

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

CASE Number: 26647/2018

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

26 August 2025

In the matters between:-

NEDBANK LIMITED

Applicant

and

JOHN MWANZA

First

Respondent

LORRAINE MWANZA

Second Respondent

JUDGMENT

H F JACOBS, AJ

[1] This application in the opposed motion court originated, as stated in paragraph 5.4 of Nedbank's¹ founding affidavit, as proceedings in action during April 2018. The record now comprises more than 700 pages and is, as Nedbank's practice note records, "*an opposed foreclosure application coupled with a Rule 46 Application for executability of an immovable property.*"

¹ The plaintiff

[2] Nedbank applies for judgment against Mr and Mrs Mwanza². The order is sought under the following circumstances. During or about April 2018, Nedbank issued a summons for the relief sought based on the default of payment by the defendants of their obligations in terms of a credit agreement (a home loan). The debt under the credit agreement was secured by a mortgage bond over the defendants' property. The order sought is for payment of the outstanding debt, interest and the declaration of the property executable for purposes of satisfying the debt as at April 2018.

[3] The matter was set down for default judgment on 25 February 2020. On the day Seleka AJ granted an order by consent between the parties, the body of which reads as follows:

"AFTER HAVING HEARD COUNSEL for the Plaintiff, the following order is made against the Defendant by consent :

1. *Payment of the amount of R1,403,089-45. Interest on the amount of R1,403,089-45. the rate of 10.80%per annum calculated and capitalised monthly in advance from 2 MARCH 2018 to date of payment;*
2. *An order declaring executable the following immovable property:
PORTION OF ERE 6[...] L[...] H[...] EXTENSION 12 TOWNSHIP,
REGISTRATION DIVISION ER; PROVINCE OF GAUTENG;
MEASURING 423(FOUR HUNDRED AND TWENTY THREE) SQUARE METRES
LOCAL AUTHORITY: CITY OF JOHANNESBURG
SITUATED AT: 3[...] C[...] ESTATE, D[...] CLOSE, L[...] H[...], EXTENSION 12, SANDTON NORTH
HELD BY DEFENDANTS UNDER DEED OF TRANSFER T[...] hypothecated in favour of the plaintiff/applicant in terms of the Mortgage Bond B[...]; is declared specially executable;*
3. *That the Registrar of the above Honourable Court be authorised to issue a Warrant of Attachment in respect of the immovable property as envisaged in terms of Rule 46(1)(a) of the Uniform Rules of Court;*
4. *A reserve price contemplated in Rule 46A(9)(d)*

² The defendants

4.1 is set at R798 000.00

- 5 *That in the event that a reserve price is not attained, and subject to Rule 46A(9)(d) and (e), the Applicant / Plaintiff may approach this Honourable Court, on these papers, duly supplemented, to reconsider the reserve price in terms of Rule 46A(9)(c);*
6. *That in the event that personal service is not attained, condonation in terms of Rule 4BA(3)(d) is granted*
7. *Costs to be taxed on the scale as between attorney and own client;*
8. *Operation of the order is suspended for a period of 1 (one) month and the order will have no force or effect in the event that the Respondents pay the amount of R207 000 within this period.*³

[4] Of relevance in these proceedings is paragraph 8. The defendants say that they paid R100 000 towards the debt during January 2019 and also the R207 000 mentioned in the order of 25 February 2020, by July 2021.

[5] In support of its application, Nedbank states that the valuers determine the forced sale value of the hypothecated property report at R1,450,000.00, and the local authority values the property at R2,924,000.00. At the same time, the outstanding arrears for rates and taxes were at the time of the default judgment application R230,391.74, and the outstanding levies (due to its body corporate) in respect of the property concerned were R85,827.44.

[6] The defendants oppose the application on the basis that, having regard to the payments of R100,000 and R207,000 (the defendants in fact paid R210,000) mentioned above, and the court order of Seleka AJ, the initial cause of action on which the claim was made, had been extinguished during July 2021. They point out that after payment of the latter sum, Nedbank (on 9 July 2021) withdrew a writ of execution it had caused to be issued for the debt on 1 December 2020 (before the order of Seleka AJ). Notwithstanding this withdrawal, the defendants brought an application which was heard by Baqwa J on 3 November 2021 for the setting aside of the withdrawn writ of execution. On that day, Baqwa J granted a cost order

³ The underlining is mine

recording that the writ of execution (which had been withdrawn by Nedbank as mentioned) would be of no force and effect. The order of that day is not relevant here. It must be noted that this matter has been on the court rolls many times. It is, therefore, an opposed action proceeding, not opposed by the filing of pleadings or claimed in a summary judgment application, but disputed during default judgment proceedings and enrolled on the opposed motion court roll.

[7] The defendants say they have cured their default and that Nedbank now abuses the court process by bringing “the same application over and over again”. They allege that the same order is sought as claimed during April 2018, while the record shows that they have cured their default and that the debt claimed had been extinguished.

[8] Nedbank disputes the challenge made by the defendants. It does so in its replying affidavit of 19 December 2023.

[9] It is not in dispute that Nedbank and the defendants entered into a credit agreement and that the defendants defaulted on their payment obligations. Their defence turns on the application of section 129(3) and (4) of the National Credit Act, 34 of 2005, as interpreted by the Constitutional Court in *Nkata*⁴ and later amended. Attached to the plaintiff’s replying affidavit as annexure “RA2” is an account statement of the defendant’s account. The document records the payments, balance, arrears and ancillary aspects of the account. The statement records (and the entries tally with the defendants’ papers) that they made three payments (R100 000, R60 000 and R50 000) totalling R210 000 between 24 March 2020 and 26 March 2020. Opposite the last payment on 26 March 2020, there remained a balance of R32 022.39 as the arrear amount, after which the arrear amount increased to R622 533.44 as at 27 October 2023.

[10] The defendants submit that their challenge of the amount and the interpretation of the order of 25 February 2020 constitutes a dispute of fact that calls

⁴ *Nkata v FirstRand Bank* 2016 (4) SA 257 (CC)

for referral of the application for trial or the hearing of oral evidence to resolve the dispute.

[11] Motion proceedings, unless concerned with interim relief, are designed for the resolution of legal disputes based on common cause facts. Unless the circumstances are exceptional, they cannot be utilised to resolve disputes of fact because they are not designed to determine probabilities.⁵ Long before the formulation of the Plascon-Evans rule⁶, our courts recognised that respondents frequently attempt to create disputes of fact when none exist. Our courts adopted the attitude that it should apply a “robust approach” to disputes of fact in such instances.⁷ It is expected from a court in such circumstances to undertake a careful perusal of the affidavits filed on record to determine whether the disputes can be decided on the affidavits.⁸

[12] The starting point is always the Plascon-Evans-rule that provides that “(W)here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”⁹

[13] The Plascon-Evans rule must be applied mindful of the law stated by Zondo CJ in his minority judgment in *Botha*¹⁰. The Plascon-Evans rule has been refined and extended to encompass untenable evidence challenges in motion proceedings. In *Fakie*¹¹, the Supreme Court of Appeal held:

“That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are

⁵ See National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at [26]

⁶ See below

⁷ See *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154E-H; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165; BR Southwood, *Essential Judicial Reasoning*, Lexis Nexis, 2015, pages 22-30

⁸ See *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere* NNO 1978 (4) SA 281 (A) at 293H.

⁹ *Mamadi v Premier, Limpopo and Others* 2024 (1) SA 1 (CC) at [22]

¹⁰ *Botha v Smuts* 2025 (1) SA 581 (CC) at [271] – [280]

¹¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 55

quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

[14] The Plascon-Evans-rule is applied always conscious of the further rule that an applicant will not be permitted to introduce new matter in its replying affidavit. When evidence is presented in reply, the rule against new matter in reply is not absolute and should be applied with a fair measure of common sense¹². Practical application of the principled approach recorded above, appears from judgments such as *Wightman*,¹³ *Lombaard*,¹⁴ *Buffalo*,¹⁵ *Mokala*¹⁶ and *National Scrap Metal*¹⁷ where our Courts held that a genuine and *bona fide* dispute of fact can only exist where the Court is satisfied that the party who purports to raise the dispute has in its affidavits seriously and unambiguously addressed the facts said to be disputed. There will be instances where a bare denial meets the requirement, but only if there is no other way open to a litigant to raise the dispute, and nothing more than a bare denial can be expected. But even a bare denial would not always be sufficient if the fact lies purely within the knowledge of the averring party and no basis is set out in the opposing affidavit for disputing the veracity or accuracy of the disputed averment.

¹² *Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 499 (T) at 511F; *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at [15]

¹³ *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) at par [13]; *MV New Endeavor and Others v Indian Oil Corp Ltd* 2024 (6) SA 64 (SCA) at [44]

¹⁴ *Lombaard v Dropop CC & Others* 2010 (5) SA 1 (SCA) at [26].

¹⁵ *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd & Another* 2011 (1) SA (8) SCA at [19]-[21].

¹⁶ *Mokala Beleggings & Another v Minister of Rural Development and Land Reform & Others* 2012 (4) SA 22 (SCA) at [11].

¹⁷ *National Scrap Metal (Cape Town) (Pty) Ltd & Another v Murray & Roberts Ltd & Others* 2012 (5) SA 300 (SCA) at [17]

Suppose a litigant possesses knowledge of the facts and can provide an answer (or countervailing evidence), but instead of doing so, rests their case on an ambiguous denial. In that case, a Court will generally have difficulty finding that the test for the existence of a genuine and *bona fide* dispute of fact is satisfied.¹⁸ The starting point is always to list the facts that are common cause.

[15] In paragraph 9 above, I list most of the common cause facts relevant to the dispute. Payment of a debt in terms of an agreement where commerce allows for the availability of bank statements, publication of interest rates, easy and ready determination of monthly instalments and the right of a litigant and a consumer to request such information during legal proceedings of this nature dictate that the litigants in position of the defendants were able to and could present evidence in their affidavits in detail how they made payments to remedy their default that would allow them to exercise their right in terms of section 129(3) of the National Credit Act. Their challenge in this regard is vague, and the disputes of fact they attempt to raise in their papers are not material and real. Moreover, the defendants chose not to meet the plaintiff's case on pleadings but resorted to opposition to the default judgment proceedings.

[16] As stated above, the outstanding debt is substantially more than what was initially claimed by Nedbank. The values for determination as presented by Nedbank are not out of kilter with the evidence it supplied, and I exercise my discretion in that regard to determine the values as suggested by counsel for the plaintiff in the draft order proposed.

[17] I am mindful of the provisions of Rule 46A and that the property concerned might constitute the primary residence of the defendants. Under the circumstances, I grant the following judgment against the defendants jointly and severally, the one paying the other to be absolved:

1. Payment of the amount of R1,403,089.45.

¹⁸ *Wightman (supra)* at [13]

2. Interest on the amount of R1,403,089.45 at the rate of 10.80% per annum, calculated and capitalised monthly in advance from 2 March 2018 to the date of payment.
3. An order declaring executable the following immovable property:
PORTION 4 OF ERF 5[...] L[...] H[...] EXTENSION 12 TOWNSHIP,
REGISTRATION DIVISION I.R., PROVINCE OF GAUTENG
MEASURING 423 (FOUR HUNDRED AND TWENTY-THREE) SQUARE
METRES
LOCAL AUTHORITY: CITY OF JOHANNESBURG
SITUATED AT: 3[...] C[...] ESTATE, DULSIE CLOE, LONE HILL,
EXTENSION 12, SANDTON NORTH
HELD BY DEED OF TRANSFER: T[...] hypothecated in favour of the
Applicant in terms of the Mortgage Bond B[...], is declared specially
executable.
4. That the Registrar of this Court be authorised to issue a Warrant of
Attachment in respect of the immovable property as envisaged in terms of
Rule 46(1)(a) of the Uniform Rules of Court.
5. That a reserve price as contemplated in Rule 46A(9)(d) be set in the
amount of R798,000.00.
6. That in the event that a reserve price is not attained, and subject to Rule
46A(9)(d) and (e), the Applicant may approach this court on these papers,
duly supplemented, to reconsider the reserve price in terms of Rule
46A(9)(c).
7. That in the event that personal service is not attained on the defendants,
condonation in terms of Rule 46A(3)(d) is granted.
8. Costs to be taxed on the scale as between attorney and own client.

H F JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for the hand-down is on the 26th of August 2025 at 10h00.

DATE OF HEARING: 29 JANUARY 2025

DATE OF JUDGMENT: 26 AUGUST 2025

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