

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

CASE NUMBER: 096078/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

31.07.2025

In the matter between

FIRST RAND BANK LIMITED

APPLICANT

And

MASANA BALOYI

FIRST RESPONDENT

CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY

SECOND RESPONDENT

P[...] F[...] LIFESTYLE BODY CORPORATE

THIRD RESPONDENT

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and was handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing-down is deemed to be 31 July 2025.

JUDGMENT

KEKANA AJ

INTRODUCTION

[1] This is an application for summary judgment against the first respondent as well as an order declaring the mortgaged immovable property of the first respondent specially executable.

BACKGROUND

[2] The first respondent's indebtedness arises out of a loan agreement entered into between the parties during April 2019. As security for the debt arising from the abovementioned loan agreement, the respondent caused a mortgage bond to be registered over the immovable property.

[3] The applicant subsequently issued summons for an amount of R563 283.88 against the first respondent for defaulting on his obligations under the loan agreement and the mortgage bond. The first respondent entered an appearance to defend and filed a plea after the applicant served a Notice of Bar. The applicant served and filed this application, which is opposed.

POINTS *IN LIMINE*

[4] The first respondent raised points *in limine* to the applicant's application, which are addressed below.

Lack of jurisdiction

[5] The respondent submitted that this application contravenes the following sections of the Constitution of South Africa: section 10, which protects the right to dignity, section 25, which protect the right to own property, section 26 which protects the right to housing and ensures that no one is unfairly evicted or left homeless and section 28 which recognises that the children need special protection and care. The respondent contends that this application in terms of Rule 46A contravenes his rights and will also affect the rights of a minor child without providing the details.

[6] The applicant submitted that the correct procedure and practice for these matters are well established and that the honourable court has jurisdiction to adjudicate the

matter as duly set out and regulated in terms of Section 21(1) Act 10 of 2013 (as amended). The applicant further submitted that the action between the parties is contractual and does not involve the interpretation, protection or enforcement of the Constitution.

[7] Rule 16A of the Uniform Rules of Court in South Africa sets out the procedure to be followed when a party raises a constitutional issue in High Court proceedings. The purpose of which is to ensure that constitutional matters are dealt with transparently and that interested parties and the public are given notice and an opportunity to intervene, especially in cases with broader public interest.

[8] Rule 16A requires that a party raising a constitutional issue to deliver a notice, setting out the nature of the issue, and to serve the notice on all parties and file it with the Registrar who will display the notice allowing interested parties to potentially participate as *amici curiae*.

[9] Similarly, in *Phillips and Others v Director of Public Prosecutions* 2006 (1) SA 505 (CC), the Constitutional Court cautioned against raising constitutional arguments without proper notice, particularly when such issues were not raised in the founding papers or at the earliest opportunity.

[10] In the present matter, the first respondent seeks to rely on a constitutional issue without complying with the mandatory procedural requirements of Rule 16A of the Uniform Rules of Court. He failed to deliver a Rule 16A notice, has not filed it with the Registrar, and no such notice has been placed on the court's notice board. There has been no opportunity for interested parties or amici to respond to the issue. The first respondent's attempt to raise the constitutional point, without following the prescribed procedure, is irregular and prejudicial.

[11] In the result, I find that this point *in limine* stands to be dismissed.

Non-joinder

[12] The respondent submitted that the Minister of Justice and Constitutional Development (the Minister) must be joined to pronounce on the proper functioning of

the impugned constitutional clauses and the effectiveness of Rule 46A, as it has the potential to render a person homeless. In response thereto, the applicant submitted that the Minister of Justice and Constitutional Development was not a party to the Loan Agreement and/or the Mortgage Bond and thus has no direct, indirect and/or substantial interest in the relief sought or the outcome.

[13] Having already decided against the adjudication of the Constitutional challenges raised by the first respondent, this point *in limine* is baseless as the determination of the issues does not require the Minister's input or participation as required in Rule 10A of the Uniform Rules of Court.

[14] Accordingly, this point *in limine* cannot be upheld.

Non-Compliance with the rules

[15] The first respondent submitted that the applicant could not approach the court in terms of Rule 46A in the summons, instead of by application. The applicant submitted that it was proper to bring the application in terms of Rule 46A together with the application for summary Judgment.

[16] In addition to including the issue of the executability of the first respondent's property in the summons, the applicant brought a separate Application in terms of Rule 46A to be heard simultaneously with the application for Summary Judgment. In this regard, the applicant relies on the matter of *Changing Tides 17 (Pty) Ltd NO v Rademeyer and Another* (1911/2019) [2019] ZAGPJHC 165 (31 May 2019) where an application for summary judgment was instituted together with a separate application in terms of Rule 46A to be heard simultaneously.

[17] In *ABSA v Sawyer* (2018/17056) [2018] ZAGPHC 662 (14 December 2018) the court adopted a pragmatic approach and prioritised substance over form. The court found that summary judgment, including a Rule 46A application, can be granted provided that there has been substantial compliance, meaning that sufficient information has been placed before the court allowing it to strike a fair balance between the parties competing interest (see *FirstRand Bank Ltd v Folscher and Another* 2011 (4) SA 314 (GNP)). Once the court is satisfied that all relevant Rule 46A

factors have been addressed and the debtor has been afforded a fair opportunity to respond, the court may grant an order of executability in summary judgment.

[18] It is clear from the above cases that what is of importance is whether the court has been placed in a position to exercise the judicial oversight enunciated in *ABSA Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ), regardless of whether the matter is brought by motion or action. In the current matter, a separate application in terms of Rule 46A was brought to be heard together with the application for Summary judgment. Whether same ought to be granted, is a matter to be determined later in this judgment. Therefore, the first respondent's point *in limine* in this regard cannot be upheld.

LEGAL PRINCIPLES

[19] Summary judgment is a mechanism designed to enable a plaintiff with a clear case to obtain expeditious relief without the need for a trial where the defendant has no bona fide defence and is merely seeking to delay the proceedings. The rule aims to prevent the abuse of the court process by defendants who have no real defence to the claim. (See *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para 32)

[20] In deciding on whether to grant the application, the court must determine whether the defendant has shown facts that, if proven at trial, would constitute a defence to the plaintiff's claim. The court is not required to determine the truth of the defence, but only whether it is sufficiently plausible to warrant a trial. (see *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A–C.)

[21] The opposing affidavit must disclose material facts with enough detail to show that, if proven at trial, the defence would succeed. Vague or bald averments are inadequate. (See: *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228F–229C).

ANALYSIS

[22] The applicant asserts that its claim is contractual and stems from a mortgage loan agreement entered into by the parties on 8 April 2019. According to the terms of

the agreement, the applicant disbursed the principal amount to the first respondent, which funds were utilized for the purchase of the immovable property in question. Further that the first respondent subsequently defaulted on his obligations by failing to make the agreed-upon monthly instalments. As of 17 August 2023, the respondent was in arrears in the amount of R101,588.91, with the total outstanding balance reaching R563,263.88.

[23] Furthermore, the applicant asserts that it has fulfilled its obligations under Section 129 of the National Credit Act 34 of 2005 ("NCA") by serving a notice to the respondent, informing him of his default and the available remedies. The first respondent acknowledges receipt of the Section 129 notice but insists that it was not service was not proper. It is now established that what matters is that the notice was served and came to the respondent's attention, not the method of service. In this case, the first respondent was properly served and there is no need to adjourn the matter. (see *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC)).

[24] The first respondent denies being indebted to the applicant in the alleged amount and contends that none of the monies allegedly owed by him in terms of the loan agreement reflected in his bank account. Inexplicably, the first respondent simultaneously alleges that his arrears on the loan agreement amount to R 5 828.91. The first respondent insisted that the covering bond in the sum of R95 760.00 should be utilised by the applicant to pay for his arrears but does not provide a basis for this contention.

[25] In his plea, the first respondent denied receiving the loan amount in his personal account. However, he also admits to being in arrears in the amount of R5 828.91. Notably, in his email dated 31 August 2023, the first respondent clearly acknowledged his debt and committed to making monthly payments of R5,500.00 starting September 2025. This communication, along with the averments in the affidavits and the plea disputing the arrears as being less than claimed, constitutes an acknowledgment that he was in breach of the loan agreement, making his denial of indebtedness untenable.

[26] Moreover, although the first respondent claims that the arrears amount to a lesser figure than that alleged by the applicant, he has failed to produce any documentary proof of payments made to support his contention. In contrast, the applicant has tendered a certificate of balance, the evidentiary value of which has not been challenged by the first respondent on any substantive ground. It is trite that bald denials unsupported by evidence do not constitute a bona fide defence.

RECKLESS LENDING

[27] The first respondent also resists the Summary Judgment by alleging that the loan agreement amounts to reckless lending. He alleges that he did not fully appreciate the risks, costs, and obligations associated with the loan, and therefore the credit was granted without proper compliance with the Act.

[28] The applicant disputes this allegation and avers that a full affordability assessment was conducted prior to the conclusion of the agreement. The assessment revealed the following: (a) The first respondent was not under debt review, sequestration, or administration at the time of application; (b) His total income amounted to R26 800.00, comprising: (i) A salary of R25 000.00; (ii) A car allowance of R1 500.00; and (iii) An entertainment allowance of R300.00; (c) His total monthly expenses, including R5 000.00 for rental, were disclosed as R15 000.00; (d) After deducting expenses, the first respondent had a surplus (disposable income) of R11 300.00. This surplus was sufficient to afford the agreed monthly instalment of R5 082.00.

[29] The applicant submitted that based on the above, the first respondent had the financial means to meet his obligations, and that the credit was granted responsibly. It is clear from the applicant's explanation that an assessment was done and that in the absence of evidence to the contrary, the first respondent's allegation of reckless lending is thus without merit.

RULE 46A

[30] Turning to the application to declare the property specially executable, the applicant placed the following information before court:

(a) The property is the primary residence of the first respondent; (b) the first respondent utilised the money loaned to purchase the property; (c) the applicant complied with the provisions of section 129 of the NCA, to which the first respondent did not react; (d) As at the day when section 129 notice was sent, 18 August 2023, the arrears on the loan account amount to R101 588.91; (e) As at the date the affidavit in support of the Summary Judgments was done, the amount in arrears had increased to R311 715.90; (f) the arrears as on the 17 April 2024 amounted to R144 642.99 and the total outstanding amount on the loan account amounted to R609 517.73; and (g) there is no reasonable alternative to execution against the property.

[31] In response to the application in terms of Rule 46A, the first respondent contends that it is unconstitutional, as it would deprive him and a minor child of their primary residence. He stated that at the date of the hearing of this matter, he was employed as a candidate attorney receiving only a stipend.

[32] Rule 46A of the Uniform Rules of Court empowers the court to order execution against the primary residence of a judgment debtor if there is no other satisfactory means to satisfy the judgment debt. In deciding on the executability of the immovable property, the court seeks to strike a balance between the interest of a commercial institution and the debtor's right to adequate housing.

[33] The court is also empowered to set a reserve price at which the sale in execution should be conducted, taking into account the market value of the immovable property, the amount owing as rates or levies, the amounts owing on registered mortgage bonds, equity which may be realised between the reserve price and the market value.

[34] The first respondent's argument that Rule 46A is unconstitutional is without merit. Rule 46A was enacted to give effect to Section 26 of the Constitution, which particularly protects people's rights to housing and ensures they are not unfairly evicted or left homeless. Particularly Section 26(3), which prohibits evictions or

demolition of homes without a court order made after considering all relevant circumstances.

[35] The rule introduced judicial oversight in all cases where a primary residence is sought to be sold in execution, ensuring the court considers the debtor's personal and financial circumstances, evaluates the proportionality of selling a person's home to recover a debt, and assesses whether less drastic measures are available. When evaluating the debtor's personal circumstances, the court will also consider other rights that the debtor has. Additionally, the court will take into account the rights of minor children living on the property in question.

[36] The constitutional validity of judicial oversight has been confirmed by the Constitutional Court in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC), which determined that selling a primary residence without judicial oversight violates Section 26(3). In *Standard Bank of South Africa Ltd v Hendricks and Others* 2019 (2) SA 620 (WCC), the court supported Rule 46A as a way to ensure fairness, equity, and constitutional compliance in execution proceedings against immovable property.

[37] The first respondent indicated that he was earning a stipend and does not indicate how he intends to regularise his account. His undertaking to resume paying the instalments approximately 2 years after the summons has been issued does not satisfy the requirement of providing an alternative to how the debt will be repaid. The first respondent is currently employed and should be able to secure accommodation for himself and his family.

[38] I find that the applicant has made out a case for the property to be declared specially executable.

[39] The applicant placed the following information before the court in support of the application in terms of Rule 46A to enable the court to set a reserve price:

- (a) The last payment made to the account on the 31 August 2023 was R200.00;
- (b) As at the date of issuing of the summons, the arrears amounted to R101 588.91;
- (c) As of 17 April 2024 to the arrears amounted to R144 642.99;

- (d) As of 17 April 2024, the first respondent was approximately 26.57 months in arrears;
- (e) The market value is estimated at R500 000.00. The estimated forced sale value amount R400 000.00;
- (f) The amount outstanding on the bond is an amount of R609 517.73;
- (g) The amount owing to the local authority for rates and taxes amounts to R14 356.29;
- (h) Outstanding levies as of 1 May 2024 amounted to R33 908.47

CONCLUSION

[40] The first respondent's conduct in these proceedings is indicative of an attempt to delay the enforcement of a legitimate debt. The first respondent has raised unmeritorious technical objections and advanced contradictory defences. He has, on the one hand, acknowledged indebtedness in correspondence and affidavits, while on the other, denied such indebtedness in his plea. This amounts to approbating and reprobating, a course of conduct which evinces a lack of bona fides and demonstrates the absence of any genuine defence to the applicant's claim. I therefore find that the applicant's application for Summary judgment should be granted, together with an order declaring the immovable property specially executable.

In the result, I make the following order:

1. The first point *in limine* is dismissed.
2. The second point *in limine* is dismissed.
3. The third point *in limine* is dismissed.
4. The application for Summary Judgment is granted with costs. The respondent is to pay the sum of R563 283.88 together with interest at the rate of 11.85 nominal per annum, calculated daily compounded monthly from 31 July 2023 to date of payment.
5. The below mentioned mortgaged property is declared specially executable:
 - (a) A Unit consisting of 200 as shown more fully described on Sectional Plan No. SS171/2011 in the scheme known as P[...] F[...] in respect of the land and buildings situated at Comet Extention1 Township; Local Authority: City of Ekurhuleni Metropolitan Municipality of which section the floor plan is 62 square metres in extent and

(b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation Quota as endorsed on the said sectional plan,

Held by deed of transfer number ST17376/2019 and subject to the conditions as set out in the aforesaid deed known as Door 2[...] P[...] F[...], G[...] Street, Comet Ext. 1, Boksburg.

6. The abovementioned immovable property may be sold in execution by the Sheriff with a reserve price of R430 000.00.
7. The Registrar is authorised to issue the writ of execution against the abovementioned immovable property.
8. The first respondent to pay the costs on an attorney and client scale.

P D KEKANA
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 19.07.2025

DATE OF JUDGMENT: 31.07.2025

APPEARANCES

Counsel for the applicant: Adv H Marais

Instructed by: RWL Incorporated

The first respondent: In person