

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Case No: **37766/2020**

(1) REPORTABLE:

(2) OF INTEREST TO OTHER JUDGES:

(3) REVISED:

DATE 30 JULY 2025

SIGNATURE

In the matter between:

SB GUARANTEE COMPANY (RF) (PTY) LTD

Plaintiff

(Registration Number: 2006/0216576/07)

and

MXOLISI ZONDO

First Defendant

(Identity Number: 7[...])

THANDEKA BRIDGETTE ZONDO

Second Defendant

(Identity Number: 8[...])

These reasons are prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for handing down is deemed to be 30 July 2025.

REASONS

RETIEF J

INTRODUCTION

[1] These are reasons for an application which served before this Court in which the Plaintiff sought summary judgment against the First and Second Defendants, [Defendants] jointly and severally for the payment of a debt in the amount of R 5,057,616.44 [the debt] in respect of an accelerated loan amount, other charges and interest pursuant to a home loan agreement. It too sought attachment relief in respect of Erf 1[...], K[...], Extension 33, Township Registration JR, Province of Gauteng [the property], pursuant to a mortgage agreement.

[2] This application served before me on the allocated opposed roll on the 28 August 2024. On the date of the hearing both Counsel for the Plaintiff and Defendants appeared and argued. As will be demonstrated below, the First Defendant's Counsel requested to be excused during the proceedings after he had been provided leave to obtain a telephonic instruction from the First Defendant during the hearing. The Defendants, their attorney of record were aware that the application would proceed on the merits and, they unfortunately elected not to appear at Court nor did they elect to participate in the proceedings at the date of the hearing. To date, it is unclear whether a request for a copy of the typed record was ever requested by the Defendants and their legal team.

[3] Be that as it may, generally, in opposed Court if a matter does not become settled or is not settled in terms of a draft order or an amended draft by agreement, the Court after hearing may reserve the judgment or if it is in a position to, it can at the hearing grant the appropriate order after having provided reasons into the record on the date of the hearing itself. At the date of the hearing in this application, being the 28 August 2024, the latter was the position and the order and reasoning is clear. At the time, the pleadings in the action, a full set of affidavits in the rule 32 application including the appropriate heads of argument were filed by both parties. Furthermore, both Counsel appeared for the Plaintiff and the Defendants, albeit in the beginning of the hearing. This Court was

therefore in a position to deal with the summary Judgment application and bring finality to the matter without further delay.

[4] The difficulty of course arises when attorneys, as ethically required, do not accompany their advocate to Court and, as in this case, the Defendants themselves do not come to Court. The First Defendant being aware of the matter only elected to participate via telephonic communication with his Counsel when the Court stood the matter down for that very purpose. This will be discussed more fully below. Elective absence results in an attorney's inability to take notes during the proceedings in the interest of their clients. Furthermore, if they are present in Court but fail to take meaningful notes, they, after the fact, may be unable to recall what happened during the proceedings. This too, equally applies to Counsel who are at present but who fail to take notes and who fail to record rulings, orders and reasons. Whatever the reason may be, this may explain why parties generally and erroneously so, rely on rule 49(1)(c) and file a notice [notice].

[5] The purpose of rule 49(1)(c) is missed and the procedure and expectation, at times, misplaced. The Plaintiff and the First Defendant have been made aware and were both reminded of the purpose of this sub-rule but, to consider the sub-rule again will, in this matter, be a purposeful exercise. The First Defendant has uploaded two such notices one after the order of the 22 April 2024 and one after the hearing of the 28 August 2024. Uniform rule 49(1)(c) unambiguously state:

“49.(1)(c) *When in giving an order the court declares (own emphasis) that the reasons for the order will be furnished to any of the parties on application, such application shall be delivered within 10 days after the date of the order.”*

[6] The record is clear that it is the Court who declares that reasons will be forthcoming on request. At the hearing of the 28 August 2024, this Court reasoned its finding in respect of both the request for postponement and the outcome of summary judgment application and attachment relief. There was therefore no reason for the Court to make a declaration as catered in the sub-rule. In consequence the purpose and expectation of the First Defendant misplaced.

[7] Furthermore, if a litigant notwithstanding the purpose of the rule, unilaterally decides to file a notice, as in this matter, it stands to reason and is logical that the presiding Judge should be informed of such request as soon as possible. To explain, if a Judge does not declare that reasons will follow the order such Judge, will not anticipate that the sub-rule will be invoked. Furthermore, once a matter has been finally dispensed with, a Judge does not retain the matter and therefore has no knowledge of any further procedural steps taken by any of the parties. The Judge's knowledge of the sub-rule is either triggered by the party who requested it by bringing it to the Judge's secretary without delay or, at times, by the Registrar if such party, like the First Defendant files an application for leave to appeal with the sub-rule notice. It is common cause that the First Defendant did not inform the Registrar of the pending leave to appeal.

[8] The First Defendant nor the attorney brought the sub-rule request to my secretaries' attention. Not even an enquiry was made from me why no reasons were forthcoming. This explains the Courts late response. Both the First Defendant and the attorney remained silent, and any anticipated delay created by such silence achieved. However, eventually the Plaintiff's attorney did contact my secretary to enquire about a date in respect of the leave to appeal as the required finality. Unfortunately their request was initially sent *via* email to my previous secretaries' email address on the 9 May 2025. Fortunately on the 28 May 2025 it was corrected and sent to my present secretary. A delay to bring the notice to my attention of was approximately 8 (eight) months during. During the time of delay, the Defendants and the attorney remained inactive.

[9] To avoid any confusion and to avoid further unnecessary delays this Court will deal with the notice notwithstanding the fact that the record is clear. In doing so, this Court first speaks to a brief history of the matter to place what happened before it to place everything which followed into context.

PROCEDURAL BACKGROUND HISTORY

[10] According to the evidence the Defendants initially fell into arrears under the home loan agreement in July 2019. The Plaintiffs allege that they repeatedly attempted to assist the Defendants to regularise their arrear position. Despite the attempts, the Defendants failed to conclude a payment arrangement with the Plaintiff, alternatively failed to adhere to any payment arrangements and legal action against the Defendants commenced by the issuing of a summons. Due to the Defendants procedural inaction to defend the action, the Plaintiff initially proceeded to take default judgment and served the notice of motion together with such request personally on the First Defendant on the 6 August 2021. On the 19 August 2021 the Defendants through their attorney who was now on record, SS Masondo Attorneys attorney [the attorney], filed a notice of intention to defend. No notice of withdrawal by the attorney has ever been filed on caselines.

[11] Notwithstanding the Defendants notice of their intention to defend the action and again, due to their inaction, they failed to file a plea in terms of the uniform rules. The Plaintiff then caused a notice of bar to be served on the 9 February 2023, approximately six (6) months after the notice to defend was filed. In response to the notice of bar and on the 13 February 2023, the Defendants, through the attorney, filed a plea.

[12] On the 3 March 2023, the Plaintiff applied for summary judgment in terms of which it sought judgment against the First and the Second Defendant jointly and severally for the payment of the debt together with attachment relief in respect of the property.

[13] The attorney acknowledged receipt of the summary judgment application on the 6 March 2023. Simultaneously, the First Defendant deposed to an affidavit resisting the application for summary judgment and stated in paragraph 1 thereof:

“1. I am an adult male of full legal capacity, the first respondent in these proceedings, am lawfully married husband to the second respondent and therefore duly authorised to depose this affidavit and resist the granting of the judgment.”

[14] It is unclear what authority the First Defendant refers to in respect of his own evidence but what is clear is that no confirmatory affidavit by the Second Defendant was attached nor referred to. In consequence, the Second Defendant did not confirm any evidence deposed to by the First Defendant. According to the papers, the Second Defendant is married, out of community of property to the First Defendant. The Second Defendant did not in terms of uniform rule 32 take any positive step/s to resist summary judgment.

[15] Nearly nine (9) months after receiving the First Defendant's opposing affidavit, the Plaintiff, due to the Defendants inaction once again, this time for their non-compliance of the directive of this Division, the Plaintiff obtained a compel order with ancillary relief to strike on the 27 November 2023. The Defendants were compelled to file their heads of argument and practice note in terms of the directive. The First Defendant however, acting in person and citing himself as an advocate practising in this Division, filed a combined document, a practice note and his heads of argument on the 12 December 2023.

[16] On the 18 January 2024, the Plaintiff caused a notice of set down for the 22 April 2024 of the summary judgment on the opposed roll. However, notwithstanding the heads of argument drafted and filed by the First Defendant himself he on that date, argued for the removal of the matter arguing non-compliance of the directive. In consequence from the 18 January 2024 to 22 April 2024, both he and the attorney were unable to secure Counsel during the 3 months.

[17] The matter did not proceed on the 22 April 2024 and Van Der Westhuizen J placed the Defendants on terms allowing them and/or the attorney of record to appoint Counsel within 10 (ten) days of the granting of the order and directing that proof of the same is to be provided to the Plaintiff's attorney. Furthermore Van Der Westhuizen J directed that the application was to be set down for hearing on the opposed roll within 10 (ten) days from date of the order. Van Der Westhuizen J granted the Plaintiff attorney and client costs. The First Defendant then uploaded his first rule 49(2)(c) notice regarding the punitive costs order. It is unclear whether

this first notice ever been came to the Learned Judge's attention by the Defendants. A further delay to pay costs achieved.

[18] The matter was finally set down on the opposed roll for the week commencing the 26 April 2024. The matter was allocated by myself to be heard on the allocated opposed roll for the 28 August 2024. My directive and allocated roll was uploaded onto caselines for all the parties attention already on the 22 August 2024.

[19] However, on the 23 August 2024 the First Defendant, without a confirmatory affidavit filed by the Second Defendant and, without leave or proof of service simply uploaded an affidavit duly commissioned by a Senior Counsel. In this affidavit, the First Respondent under oath now explained the circumstances under which he released his previous unnamed Counsel from a brief. This being the Counsel in compliance of the 22 April 2024 order. In short, he released his Counsel from brief for his failure to inform him and the attorney that he was trying to settle and entertain a joint minute without his instructions. In other words, he released his Counsel's attempt to comply with the directive. He stated that:

"No updates were ever given to either my attorney or myself (own emphasis) and we were never even copied in such communications, let alone being invited to participate in those engagements and it appears that these discussions were taking place outside of the parameters of what is lawful and ethical between the applicant, its counsel and our counsel"(own emphasis).

[20] The attorney failed to confirm these facts under oath in circumstances when he too, as an officer of the Court had to comply with the 22 April 2024 order, alternatively, he failed to provide an explanation under oath for the present non-compliance.

[21] The First Defendant under oath confirmed that on the 23 August 2024, a date after my allocated directive, he managed to secure the services of Counsel. This Counsel he stated was in his own Group. No particulars were provided, the

Counsel and his/her details remained nameless. This affidavit was uploaded on the 27 August 2024, the day before the hearing and several court days after my directive.

[22] Simultaneously however, the First Defendant, again without any confirmation from the attorney nor a confirmatory affidavit from the Second Defendant, deposed to yet a further affidavit in which he now sought a postponement. This postponement request was not brought by way of a brought by way of substantive application, nor did he tender costs.

[23] The only reason advanced for the postponement was that his unnamed Counsel was only available on the 26 August 2024 and not on Wednesday 28 August 2024, as allocated. Of significance, was that the unnamed Counsel never attempted to inform my office of his predicament to ensure a reallocation notwithstanding the ethical rule that Counsel must make themselves available for the entire week in anticipation of the allocation in opposed motion court.

[24] As anticipated, the Plaintiff opposed the postponement request and uploaded written argument to assist the Court.

THE POSTPONEMENT REQUEST, THE OPPOSED SUMMARY JUDGMENT APPLICATION AND RULE 46 AND RULE 46A RELIEF

[25] Notwithstanding the affidavits which were simply uploaded onto caselines, the First Defendant was represented at the hearing by Advocate Sibisi. Advocate Sibisi and on the record stated that he acted on behalf of the 'Respondent'. The Court accepted that he must have meant the First Defendant. No mention was made of the Second Defendant nor as will be illustrated did Advocate Sibisi ever refer to the Second Defendant in the record, not even erroneously as the Second Respondent. This must also be considered against the fact that Advocate Sibisi called the First Defendant during the hearing for further instructions. The Second Defendant did not file papers nor confirm the request for postponement. Advocate Sibisi stated that he and the attorney had been instructed on a *pro bono* basis.

Advocate Sibisi appeared without the attorney and was not accompanied by either the First or Second Defendant.

[26] Absent a notice of motion to support of a substantive application for a postponement, the Court, none the less, heard both parties. Advocate Sibisi confirmed for record purposes that his instructions were only to advance submissions in respect of the postponement and that he was not to make submissions regarding the merits of the matter set down before Court. In amplification, he stated the following:

“If the Court does not grant this postponement, My Lady, that is the end of it. I do not have instructions for the postponement – for to argue merits. I did have a word with the applicant because I also said that look, a postponement is discretionary after all. However, My Lady, I was simply told that you cannot argue, you know the merits. I am a creature of instructions, after all, My Lady. I cannot do what is beyond my scope, My Lady.”

[27] The First Defendant had filed papers in the opposed summary judgment and written and filed the heads of argument, yet he elected not to be present to assist his own Counsel nor the Court, as its Officer. The election not to assist is seen against the backdrop of the fact that when the First Defendant wanted to assist himself, he did, and he could. This fact is borne out in his own evidence at the hearing of the 22 April 2024 at paragraph 4 he states “- I appeared in my own capacity (own emphasis) Justice Van Der Westhuizen, and vehemently argued the matter (own emphasis) as was not properly before the Court, as the applicant-plaintiff had failed to comply with the provisions of the 2024 practice directive.” In other words, this demonstrates that he was capable and able to make submissions then, and it is on this basis that it appears unclear that he now, in respect of resisting summary judgment as envisaged in terms of rule 32, cannot assist himself nor the Court. A change in professional circumstances or ability was not clear from the papers.

[28] In any event, irrespective of Advocate Sibisi’s instructions and irrespective of his statement into the record, he did go into the merits. The highwater mark of

his merit argument was: *“However, what I can actually submit before this Court is that this is a primary residence, and obviously, it will have an effect on the children because they also attending school around the area My Lady.”*

[29] Notwithstanding these submissions, Advocate Sibisi informed the Court that the unnamed Counsel who was briefed to deal with the merits was in fact Byron Morris and he advanced the reason why Byron Morris could not argue the merits : *“- if this matter was going to be argued either on Monday or Tuesday, he was, but because it’s Wednesday, he is not available.”* Byron Morris filed no papers nor a practice note.

[30] To compound the First Defendant’s predicament, the Plaintiff’s Counsel reminded the Court that if it had regard to the previous Court order by Van Der Westhuizen J, and if the Court accepted the First Defendant’s evidence that he released his previous Counsel on the 6 July 2024 both he and the attorneys had ample time to adhere to the Court order and obtain Counsel to argue the merits of the matter. Such an explanation of delay of the full period with any particularity was not explained. Furthermore, that from the explanation the First Defendant waited until the last minute to secure Counsel. In fact, his attorney has not even bothered to comply with the order and not placed any version before court for his non-compliance of the court order.

[31] Furthermore, my directive was published and uploaded onto caselines on the 22 August 2024, therefore, the First Defendant’s allegation when speaking for both himself and the Counsel that he on the 23 August 2024 secured his counsel stated under oath at paragraph 4 that: *“ It was never within our foresight (his and his Counsel-own emphasis) that the matter would not proceed as per the notice of set down but would be rolled over for another day during the week”* , is not only watered down but disingenuous. My allocated roll was uploaded before he secured the Counsel to deal with the merits and furthermore, the directives and Practice Manual dealing with Counsels obligations in the opposed motion Court is clear. This aspect has been mentioned before.

[32] Considering all the submissions, this Court also acutely aware that the Second Defendant had not filed a postponement made its ruling with reasons into the record. Advocate Sibisi was present. The postponement was refused and costs of suit on scale A was awarded to the Plaintiff.

[33] The Court then informed Advocate Sibisi that it was ready to proceed with the merits of the summary judgment application and that it was willing to stand the matter down for a number of minutes so that he could take instructions from his client who could arrange to be at court and the Court adjourned to assist the First Defendant. Advocate Sibisi was grateful for the indulgence.

[34] On Advocate Sibisi's return he explained that he could not get hold of the attorney, but he managed to get hold of the First Defendant. He stated the following:

"I relayed; I conveyed the message to him regarding the order of the postponement. And then I actually told him about now the fact that you are only left with the merits, and he insisted on that I should not touch on the merits. I said that it means the matter is unopposed if that is the case."

[35] The Court enquired whether the First Defendant would then be on his way to Court under these circumstances and the answer Advocate Sibisi gave was: *"Not at all."*

[36] In the premises, the First Defendant had elected to be absent after being provided with a further opportunity to attend. The Second Defendant was also absent. The First Defendant was steering the ship and trying to control a narrative of absence which is untenable on the facts. If anything by his absence was at his own hand and election. Advocate Sibisi excused himself and did not even remain in Court to take notes for the Defendant/s. To obtain and understand, the reasons for the judgment were accessible for all the parties at the time.

[37] The Court considered all papers filed and having regard to the pleadings and the admission of the material relevant facts by the Defendants not triable

issue was raised on the pleadings. The Defendants admitted the conclusion of the loan agreement and the material terms thereof, the failure to pay the mortgage bond instalments and compliance with section 129 notice, including the admission of the arrears and the debt. The nub of the plea was that the proceedings were academic, because the First Defendant had undertaken from the end of March 2023 to extinguish the arrears. However, the Plaintiff's Counsel argued that the Defendants have failed to settle the arrears as of March 2023.

[38] In the affidavit resisting summary judgment the First Defendant raised further defences in an attempt to extend the reach of the plea. The Plaintiff's Counsel reminded the Court that without a proper explanation it was not permissible in a summary judgment application as such defence cannot be said to be *bona fide* as the rule requires. The Court in this regard was invited to consider the matter of Vukile Property Fund Limited v True Ruby Trading 1002 CC and Others,¹ which the Court highlighted that if allegations in an affidavit resisting summary judgment are not consistent with that of the plea as in this case, it cannot, in the absence of an explanation for the inconsistency to be said to be *bona fide*. It is a prerequisite that a consideration of the defence must be *bona fide* and in good faith in law.

[39] Without a proper explanation of the reason for the inconsistency caused and having regard that all the material facts in support of judgment as prayed for, not triable issues warranting leave to trial was apparent. Furthermore, the Plaintiff's claim in respect of the debt was jointly and severally with the Second Defendant not taking any steps to resist the same in terms of rule 32, Judgment as prayed for was granted.

[40] The Plaintiff's Counsel took the Court through the formalities with regard to rule 46A. The Court was satisfied. Then having regard to the remaining provisions of rule 46A and considered the submissions in terms of sub-rule 46A(3)(b). It is for this purpose that this Court considered the submission of the First Defendant. At this juncture this Court considered it a grave pity that the voice of the Second

¹ (Case number 2020/9705) per Moorcroft AJ, Gauteng Division, Johannesburg at par [10] read together with **ABSA Bank v Meiring** 2022 (3) SA 449 (WCC) at par [14].

Defendant was not specifically heard, in that she, as previously stated numerous times, did not prosecute her opposition in any way nor did she confirm any evidence proffered by First Defendant not even pertaining to the alleged minor children. She failed to provide any evidence in terms of sub-rule 46A(6). No submissions in respect of the Rule 46A relief was made by her by choice, to assist this Court.

[41] The First Defendant, other than making reference to rights enshrined in section 26, failed to advance any reasons or provide any facts to this Court to substantiate why his right to adequate housing would be infringed by the attachment and execution relief. It was almost as if, by mere reference to the Court's Constitutional obligation, such right was established. However, that alone does not translate into his inability to have access to adequate housing whether factually or financially. Factually he does not state that he has tried to obtain other housing by rental or otherwise nor fully demonstrate that he does not factually possess an inability to afford adequate housing elsewhere. His affidavits seem to suggest that he still practises with the Group as a member of the Johannesburg Bar. This Court without evidence is not asked nor required nor can guess what his factual financial position is without proof. None the less if it was dire and Constitutional protection clear, the Court could have ordered the Municipality to assist him. No other submissions or facts were presented which bolstered the case that both Defendants were indigent Defendants requiring the protection of section 26 of the Constitution. The First Defendant was not an indigent litigant a consideration the Court applied having regard to section of the Constitution.

[42] As far as the best interest of the minor children are concerned, the Court enquired whether proof of such children, other than the allegation was before it. None was, no birth certificates were forthcoming to assist a Court to ascertain the weight of the First Defendant's allegations and reliance of the minor children.

[43] The Court made its enquiries, exercised its discretion, considered the facts and was satisfied that the property could be declared attached and declared executable but to assist the Defendants intended to suspend the execution of the writ for 3 (three) months to enable the Defendants to relocate or to repay the

arrears as stated in the pleadings he would do. The Court then in favour of the Defendants heard submissions in respect of setting a reserve price in terms of section 46A(9). It considered the updated and most recent valuation affidavit (valuation of R 4 000 000.000) and the expenses (rates and taxes of R 10 563.27 and outstanding levies of R 3 074.25) and determined a reserve price of R 3 986 362.48.

[44] It was on this basis having regard to all before it that the order was granted.

COSTS

[45] The Plaintiff's Counsel argued for attorney client costs as agreed to in the loan and mortgage agreement and reference was made to clause 1.3.1.12 of the agreement appearing on A-66 on caselines. The Court awarded attorney client costs as per the agreement and having regard thereto.

[46] An amended draft order duly handed up by the Plaintiff's Counsel with the addition of prayer 9 including the suspension of the writ for 3 (three) months was made an order of Court.

L.A. RETIEF

Judge of the High Court

Gauteng Division

Knowledge of date of request for reasons: 28 May 2025

Date of furnished reasons: 30 June 2025.