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

CASE NR: 2024-071736

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED:
DATE: 27/08/2025
SIGNATURE:

In the matter between:

INTELLO CAPITAL CC

APPLICANT/PLAINTIFF

and

FBO TRADING PROPRIETARY LTD

FIRST RESPONDENT/DEFENDANT

BHEKI SIZA N.O.

SECOND RESPONDENT/DEFENDANT

S'BONELO DLAMINI N.O.

THIRD RESPONDENT/DEFENDANT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected 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 CaseLines. The date of the judgment is deemed to be 27 August 2025.

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

1. The Applicant brought two different applications at the same time against the First to Third Respondents. The first application is for summary judgment. Generally, in summary judgment applications, the parties are referred to as they are in the main action proceedings. However, to avoid confusion, they will be referred herein as the Applicant and Respondents respectively.
2. The second application is brought under Uniform Rule 46A to declare the immovable property owned by B Buza Family Trust (hereafter 'Trust') to which the Second and Third Respondents are trustees as specifically executable. These applications follow the action proceedings instituted by the Applicant against the First to Third Respondents. The Respondents defended the main action proceedings by serving and filing their plea. They also opposed these two applications.
3. The fate of the second application depends on the outcome of the first application. In the first application, the issue is whether the Respondents have a *bona fide* defence to the Applicant's main action proceedings against them. In the second application, the issue is whether the Applicant has made out a case for the said immovable property to be declared specifically executable.

B FACTUAL MATRIX

4. On 11 March 2020, the Applicant concluded a loan agreement with the First Respondent. The Second and Third Respondents, in their capacity as the trustees of the Trust, signed an agreement with the Applicant where they bound the Trust to stand surety for the obligations of the First Respondent in terms of the 11 March 2020 loan agreement.
5. In terms of this agreement, the Applicant provided the First Respondent with a credit facility of R 1 491 980.00. The parties agreed that the First Respondent

would repay this amount within eight months, with the payment of R 53 285.00 monthly interest, a facility fee of R 60 000.00, a documentation fee of R 5 700.00, and a bond registration fee of R 42 995.48. A security in the form of a bond was registered over the property known as Erf 6[...] P[...] Ext 8, W[...] G[...] Estate, Pretoria, in favour of the Applicant for R 4 800 000.00. This is the immovable property owned by the Trust.

6. The Second and Third Respondents also signed an acknowledgment of debt of an amount of R 1 491 980.00. The Applicant signed a rollover agreement with the Second Respondent, on behalf of the First Respondent. This agreement explicitly outlined that the total facility amount granted to the First Respondent was R 2 993 287.73, repayable over eight months at a daily interest of 0.15%.
7. The Applicant further alleges that the monthly interest of R 50 340.92 was due on 28 January 2021, followed by separate monthly payments of R 100 781.83 over a period of seven months. In addition, the First Respondent was obliged to pay a R 100.00 monthly service fee, R 25 000.00 facility fee, and R 5 700.00 document fee. The Respondents allege that as of 28 January 2021, the First Respondent had paid a total amount of R 1 228 404.17 to the Applicant. These are aggregate amounts paid between 11 April 2020 and 13 January 2021.
8. The Applicant alleged that a second rollover agreement was signed on 29 March 2023. In this agreement, it was recorded that the total facility amount granted was R 2 193 442.34, with the new facility amount calculated at R 2 811 061.66, with a three-month extension period at a daily interest rate of 0.133%. The First Respondent had to pay R 233 201.33 and R 98 804.91 on 31 March 2023.
9. The First Respondent also had to pay R 88 987.69 on 2 and 30 May 2023 as well as on 2 June 2023 respectively. This included the R 100.00 monthly fee service. In this agreement, the indebtedness of R 111 766.56 in interest arrears and R 321 906.24 debit order arrears were acknowledged. The Respondents admitted these allegations.

10. According to the Applicant, the Respondents are jointly and severally indebted to it for R 2 717 128.67, which they failed to pay despite having been requested to do so. The Respondents deny this allegation. They allege that despite not having adhered to the payment arrangements between the parties, several payments were effected between 11 April 2020 and 29 February 2024 to the Applicant, amounting to R 4 927 042.52.
11. The Respondents contend that they have a *bona fide* defence against the Applicant's cause of action. They argue that the essence of their plea is that the Applicant advanced a loan of R 2 000 000.00 to the First Respondent, and as at the time the Applicant instituted its action proceedings, the First Respondent had paid a total amount of R 4 927 042.52 to the Applicant.
12. The Respondents argue that the First Respondent has already paid the amount owed to the Applicant, including interest that exceeds the capital loan amount, in violation of the *in duplum* rule. They argue further that they instituted a counterclaim against the Applicant to recover monies more than what the First Respondent ought to have paid to the Applicant.
13. The Applicant submits that the Respondents' construction of the *in duplum* rule, the maximum payable over the life of the loan, deals with agreements to which the National Credit Act¹ applies. According to the Applicant, this legislation does not apply to the parties' loan agreement. Further, the *in duplum* rule, as it is understood under common law, does not apply when the outstanding amount is reduced below the outstanding principal debt. Under those circumstances, interest can start running until it reaches the 'in duplum limit' once again.
14. With respect to the application to declare the Trust's immovable property specifically executable, the Applicant argues that it is entitled to this order because the Mortgage bond was registered as security for the First Respondent's indebtedness to the Applicant. The Trust purchased the immovable property for

¹ 34 of 2005.

residential purposes, and it is not used for commercial purposes. The property is occupied by the beneficiaries of the Trust.

15. The Applicant submitted that the court should set the appropriate reserve price. Should a purchase consideration equivalent to at least the reserve price not be achieved at a sale in execution, the Applicant will be prejudiced because the prospects of recovering the amounts owing to it within a reasonable time are significantly reduced. Where the reserve price is not attained, the sale should be cancelled, and a new sale date should be obtained without a reserve price.
16. The Second Respondent submitted that the property sought to be declared specifically executable is his family home, where he lives with her four children, three of whom are minors. He alleged that the execution would violate their right to housing. He further states that there is no legal basis for the Applicant's application for summary judgment to succeed.
17. The Applicant rejects that the Second Respondent will be rendered homeless. It was argued on behalf of the Applicant that the Second Respondent owns multiple immovable properties, which he disclosed to the Applicant when the First Respondent was applying for a loan.

D LAW AND ANALYSIS

i) First Application: Summary Judgment

- *Legal Principles*

18. In terms of Uniform Rule 32(1):

'The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only— (a) on a liquid document; (b) for a liquidated amount in money; (c) for delivery of specified movable property; or (d) for a liquidated amount in money'

19. In *Amiss and Another v F E Industrial Supplies CC*, it was held that:

'[t]he summary judgment procedure is designed to enable plaintiffs with clear cases to obtain prompt enforcement of their claims against defendants who lack valid defences. This remedy is considered extraordinary and drastic, as it effectively denies the defendant the opportunity to contest the claim. Courts emphasise that it is granted based on the supposition that the plaintiff's case is unimpeachable and the defendant's defence appears to be flawed and without merit'.²

20. The Supreme Court of Appeal in *Cohen N.O and Others v D*, held that the:

'[p]rospects of success are irrelevant and as long as the defence is legally cognisable in the sense that it amounts to a valid defence if proven at trial, then an application for summary judgment must fail'.³

21. In *Cellsecure Monitoring and Response (Pty) Ltd and Others v South African Securitisation Programme (RF) Limited*, it was held that an application for summary judgment:

'... requires the plaintiff to deliver an affidavit verifying the cause of action and alleging that the defendant has no bona fide defence and has entered an appearance solely to delay proceedings. A defendant resisting summary judgment must satisfy the Court that it has a bona fide defence by disclosing fully the nature and grounds of the defence and the material facts relied upon'.

22. In terms of Uniform Rule 32(2)(b):

'[t]he plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial'.

² (002313/2024) [2025] ZAGPJHC 730 (21 July 2025) para 8.

³ (368/2022) [2023] ZASCA 56 (20 April 2023) para 29.

23. In terms of Uniform Rule 32(3)(b):

'[t]he defendant 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'.

24. Siyali correctly argues that

'[a] bona fide defence is one that raises a genuine dispute of fact or law, and the court will only grant summary judgment if the defence is clearly without substance'.⁴

- Evaluation

25. There is no need to provide the historical development of the rule that regulates summary judgments and the amendments that were effected in South Africa in this judgment. The different divisions of the High Court have extensively done this.⁵ However, it is worth noting that summary judgment is a necessary procedure that not only has the potential to prevent unnecessary trials and the adducing of evidence, but also enables the parties to save legal costs by bringing legal proceedings to a speedy conclusion.

26. The Applicant's cause of action is based on breach of contract, and in particular, the First Respondent's failure to pay a specific amount. To succeed with the application for summary judgment, the Applicant must have assessed the Respondent's plea and formulated a view that it does not take the litigation anywhere. There is no *bona fide* defence raised in the plea that justifies

⁴ 'Verifying affidavits in summary judgment applications' De Rebus in 2024 (December) De Rebus 46

⁵ In *Pareto (Pty) Ltd and Another v Theron and Another* (9804/2023) [2024] ZAWCHC 249 (6 September 2024) para 10, the court held that '[a]lthough, the recent amendments to the summary judgment procedure have initially caused a furor, the fundamental considerations a court should have regard to when faced with a summary judgement remain consistent'. See also *Cellsecure Monitoring and Response (Pty) Ltd and Others v South African Securitisation Programme (RF) Limited* (A201/2023; 21647/2021) [2025] ZAGPPHC 98 (31 January 2025) paras 23 – 26.

proceeding with the trial. Most importantly, the Applicant is obliged to demonstrate that by defending the main action and submitting their plea, the Respondents' conduct is merely dilatory, and their defence is not genuine. The defence raised should not stand a chance of defeating the Applicant's cause of action.

27. According to the Applicant, the Respondents do not have a *bona fide* defence, and their plea was served and filed to delay. Further, the First Respondent is in breach of the parties' agreement by failing to pay amounts that were due to the Applicant. However, it is surprising that the Applicant does not deal with the Respondents' allegations that between 1 April 2020 and 29 February 2024, the First Respondent paid the aggregate amount of R 4 927 042.52 to the Applicant.
28. The fundamental question is whether these amounts were paid. If they were paid, were they paid towards the reduction of the actual capital debt amount, or were they merely servicing the interest on the capital amount? The Respondents are entitled to have a proper trial where these issues can be adequately determined.
29. Even in the heads of argument submitted on behalf of the Applicant, the Respondents' allegation that they paid over four million rands to the Applicant is repeated without being denied or seriously challenged. In other words, the Applicant has not denied that the First Respondent paid various amounts to it that add up to more than four million. The Respondents allege that they are not indebted to the Applicant.
30. It is not clear how this can be regarded as not constituting a *bona fide* defence to the Applicant's cause of action. The Respondents state that they settled their debt, and there is no outstanding amount owed to the Applicant. It was argued on behalf of the Respondent that the Applicant failed to provide a breakdown of how the current debt and interest were calculated. On behalf of the Applicant, it was stated that the debt amount arose from the rollover agreements. This is a matter that must be established and proved in a trial.

31. The Applicant appears to be taking issue with the Respondents' reliance on the *in duplum* rule. During oral argument, extensive arguments were made in this regard. According to the Applicant, the Respondents crafted their case in line with agreements that attract the application of the National Credit Act.⁶ It was further argued that this legislation does not apply to the parties' agreement and that the common law formulation of this rule is applicable.

32. As the argument went, if payment is made and the amount is reduced below the outstanding principal debt, the common law *in duplum* rule will no longer apply, and interest can start running until it reaches the *in duplum* limit again.⁷ During oral arguments, it was submitted on behalf of the Applicant that the Respondents ought to have made payments towards the capital amount to benefit from the application of this rule. However, there is nothing in the papers that suggests that the payments made by the Respondents were only used to service the interest. This is an important dispute of fact that ought to be ventilated at the trial.

33. It is worth noting that the majority of the Constitutional Court in *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited*, without making any distinction between statutory and common law *in duplum* rule, held that:

'... the overarching purpose of the rule is to protect debtors from being crushed by the never-ending accumulation of interest on an outstanding debt'.⁸

34. The Respondents claim to have paid the money towards settling the capital debt plus interest that exceeds the principal debt in this matter. This requires an

⁶ 34 of 2005.

⁷ Counsel for the Applicant relied on the case of *Standard Bank of South Africa Ltd. v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) 827H, where it was stated that '... it is convenient to refer first to the *in duplum* rule which is undoubtedly part of our law. It provides that interest stops running when the unpaid interest equals the outstanding capital. When due to payment interest drops below the outstanding capital, interest again begins to run until it once again equals that amount'. It was argued that this part of the judgment was not overturned by the Constitutional Court in *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) and remains part of our law. See also *ABSA Bank Ltd v Leech and Others* [2001] 4 All SA 55 (A); 2001 (4) SA 132 (SCA).

⁸ 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (24 March 2015) para 44.

assessment of whether they should be protected through the application of the *in duplum* rule, which can be done during the trial between the parties.

35. The main challenge in these summary judgment proceedings is that it is not particularly clear where and when the Respondents' payments were reduced below the outstanding principal debt for the *in duplum* rule to cease to apply, as alleged. This makes it difficult to assess how the mischief identified by the Constitutional Court can be prevented.

36. The fact that the Applicant does not dispute the Respondents' allegation that various amounts totalling R 4 927 042.52 were paid to the Applicant between 1 April 2020 and 29 February 2024 by the First Respondent makes it necessary for a trial court to hear the evidence and then decide whether the *in duplum* rule is applicable. If it is, then establish which version of this rule relates to the parties' agreement, if at all.

37. This is not an exercise that should be undertaken by a court asked to consider whether the Respondent has a *bona fide* defence against the Applicant's cause of action. In my view, the Respondent's defence has substance and is legally cognisable in the sense that it amounts to a valid defence. There is no need to deny the Respondents an opportunity to defend the action brought against them by the Applicant.

38. I am not convinced that the Applicant has managed to illustrate that the Respondents do not have a *bona fide* defence. To the contrary, I am convinced that the Respondents demonstrated that they have a *bona fide* defence and they have fully disclosed the nature and grounds of their defence and the material facts relied upon. The Applicant's application for summary judgment cannot succeed.

ii) Second Application: Declaring Immovable Property Specifically Executable

- Legal Principles

39. Uniform Rule 46(1)(a)(ii) provides that:

'[s]ubject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5).'

40. In terms of Uniform Rule 46A(2)(a), a court considering an application to execute against the residential immovable property must establish whether the immovable property sought to be executed against is the primary residence of the creditor's debtor. The court is enjoined to *'... consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence'*.⁹

41. When immovable properties subject to preferent claims are sought to be specifically executed, there is a need to set a reasonable reserve price. In *Actom Electrical Products v Matlala*,

'Rule 46A seeks to protect homeowners by ensuring that their homes are not sold in execution for prices which are not market related. Courts are called upon to take account of the market value of the property, making a fair determination of what a fair reserved price would be'.¹⁰

42. In *Nedbank Limited v Malaka*, it was held that

'Rule 46(A) deals with the procedural rules for executing a judgment debt against residential immovable property. The rule focuses on two main aspects: determining if it is justified to sell the debtor's home in execution and, if a sale is ordered, setting a reserve price at which the property is to be auctioned'.¹¹

⁹ Uniform Rule 46A(2)(b).

¹⁰ (42355/2020) [2024] ZAGPPHC 75 (29 January 2024) para 26.

¹¹ (38015/2021) [2023] ZAGPJHC 195 (1 March 2023) para 19.

- Evaluation

43. It cannot be denied that for the court to consider an application to declare immovable property subject to security to be specifically executable, there must be a judgment creditor who obtained a judgment debt against the judgment debtor. Such an application cannot be brought, let alone considered, if there is no judgment debt.

44. However, the Applicant cannot be harshly criticised for bringing this application because it was dependent on the Applicant's application for summary judgment. Had the latter application succeeded, there would have been a judgment debt upon which this application could have been brought.

45. Since there is no judgment debt, there is no point in considering the Applicant's application to declare the immovable property belonging to the Trust specifically executable. This application must fail.

E CONCLUSION

46. I am satisfied that the Respondents raised a *bona fide* defence and should be allowed to defend the main action brought against them by the Applicant.

ORDER

47. In the premises, I make the following order:

47.1. The Applicant's application for summary judgment is dismissed with costs, including costs of counsel on scale B;

47.2. The Applicant's application to declare immovable property specifically executable is dismissed with costs, including costs of counsel on scale B.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

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Date of Hearing : 26 May 2025

Date of Judgment : 27 August 2025