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

Case number: 21674/2023

In the matter between:

SB GUARANTEE COMPANY (RF) (PTY) LTD

Plaintiff

and

TERTIUS JOHANNES FRANZSEN

Defendant

JUDGMENT DELIVERED ON 19 MAY 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 045 319,94 (plus interest and costs) on the basis of monies lent and advanced by Standard Bank Limited¹ to the defendant under a home loan agreement concluded in November 2019. Pursuant to the conclusion of the home loan agreement the defendant caused a mortgage bond to be registered in the plaintiff's favour over the immovable property situated at Erf 2[...] George, Western Cape. The property is the defendant's primary residence.
3. The provisions of the National Credit Act 34 of 2005 ("NCA") are applicable in the circumstances.
4. The defendant failed to keep up with the monthly payments due under the mortgage bond, and in November 2023 the plaintiff instituted action against the defendant. The defendant delivered a plea in March 2024 after service of a notice of bar, and opposed the summary judgment and Rule 46A applications subsequently brought.
5. The matter limped along and was finally set down for argument on 15 May 2025, with directives as to the delivery of further affidavits and heads of argument. On 14 May 2025 the defendant delivered an affidavit in which he sought a postponement of the applications pending the final determination of a complaint that he had lodged with the Ombudsman under the National Financial Ombud Scheme South Africa. There was no substantive application for a postponement attached to the affidavit. Counsel briefed on the defendant's behalf indicated that she had received instructions the evening before, and was not in a position to argue the matter. I accordingly postponed the hearing of the applications to 19 May 2025.²

The summary judgment application

¹ The plaintiff litigates on the basis of a common terms guarantee agreement concluded between Standard Bank and the plaintiff in March 2015. It is not necessary for present purposes to discuss the details of this agreement.

² With the defendant to pay the wasted costs occasioned by the postponement on the scale as between attorney and client.

6. Counsel's heads of argument indicated that the only submission to be pursued at the hearing in relation to the summary judgment application would be a request that the application be postponed for a period fixed by the Court to enable the Ombudsman to consider the matter and to resolve the dispute before it. That was because the defendant hoped that, should the Ombudsman find his complaints to be valid, a settlement could be reached between the parties which would obviate the need for further litigation. There was still no formal application for postponement before the Court.
7. This issue can be dealt with swiftly. The plaintiff's action was instituted in April 2023. The complaint to the Ombudsman upon which the defendant relies was submitted in October 2024, after the institution of the action, and in fact months after the delivery of the defendant's plea. Section 130(3) of the NCA provides that:³

“(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having-

(aa) surrendered property to the credit provider, and before that property has been sold;

³ Emphasis supplied.

- (bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;*
- (cc) complied with an agreed plan as contemplated in section 129(1)(a); or*
- (dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a)."*

8. it is clear from these provisions that complaints belatedly (after the institution of the action) brought to the Ombudsman do not stand in the way of a court considering a credit provider's claim for enforcement of a credit agreement. There is no justification for the postponement of the application in the hope that the parties would reach a settlement, and this Court am not empowered under the NCA to do so. The defendant is seeking to delay the inevitable.
9. The relief sought from the Ombudsman is in any event of such a nature that it would not address the issues in the summary judgment application. The defendant seeks the reinstatement of a cancelled debit order facility with the bank and damages arising from the cancellation of the facility, as well as an order directing the bank to renegotiate the terms of the home loan. The defendant's issues with his debit order facility do not address the fact that he is in arrears with his mortgage bond payments, and neither the Court nor the Ombudsman can order the bank to conclude a new contract with the defendant. While section 60(1) of the NCA does afford a person the right to apply for credit, this right is qualified by sections 60(2) and 60(3) which state, *inter alia*, that a credit provider cannot be compelled to enter into a credit agreement, at least not without it having done an affordability analysis and a risk assessment. Section 60 reads as follows:

"60 Right to apply for credit

- (1) Every adult natural person, and every juristic person or association of persons, has a right to apply to a credit provider for credit.*
- (2) Subject to sections 61 and 66, a credit provider has a right to*

refuse to enter into a credit agreement with any prospective consumer on reasonable commercial grounds that are consistent with its customary risk management and underwriting practices.

(3) *Subject to sections 61 and 92(3), nothing in this Act establishes a right of any person to require a credit provider to enter into a credit agreement with that person.*⁴

10. The informal application for postponement – insofar as there is such an application before me – can therefore not be granted.
11. I refer briefly to the defences raised in the defendant's plea. They are that the plaintiff wrongfully charged the defendant a monthly life insurance premium, that the suspensive conditions to which the loan agreement was subject had not been fulfilled, and that the defendant was prevented, through *force majeure*, from complying with his obligations under the mortgage bond.
12. In relation to the first defence, the defendant argues that the plaintiff charged a monthly amount for insurance despite the fact that the defendant had his own insurance. In concluding the loan agreement, however, the defendant had signed an insurance declaration which entitled the bank to take out life insurance on the defendant's behalf should the defendant not provide the bank with proof of his own insurance within a specific period of time. A similar provision occurs in the plaintiff's standard terms and conditions. It is common cause on the papers that the defendant failed to provide the bank with proof of his own life insurance policy. The charge was therefore raised in accordance with the contractual arrangement between the parties.
13. The second defence is similarly without merit. The signed indemnity given by the defendant was executed and became unconditional, and the mortgage bond that was granted by the defendant was registered in favour of the plaintiff. Both of these documents are before the Court. There are no suspensive conditions that

have remained unfulfilled.

14. The defendant's third defence is that he fell into arrears as a result of the Covid-19 pandemic. He relies on the defence of *force majeure* as justification for failing to make the requisite payments. However, the defendant fell into arrears in April 2020, and he has not made any effort since then to negotiate a viable payment arrangement with the plaintiff, despite various invitations from the plaintiff to the defendant to make settlement proposals. As at May 2024 his arrears were R197 000,00. The arrears have grown to almost R350 000,00 in April 2025. The defendant last made a payment in November 2023. There are no facts placed before the Court to sustain a defence of supervening impossibility, either under the parties' agreement or in common law:

*"Applying these principles to the facts, it cannot be concluded that the defendant has established impossibility of performance as a legally cognisable defence. First, the defendant put up no cogent documentary evidence in support of its contentions. Second and more importantly, the impossibility on which the defendant relies is subjective and specific to itself. The change in the defendant's financial position is not, as required by law, absolute. The obligation to render performance even during lockdown can, in general, be performed by parties in the position of the defendant. The defendant's personal incapability does not render the instalment sale agreement void."*⁵

15. The plaintiff argues in relation to the summary judgment application that the defendant's plea fails 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.⁶ I agree.
16. 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

⁵ See *Wesbank, a Division of Firstrand Bank Limited v PSG Haulers CC* [2022] ZAGPJHC 603 (25 August 2022) para 21.

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

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.⁷

17. 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*”.
18. In *Breitenbach v Fiat SA (Edms) Bpk*⁸ 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 of bona fides”.
19. 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.⁹ A *bona fide* defence is accordingly one that is good in law, and that is pleaded with sufficient particularity.¹⁰

⁷ *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–G.

⁸ 1976 (2) SA 226 (T) at 228D–E. Emphasis added.

⁹ See *Breitenbach supra* at 227G–228B; *Standard Bank of South Africa v Friedman* 1999 (2) SA 456 (C) at 461I–462G.

¹⁰ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C–D.

20. In considering the now amended Rule 32, the Court in *Tumileng Trading CC v National Security and Fire (Pty) Ltd*¹¹ 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”.

21. Considering the defences raised by the defendant against this background, they fall woefully short.

Conclusion on the summary judgment application

22. 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

23. 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).
24. I have considered the evidence available in relation to this application, and am

¹¹ *Supra* para 13. Emphasis added.

satisfied in relation to both merits and procedural requirements that a case is made out for an order declaring the defendant's property specially executable.

25. Counsel for the defendant indicated at the hearing that the Rule 46A application is not opposed, save in respect of the reserve price proposed by the plaintiff. The market value of the property is 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 market value and forced sale value that it relies upon are evident.
26. The valuation was done in May 2024. The defendant argues in his opposing affidavit deposed to in November 2024 that he has made various alterations to the property "*since your evaluation was done*". He indicates that he has added more bedrooms to the building, as well as several other features. No further details are given. I agree with the submission made by the plaintiff's counsel that the plaintiff's valuation report should be preferred over the defendant's mere assertion that the market value of his property is higher than indicated in the report.
27. In *Standard Bank of South Africa Ltd v Hendricks and another and related cases*¹² this Division shared the approach taken in *Absa Bank Ltd v Mokebe and related cases*,¹³ 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.
28. 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;

¹² 2019 (2) SA 620 (WCC) paras 57-63.

¹³ 2018 (6) SA 492 (GJ).

- (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. I propose the following formula for calculating the suggested reserve price: take the average¹⁴ of the market valuation¹⁵ and of the municipal valuation¹⁶ of the property, then deduct 30%¹⁷ from the average to determine the forced sale value of the property.¹⁸ The outstanding rates and taxes¹⁹ should then be subtracted from the forced sale value to arrive at the reserve price. This leaves one with the amount of R844 353.00.

30. The defendant's arrears have increased since May 2024, and the outstanding rates and taxes fluctuate, but on the available evidence it seems to me that a rounded-off reserve price of R850 000,00 is reasonable in the circumstances. This is less than the total amount outstanding on the mortgage bond, but it takes account of expenses necessarily incurred in the sale in execution of the property.

¹⁴ R1 260 000.00.
¹⁵ R1 300 000.00.
¹⁶ R1 220 000.00.
¹⁷ R378 000.00.
¹⁸ R882 000,00.
¹⁹ About R37 647.00.

The risk of setting an unrealistic reserve price, and the delays consequent upon the failure to sell the property to settle the defendant's debt, is that the defendant will continue to incur further debt as time goes by. The probability of the defendant being able to settle this debt at all is fast diminishing.

Conclusion on the Rule 46A application

31. In all of these circumstances, I am of the view that an order declaring the defendant's property specially executable is justified.

Costs

32. The defendant argues that each party should their own costs, but there is no reason why costs should not follow the result. The mortgage bond provides for costs to be taxed on the attorney and client scale. No facts have been placed before me to justify a deviation from this contractual arrangement.

Order

In the circumstances, I grant the following orders:

33. The application for the postponement of the summary judgment application is refused.
34. Summary judgment is granted in favour of the plaintiff against the defendant, for:
- 34.1. Payment of the amount of R1,045,319.94; and
- 34.1.1. Interest on such amount at the rate of 13.350% per annum on the first R690,000.00; 13.450% per annum on the balance between R690,000.00 and R920,000.00; and 13.650% per annum on the balance exceeding R920,000.00, from 29 August 2023 to date of payment, both dates inclusive.

35. The immovable property described as **ERF 2[...] GEORGE, IN THE MUNICIPALITY AND DIVISION OF GEORGE, WESTERN CAPE PROVINCE, IN EXTENT 1000 (ONE THOUSAND) SQUARE METRES, HELD BY DEED OF TRANSFER NUMBER T[...], SUBJECT TO THE CONDITIONS THEREIN CONTAINED** (“the property”) is declared executable for the aforesaid amounts.
36. The Registrar of this Court is authorised and directed to issue a warrant of execution to enable the Sheriff to attach and execute upon the property in satisfaction of the judgment debt, interest, and costs, in terms of Rule 46 as read with Rule 46A.
37. In terms of section 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.
38. If the credit agreement is reinstated by payment as contemplated in paragraph 37, the property may not be sold in execution.
39. The property shall be sold subject to a reserve price of **R850 000,00**.
40. 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.
41. 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 plaintiff:

Ms C. Francis, instructed by Tim du Toit
Attorneys

For the defendant:

Ms L. B. Hodson, instructed by Lionel G.
Marx Attorney