to justify the grant of summary judgment....

[12] ... To insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all of the material facts of the claim of the cedent against the debtor, emphasises formalism in procedural matters at the expense of commercial pragmatism.”

38. In the present case, the verifying affidavit deposed to by Mr Roy Gomes on the plaintiff’s behalf explains that he has personal knowledge of the matter because of his access to the relevant records of the plaintiff. The records are under his

¹⁹ *Supra* at paras [10]-[12].

control, and he has inspected them. Mr Gomes is employed as manager in the plaintiff's Home and Structured Lending Department.

39. The defendant does not dispute Mr Gomes' allegations concerning his position and employment with the plaintiff, or his control over the plaintiff's records relating to the action. She also does not contest any of the allegations in the verifying affidavit regarding the nature of the information recorded and stored in the plaintiff's records, to which Mr Gomes, as an employee of the plaintiff, had access.

40. In *Trustees for the time being of Delsheraf Trust and others v Absa Bank Limited*²⁰ this Division confirmed that the deponent to the plaintiff's verifying affidavit may acquire his or her personal knowledge solely from the plaintiff's computer-generated information:

"[52] We revert finally to the judgment of Corbett JA in the Maharaj case. We believe that our approach herein is not inconsistent with the principles applied in that judgment. Corbett JA accepted, for pragmatic reasons, that the manager of the branch of the respondent bank who deposed to the verifying affidavit could not have been expected to have personal knowledge of every entry in the client's statement of account. He 'must needs rely upon the bank records' which show the amounts paid into his account and the amounts withdrawn by the client'.

[53] The technological environment was in any event very different from what it is today. The Maharaj judgment was delivered in 1975, before the advent of the information revolution referred to above

[54] It may also be noted in this regard that the terms 'personal' and 'direct' which appear in the passage at 423BC in the Maharaj judgment ... do not appear in Rule 32(2). In terms of that rule the deponent is only required to 'swear positively' to the facts in question. Mr Pillay would have been authorised to have access to respondent's computer records and he would

²⁰

[2014] 4 All SA 748 (WCC) at paras [52]-[55]. Emphasis added.

have been qualified to understand and interpret them. He would therefore have been in a position to depose to a verifying affidavit that complied with Rule 32(2).

[55] We are accordingly of the view that the computer generated information of first appellant's financial standing with respondent that was available to Mr Pillay, was sufficient to allow him to depose to a valid and adequate verifying affidavit....”

41. In the premises, given this precedent, the defendant's objection in relation to the verifying affidavit does not disclose a *bona fide* defence.

The plaintiff's compliance with the terms of the indemnity agreement

42. In the affidavit opposing summary judgment, the defendant argues that the plaintiff has not demonstrated compliance with the “*conditions precedent*” of the indemnity agreement, and has not proved that the defendant has breached its terms.

43. These defences were not raised in the defendant's plea. They can therefore not be considered as *bona fide* defences for the purposes of resisting the summary judgment application.²¹

“[14] ... in my view, a defendant cannot for the first time raise defences in its affidavit opposing summary judgment, where no such defences exist in its plea. In the new summary judgment formulation, rule 32(2)(b) sets out inter alia that a plaintiff must ‘explain briefly why the defence ‘as pleaded’ does not raise any issue for trial.’ (own emphasis). This presupposes, that in the normal acceptable course of pleadings – and which are presumably non-excusable – the matter would be adjudicated on the defendant’s pleaded defence. This, in my mind, was perhaps one of the reasons that the requirement of the plea was introduced before summary judgment could be applied for, so that by the time that a defendant filed its opposing affidavit, that he would be committed

²¹ See *AHMR Hospitality (Pty) Ltd t/a Bakenhof Winelands Venue v Da Silva* 2024 (3) SA 100 (WCC) at para [14]. Emphasis added.

to the version expressed in his plea, as opposed to a situation where a defence as contained in the affidavit is materially divergent from that which was contained in its plea. As an aside, a defendant is in any event required to set out a defence with reasonable clarity and when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea, it cannot in the absence of an explanation for the inconsistency be said to be bona fide.

44. The indemnity agreement does in any event not contain any suspensive conditions or “conditions precedent”. That agreement stipulates that the defendant undertakes to pay the plaintiff the amount for which she is liable to the lender upon receipt of a written demand. Such written demand is attached as an annexure to the plaintiff’s particulars of claim. It is common cause that the defendant has failed to comply with the letter of demand.

45. This defence thus also fails to raise a *bona fide* defence.

The disputed claim amount

46. The loan agreement provides that a certificate of balance (“COB”) will serve as *prima facie* proof of the balance owing, plus the applicable interest rate. The COB in the present matter is attached as an annexure to the particulars of claim, and certifies the amount owing as at 29 October 2023.

47. In her opposing affidavit, the defendant relies on a bank statement dated 9 March 2024, alleging that legal fees exceeding R10 000,00 have been added to her account. However, all the legal fees referred to by the defendant were incurred after the date of the COB, and such fees are thus not included in the amount reflected on the COB.

48. This defence therefore has no merit.

The defendant's application for debt review

49. The defendant alleges that on 29 April 2024, the lender was notified that she

had applied to be placed under debt review.

50. The defendant's application for debt review was, however, made after 10 business days had elapsed following the delivery of the section 129 notice, which had occurred in October 2023. The loan agreement that is the subject of the plaintiff's claim is therefore automatically excluded from such debt review application, even if her application was successful. This is in terms of section 86(1), read with subsection (2), of the NCA, which provides as follows:

“(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.

(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 130 to enforce that agreement.”

51. In the present matter, the plaintiff had already instituted action by the time the defendant applied for debt relief. Whilst the defendant had previously sought an internal rearrangement of her agreement with the lender by way of the Distressed Debt Applications to which reference has been made, those requests - effectively seeking to renegotiate the terms of the loan agreement - did not qualify as applications for debt review as contemplated by the NCA. The fact that such requests were made therefore did not bar the plaintiff from instituting these proceedings.

52. In the premises, this defence does not qualify as a *bona fide* defence.

Infringement upon the defendant's rights in terms of section 26(1) of the Constitution

53. The defendant states that her rights under section 26(1) of the Constitution would be infringed if the property is declared executable. She does not, however, provide evidence to justify why the property should not be declared executable.

These aspects are discussed below in relation to the plaintiff's application in terms of Rule 46A.

Conclusion on the summary judgment application

54. In the premises, the plaintiff has made out a proper case for summary judgment to be granted against the defendant.

THE APPLICATION IN TERMS OF RULE 46A

The general principles

55. An application in terms of Rule 46A comprises of two parts. The Court must consider whether a case is made out for an order declaring the immovable property in question executable in terms of Rule 46A(2). If so, the Court must consider whether a reserve price should be set in terms of Rule 46A(9).

56. Section 26(1) of the Constitution provides that everyone has the right to have access to adequate housing. The Constitution requires judicial oversight over orders of execution made against immovable property which is the primary residence of the judgment debtor.²² This is the case in the present matter.

57. Rule 46A provides for the process to be followed to give effect to the requirement of judicial oversight whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.²³ Rule 46A(2)(a) and (b) provide as follows:

“(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

²² See *Jaftha v Schoeman and others* 2005 (2) SA 140 (CC).

²³ See, generally, *Standard Bank of South Africa Ltd v Hendricks and another and related cases* 2019 (2) SA 620 (WCC).

(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 execution against such property is warranted."*

58. The approach to be adopted by the Court in exercising its judicial oversight in the context of section 26(1) of the Constitution is similar to any other constitutional analysis under the Bill of Rights. It entails a two-stage approach, which was explained as follows in *Standard Bank of South Africa Ltd v Saunderson and others*:²⁴

"... A plaintiff is called to justify an infringement of a constitutionally protected right only once it has been established that infringement has in fact occurred. As pointed out by Stewart Woolman in Chaska/son et al Constitutional Law of South Africa at 12-2:

'Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate that her ability to exercise a fundamental right has been infringed If the court finds that the law [or measure] in question infringes the exercise of the fundamental right, the analysis may move to its second stage. In this second stage ... the party looking to uphold the restriction ... will be required to demonstrate that the infringement is justifiable.'"

59. The Constitutional Court in *Gundwana v Steko Development and others*²⁵ provided the following context against which the possibility of execution against residential immovable property may be considered:

"It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality

²⁴ 2006 (2) SA 264 (SCA) at para [20].

²⁵ 2011 (3) SA 608 (CC) at para [54].

between the means used in the execution process to exact payment of the judgement debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."

60. In *ABSA Bank Ltd v Petersen*²⁶ the Court restated the correct approach to be followed when considering applications under Rule 46A:

"The proper approach would have been to give effect to the provisions of the mortgage bond unless something about the case, whether based on information apparent on the summons or provided by the defendant, made it appear inappropriate to do so. The right to housing is not an absolute right; and it is a right to adequate housing, not to housing that a mortgagor is unable to afford. In the context of hypothecation, the defendant-mortgagor's right to ownership of his or her home must, in general, yield to the mortgagee's right to realise its security. It is only when the exercise of the mortgagee's right is in bad faith that effect should not be given to the right. An indication of bad faith would be provided if the mortgagee seeks to proceed with execution against the defendant's home when it is evident that the judgment debt can probably be satisfied in a reasonable manner, without involving the drastic consequences of the loss of the mortgaged home. This much has been acknowledged in various ways in a number of cases"

61. The test at execution stage differs from the test to be applied when the court considers the eviction of occupants. At execution stage, the question is whether there are alternative proportionate means available to the defendant to settle the indebtedness rather than execution against her home. At eviction stage, the enquiry is whether an eviction order is just and equitable, which includes the question of the availability of alternative accommodation.²⁷

The defendant's circumstances

²⁶ 2013 (1) SA 481 (WCC) at para [33]. Emphasis added.

²⁷ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at paras [12], [18], and [25].

62. In her answering affidavit in the application under Rule 46A the defendant reiterates her defences against the summary judgment application. I have already found that those defences do not constitute *bona fide* defences capable of resisting the grant of summary judgment.

63. The defendant raises the following additional defences, namely:

63.1. that her debt review application constitutes a reasonable alternative to execution against her property;

63.2. that a sale in execution would cause undue hardship to her and her parents, thereby infringing their section 26 rights; and

63.3. she disputes the plaintiff's assessed market value of the property.

Debt review as a reasonable alternative

64. The defendant states that she applied for debt review after the institution of the action, and that she has been making monthly payments in line with the debt counsellor's rearrangement proposal. As the plaintiff has been accepting these payments, the defendant argues that the plaintiff has agreed to the rearrangement proposal.

65. She argues further that the proposed debt rearrangement would result in full settlement of the outstanding debt by 7 February 2040, which is earlier than the 22-year repayment period agreed to in the loan agreement. She contends, therefore, that this proposed rearrangement constitutes a reasonable alternative means of satisfying the debt as contemplated by Rule 46A(2)(a)(ii).

66. The main problem with the defendant's submission is that the loan agreement forming the subject of this action is excluded from the defendant's debt review. This is because her debt review application was made only after legal proceedings had been instituted. In terms of section 86(2) of the NCA, a defendant is prohibited from

initiating debt review proceedings for a loan agreement after legal proceedings related to that agreement have already commenced. I have made reference to this issue earlier in this judgment. The plaintiff has therefore informed the defendant's debt counsellor that the debt review proposal could not be accepted because the account was already subject to litigation.

67. I do not agree with the defendant's contention that the plaintiff's acceptance of the reduced monthly instalments amounts to acceptance of the proposed debt rearrangement. The defendant is always entitled to make payments into her account, but such payments do not constitute compliance with the loan agreement unless they meet the terms agreed upon between the parties.

68. The debt counsellor's proposed repayment plan is, moreover, inherently unenforceable, because it provides for fixed interest rates on all listed credit agreements, including the present loan agreement. This contradicts the contractually agreed variable interest rate as stipulated in the loan agreement, which is linked to the prime lending rate. A magistrate has no authority under sections 86(7)(c)(ii) and 87 of the NCA to alter the agreed interest rate. Any such order would be *ultra vires* the NCA:²⁸

“[43] Apart from this, the magistrate also ordered that the first respondent's contractual obligations to pay interest on the outstanding balance of the loan be reduced from the fixed 17,5% to 0%.

[44] Section 86(7)(c)(ii) confers no such power upon the magistrates' court. A debt-rearrangement order has as its purpose the rescheduling or rearrangement of the obligations of the consumer in such a manner as to enable the consumer to meet his/her/its obligations to the credit provider. It serves to mitigate the effect of overindebtedness by making provision for payments within the existing means of the consumer and over an extended period. A rearrangement order does not, and cannot, extinguish the underlying contractual obligations. This much is plain from the wording of s 86(7). The

²⁸ *Nedbank Limited v Norris and others* 2006 (3) SA 568 (ECP) at paras [43]- [44]. Emphasis added.

order reducing the first respondent's contractual obligation to pay interest on the outstanding balance of the loan is therefore ultra vires the NCA”

69. Consequently, the proposed debt rearrangement cannot result in a legally valid rearrangement order insofar as the loan agreement in issue in the present matter is concerned.

70. It follows that the defendant's debt review application does not constitute a viable alternative to execution as contemplated by Rule 46A(2)(a)(ii).

71. The defendant is currently making monthly payments of R14,622.88, whereas the required instalment is R17,568.83, resulting in the continued accumulation of monthly arrears. She is making these payments diligently, which is commendable, and it is clear that she is not seeking to shirk her responsibilities towards the plaintiff. The arrears however already amount to R120 926,54 as at 20 May 2024, which means that the defendant is almost 7 months in arrears. She has no means with which to settle the arrears and maintain her monthly instalments.

72. The defendant, whose troubles started when she lost her employment, is currently involved in proceedings before the Commission for Conciliation, Mediation and Arbitration. She is hopeful that those proceedings will be finalized within the next six months, and that she would thereafter be in a position to settle the arrear amount owing to the plaintiff. I shall take these circumstances into account in formulating an appropriate order.

The setting of a reserve price

73. The defendant disputes the plaintiff's market valuation of the property, which is to the value of R1 950 000,00. She alleges that the property's market value is closer to its insured value of R2 569 776,03.

74. The market value of the property is only relevant for the purpose of setting the reserve price under Rule 46A(9). The plaintiff has included a valuation report as part of its papers, from which the value that it relies upon is evident. I agree with the

submission made by the plaintiff's counsel that such valuation report should be preferred over the defendant's mere assertion that the insured value is a more accurate reflection of the market value of her property.

75. In *Hendricks*²⁹ this Division shared the approach taken in *Absa Bank Ltd v Mokebe and related cases*,³⁰ namely that the benefits of setting a reserve price in most instances outweigh any prejudice which may arise in doing so. It is only in exceptional circumstances that the court should exercise its discretion against setting a reserve price.

76. In considering whether to set a reserve price, and what such reserve price should be, the Court must take into account the factors set out in Rule 46A(9):

“(b) In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court shall take into account—

- (i) the market value of the immovable property;*
- (ii) the amounts owing as rates or levies;*
- (iii) the amounts owing on registered mortgage bonds;*
- (iv) any equity which may be realised between the reserve price and the market value of the property;*
- (v) reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);*
- (vi) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;*
- (vii) the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;*
- (viii) any prejudice which any party may suffer if the reserve price is not achieved; and*
- (ix) any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.”*

²⁹ *Supra* at paras [57]-[63].
³⁰ 2018 (6) SA 492 (GJ).

77. The plaintiff proposes the following formula for calculating the suggested reserve price: take the average³¹ of the municipal valuation³² and the market valuation³³ of the property, then deduct 30% from the average to determine the forced sale value of the property. The outstanding rates, taxes³⁴ and levies³⁵ should then be subtracted from the forced sale value to arrive at the final reserve price.

78. The above formula was applied to calculate the plaintiff's suggested reserve price of R1 333 176,48 at the time when the Rule 46A application was instituted. The defendant's arrears have since increased, and the outstanding rates, taxes and levies fluctuate, but on the available evidence I have no quibble with this method. It seems to me that a rounded-off reserve price of R1 334 000,00 is reasonable in the circumstances.

Alleged violation of section 26 rights

79. The defendant's elderly parents reside with her in the property. Her mother is wheelchair-bound, and the defendant has effected extensive renovations to the property to accommodate this difficulty. The defendant has, however, not provided any factual basis to support her assertion that the execution of the property would infringe her section 26 Constitutional rights.

80. The Constitutional Court has clarified that judicial oversight in execution matters serves only to ensure compliance with section 26(1) of the Constitution, specifically to prevent homelessness.³⁶

"[56] The Court having regard to the effect of section 66(1)(a) on the right to adequate housing held:

"The importance of access to adequate housing and its link to the inherent dignity of a person has been well emphasised by this Court. In the present

³¹ R1 929 500,00.

³² R1 909 000,00.

³³ R1 950 000,00.

³⁴ R15 433,39.

³⁵ R2 040,13.

³⁶ See the discussion in *Bestbier and others v Nedbank Ltd* 2024 (4) SA 331 (CC) at paras [56]-[64].

matter access to adequate housing already exists. Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. ... The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity. Section 66(1)(a) is therefore a severe limitation of an important right."

*[57] It is clear that the concern of this Court was the deprivation of the poor of their homes. This led the Court to the conclusion that judicial oversight is required when seeking a writ of execution on residential immovable property in order to protect the section 26 right to adequate housing."*³⁷

81. The defendant has not claimed that she and her parents would be rendered homeless in the event of execution, or that she lacks access to alternative housing. On the contrary, given that the defendant can afford monthly payments of R14 622,88 in respect of her current loan agreement, she evidently has the means to secure alternative accommodation.

82. I acknowledge the fact that the defendant has renovated the property to accommodate her elderly parents, and that it will probably be difficult for her and her parents to adjust to a new environment. The fact that a judgment debtor may experience hardship due to execution of their primary residence does however not automatically amount to a violation of their section 26 rights. The core question remains whether execution will result in homelessness. Such a result is not evidenced on the papers, even though the defendant's situation is without a doubt unfortunate.

³⁷ Bestbier *supra* at paras [56]-[57].

Conclusion on the Rule 46A application

83. In all of these circumstances, I am of the view that an order declaring the defendant's property specially executable, as provided for in the indemnity bond, is justified.

Costs

84. There is no reason why costs should not follow the result. The indemnity agreement provides for costs to be taxed on the attorney and client scale.

Order

In the circumstances, I grant the following orders:

85. Summary judgment is granted in favour of the plaintiff against the defendant, for:

85.1. Payment of the sum of R1 804 608,13.

85.2. Interest on R1 804 608,13, calculated daily and compounded monthly from 01 October 2023 to date of final payment, both days inclusive, at a variable rate which is linked to the plaintiff's mortgage bond base rate, which variable interest rate was 11.33%, nominal per annum as at the date of the certificate of balance.

86. The immovable property situated at SECTION 3[...] & 2[...] M[...], held by virtue of Deed of Transfer No. ST23614/2021, is declared specially executable for payment of the sum referred to in paragraph 85.1 above.

87. The Registrar of this Court is directed immediately to issue a warrant of execution to enable the Sheriff to attach and execute upon the immovable property described above, in satisfaction of the judgment debt, interest and costs.

88. No sale in execution pursuant to this order shall take place on a date earlier than **6 months from date of this order**.

89. In terms of s 129(3) of the National Credit Act 34 of 2005 the defendant may, at any time prior to the sale in execution of the property, reinstate the credit agreement by paying to the plaintiff all amounts that are overdue (i.e., in arrears), together with the plaintiff's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement, which amounts, charges and costs the plaintiff must on enquiry from the defendants furnish to her.

90. If the credit agreement is reinstated by payment as contemplated in paragraph 89, the immovable property may not be sold in execution.

91. The immovable property shall be sold subject to a reserve price of **R1 334 000,00**.

92. The plaintiff shall be entitled to approach this Court on the same papers (duly supplemented) for a variation of the reserve price if a change in the factors influencing the reserve price necessitates a change of the reserve price. The application may be brought before any Judge in this Division.

93. The defendant shall pay the costs of these proceedings on the scale as between attorney and client.

P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the applicant: Mr W. Jonker, instructed by Minde Schapiro & Smith

The respondent in person