IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO.: 5318/2024

Reportable	**Yes/No**

In the matter between:

THE LAND AND AGRICULTURAL

DEVELOPMENT BANK OF SOUTH AFRICA **Applicant**

and

ALBERTHA MAGDALENA VAN RENSBURG N.O **1st Respondent**

JAN PETRUS VAN RENSBURG N.O **2nd**

Respondent

JOHANNES JOSIAS VAN WYK N.O **3rd Respondent**

[The first to third respondents are cited in their capacity as duly appointed trustees of the Rynheath Trust, I[...] (E)]

ALBERTHINA MAGDALENA VAN RENSBURG **4th Respondent**

JAN PRETRUS VAN RENSBURG **5th Respondent**

JOHANNES CHRISTOFFEL VAN RENSBURG **6th Respondent**

JUDGMENT

Cengani- Mbakaza AJ

Introduction

[1] On 12 December 2024, the applicant filed a notice of motion seeking an order in these terms:

1. That the applicant be authorised, in terms of s 33 of the Land and Agricultural Bank Act, 15 of 2002, to attach and thereafter sell the following immovable properties of the first to third respondents as may be necessary, to liquidate the amount owing in respect of the advances made by the applicant:

   1.1 Portion 1 of the farm Klipdrift 426, district Graaf-Reinet, Eastern Cape Province measuring 50,2654 hectares, held in terms of Deed of transfer T[...];

   1.2 Portion 2 of the farm Klipdrift 426, district Graaf-Reinet, Eastern Cape Province, measuring 71.2892 hectares, held in terms of Deed of Transfer T[...];

   1.3 Portion 3 of the farm Klipdrift 426, district Graaf-Reinet, Eastern Cape Province, measuring 533,6397 hectares, held in terms of Deed of Transfer T[...];

   1.4 The remainder of portion 6 (North Kendrew) of the farm Rynheath 417, district Graaf-Reinet, Eastern Cape Province, measuring 5343,0648 hectares, held in terms of Deed of Transfer T[...].

[2] That the properties referred to in prayer 1.1 to 1.4 above be sold by the applicant or its appointed agent by public auction or private treaty.

[3] That the applicant be granted judgment against the first to fifth respondents, jointly and severally, the one paying the other to be absolved, for payment in the amount of:

3.1 R14 352 821,66 together with further compounded interest at a rate of 12,5% *per annum*, such interest to be calculated daily and capitalised monthly from 30 November 2024 to date of payment;

3.2 R3 568 263.25, together with further compounded interest at a rate of 13% *per annum*, such interest to be calculated daily and capitalised monthly from 30 November 2024 to date of payment;

3.3 R1 652 713.02, together with further compounded interest at a rate of 13% *per annum*, such interest to be calculated daily and capitalised monthly from 30 November 2024 to date of payment, and

3.4 R1 459 423.44, together with further compounded interest at a rate of 17,75% per *annum*, such interest to be calculated daily and capitalised monthly from 30 November 2024 to date of payment.

[4] That the applicant be granted judgment against the sixth respondent, jointly and severally, the one paying the other to be absolved, for payment in the limited amount of R11 000 000.

[5] That the respondents be ordered to pay the applicant's costs on an attorney and client scale;

[6] Further and/or alternative relief.

[7] In the alternative, the applicant seeks an order in terms of Rule 46A of the Uniform Rules of Court, that the properties listed at paragraphs 1.4 to 1.4 be declared specially executable. Furthermore, it seeks that such properties be sold by the applicant or its appointed agent in conjunction with the sheriff of the court by public auction or private treaty.

[2] The application is vehemently opposed by the respondents for the reasons that will be detailed during the course of this judgment.

The parties

[3] The applicant is the Land and Agricultural Development bank of South Africa Limited, a statutory body and a bank established in terms of the Land and Agricultural Development Bank Act 15 of 2002 (the Act), a registered credit provider with registration number […], and with principal place of business situated at 2[...] L[...] Avenue, L [...] Office Park, Building [...] 1st Floor, Die Hoewes, Centurion (the Land Bank).

[4] The first to third respondents are cited in their capacities as duly appointed trustees of the Rynheath Trust. The fourth to sixth respondents are farmers residing at Farm Rynheath in the district of Graaf- Reinet. They bound themselves as sureties and co-principal debtors on behalf of the trust in favour of the Land Bank.

The Land Bank's case

[5] In an affidavit deposed to by Ms Thabiso Sarah Mathapuna(Ms Mathapuna), the following are the salient facts: On 21 October 2011, the Land Bank concluded a written sales agreement in terms of which Gro Capital Financial Services (Pty)Ltd (GroCap) ceded and delegated its rights, title and interest to existing and future respondents' book debts to Land Bank.

[6] In terms of the sales agreement, GroCap would sell and the Land Bank would purchase the rights to all future book debts, provided they met the criteria determined by GroCap for the duration of the agreement.

[7] On 27 November 2011, GroCap was appointed to manage and administer the sale book debts on behalf of the Land Bank as per the service level agreement entered into by the Land Bank, Afgri Operations Limited, and GroCap. On 27 September 2012, GroCap sold its farmer lending division to UniGro Financial Services (Pty) Ltd (UniGro) as a going concern.

[8] On 27 September 2012, Land Bank entered into a cessionary agreement with Afgri Operations Limited, GroCap and UniGro. With the consent of the Land Bank and Afgri Operation's Limited, GroCap ceded its rights and obligations from the sale and service level agreement to UniGro.

[9] Land Bank claims that the rights in and to the book debts were sold, ceded and delegated by UniGro to it in terms of the sale agreement, constituting a sale of book debt(s). It asserts that such rights include, without limitation:

> (a) All the rights, title and interest (both present and future) in and to each sale book debt, including all rights, title and interest (both present and future) in and to the related security which shall include without limitation, the right to ensure the perfection of the related security.
>
> (b) All rights to sue on all undertakings and obligations in favour of UniGro in relation to each sale book debt and the right to exercise all powers of UniGro in relation to each sale book debt.
>
> (c) All the rights to receive all payments of principal debts and interest, and all other sums due or become due on each sale book of debt.
>
> (d) All right, title and interest (both present and future) relating to any causes and rights of action and other rights of UniGro against sureties and/or any person who has guaranteed the payment of or otherwise indemnified uniGro against the consequences of any default by a respondent in payment of. or otherwise taken responsibility for, any indebtedness of a respondent in relation to the relevant sale book debt.
>
> (e) All rights title and interest (both present and future) in and to all insurance contracts in so far as they relate to the relevant sale book debt including without prejudice to the generality of the foregoing, the right to receive the proceeds of any claim under any of such insurance contracts.

[10] Land Bank asserts that, it was a registered credit provider along with UniGro throughout the relevant period. It appointed UniGro to perform services

and exercise its rights, powers and duties under the loan documents and related security as its lawful agent.

The common cause facts relevant to the trust's indebtedness

[11] On 12 November 2018, the trust and UniGro concluded a written term loan agreement (the first agreement), annexed as FA 6 in the founding affidavit, in terms of which UniGro lent and advanced R8, 000 000 to the trust.

[12] The first agreement stipulated that the trust would repay the loan amount, plus interest, over 20 years (twenty years). The trust was also required to make annual instalments of approximately R1,052,120.78 to repay the loan amount plus interest.The first instalment was payable on or before 30 November 2019, with subsequent instalments due on or before 30 November each year, concluding on 30 November 2038.

[13] The parties agreed further that interest on the outstanding amount would be calculated daily at Absa Bank Limited's prime lending rate plus 1% per annum, debited monthly in arrears and capitalised monthly. In the event of the trust defaulting on any instalment on the due date, the balance of the loan amount, together with interest thereon would immediately become due and payable.

[14] The first agreement allowed UniGro to transfer its rights to a third party without informing the trust. The trust agreed that if UniGro did so, the third party would become the owner of the goods sold by UniGro to the trust. UniGro fulfilled its obligations and made R8, 000, 000 in credit facilities available to the trust.

[15] On the same date, the trust and UniGro entered into a second written term loan agreement (the second agreement), attached as FA7 in the founding affidavit. Under the second agreement UniGro lent R1,930 000 to the trust. The

loan plus interest was payable by the trust over a period of 5 years in annual instalments, paid in arrears.

[16] The trust was to repay the loan plus interest in annual instalment of roughly R542,105.91 each. The payments were due on or before 20 November each year, starting 2018, with the final payment due on 30 November 2023.The second agreement adopted the same interest terms (at 1.5% per annum) and conditions that were applicable from the first agreement , including the terms around the cession and transfer of rights. Even in this instance, UniGro fulfilled its rights and obligations.

[17] According to FA8 attached in the founding affidavit, on the same date UniGro and the trust, both duly represented entered into a written loan agreement (the third agreement). UniGro lent R870 000 to the trust adopting the same terms and conditions applicable to the second agreement, in particular regarding the interest, cession terms as well as the transfer of rights.

[18] The trust was to repay the loan amount in annual instalments of approximately R366,396,04. The payments were due on or before 30 November each year, starting 2018, with the final payment due on 30 November 2021. According to the third agreement, if the trust defaulted on an instalment, the remaining loan balance plus interest became due and payable.

[19] In addition to all the agreements noted above, FA9 , a document annexed in the founding affidavit, demonstrates that on 30 January 2020 UniGro and the trust both duly represented, signed a 2020 summer production credit agreement (the summer production agreement).

[20] UniGro advanced R740,960.81 to the trust. According to the summer production agreement interest in the outstanding amount would be calculated at the prime lending rate of Absa Limited plus 1.25% per annum, up until the date

that the facilities would lapse, alternatively expire, after which interest would be calculated at Absa Bank Limited’s prime lending rate plus 6,25% per annum.

[21] The agreement stipulated that the amount of R740 960.81 would be repaid in full on or before 30 September 2020. In the event of the trust defaulting in respect of any payment on the due date, the balance of the facility, together with interest thereon would immediately become due and payable. Regarding the cession, the same terms and conditions as stipulated in the first second and third agreements were adopted.

The mortgage bond

[22] As security for the trust’s debts, as exhibited on annexure FA10, UniGro registered first- ranking mortgage bond (B692/2019) over the immovable properties listed in paragraph 1 of this judgment (the mortgage bond agreement). Under the mortgage bond, the trust’s liability was secured at R12 000 000. This covered the capital amount for various causes, including money lent and advanced by UniGro.

[23] The mortgage bond agreement also covered an additional amount of R2,400 000. The extra R2,400 000 covered costs like preserving the properties, insurance premiums and UniGro’s expenses on behalf of the trust. The mortgage bond allowed UniGro to cede, delegate or assign its rights without limitation, appointing UniGro officials as the trust’s agents to handle the process.

[24] The agreement was that the mortgage bond would serve as continuing cover for all sums of money owing or claimable by UniGro, regardless of the cause, whether present or future and notwithstanding any payment deemed to settle the whole or part of the original amount due.

[25] It further stipulated that UniGro, at its sole and absolute discretion could grant additional facilities to the trust, with all such obligations secured under the mortgage bond, not exceeding the specific amount, as if they formed part of the original debt, until the bond is cancelled.

[26] In terms of the mortgage bond agreement, UniGro would be entitled to cede, delegate, and/or assign any of its rights under the mortgage bond agreement without any limitations. The trust agreed to appoint any UniGro official as its agent to execute any deed or agreement necessary to effect such cession and/or delegation.

[27] The trust undertook to pay the amount(s) due, together with interest thereon as agreed from time to time. The trust also undertook to insure all improvements on the mortgage properties, maintain the properties in good order and repair, pay property rates , taxes, site rentals, and other charges levied on the properties.

[28] The parties also agreed that UniGro would allow the trust to let the mortgage properties and that the trust would cede, transfer and assign to UniGro all rights to rentals and revenues from the properties as additional security for the debt owed to UniGro. If the trust failed to make payments, perform obligations, or comply with UniGro's demands, or breached any agreement, the full outstanding capital would become claimable under the mortgage bond.

[29] On 5 February 2019, UniGro allegedly ceded all its rights and interest in the mortgage bond to Land Bank under reference number (B[...]). As further security for the trust's debt, UniGro registered a second mortgage bond (B405/2020) over the same immovable properties of the trust (the covering mortgage bond).

[30] The covering mortgage bond (annexure FA10) secured the trust's liability for R2,100 000 covering the capital sums from various causes, including monies

lent by UniGro. The covering mortgage bond also covered an additional R420, 000 for costs of preserving and maintaining the properties, insurance premiums and other costs UniGro may incur on behalf of the trust, recoverable from the trust.

[31] An agreement was reached the trust would keep the properties in good order, pay rates and taxes etc. If the trust failed to comply or breached the agreement, UniGro would claim full outstanding capital balance under the covering mortgage bond. On 19 May 2020, UniGro allegedly ceded all its rights and interest in the mortgage bond to Land Bank under reference number (BC4376/2020).

The trust's breach of the agreements

[32] It is undisputed that the trust missed payments on loan agreements. As of 14 October 2024, the trust was in arrears for R11,286, 110.64. Land bank breaks down the arrears as follows: first agreement: R5,315,936.19; second agreement:R2,935,715.46; third agreement:R1,617,382.87; summer production credit agreement R1,427,075.12. It contends that the full amount is due and payable. On 4 November 2024, a letter of demand was sent to the respondents. Despite the acknowledgement of receipt, they failed to pay or make adequate arrangements.

[33] As of 30 November 2024, the outstanding balance for the first agreement was R14,352,821.66 with interest rate at 12,5% per annum, compounded daily, capitalised monthly and accruing from 30 November 2024 to date.

[34] With regard to the second agreement, the outstanding balance was R3, 568 263,25 with interest rate at 13% per annum, compounded daily, capitalised monthly and accruing from 30 November 2024 to date.

[35] Regarding the third agreement, the outstanding balance was R1, 652 713,02 with interest rate at 13% per annum, compounded daily, capitalised monthly and accruing from 30 November 2024 to date.

[36] Pertaining to the summer production credit agreement, the outstanding balance was R1, 459 423,44 together with further compounded daily interest at a rate of 17,75% per annum, capitalised monthly and accruing from 30 November 2024 to date.

The respondents' case

[37] The respondents filed answering affidavit by Mr Jan Petrus Van Rensburg with confirmatory affidavits outlining the defences to the Land Bank's claim. The respondents challenge Land Bank's *locus standi*, demanding proof of proper authorisation , via a resolution to institute the litigation.

[38] They also argue that regarding the *locus standi*, the Land Bank 's claim relies on sale agreement dated 21 October 2011 involving Grocap and not UniGro. Briefly, the respondents are questioning the transfer of rights relied upon by the Land Bank.

[39] The respondents also dispute two agreements (2011&2012) between Land Bank affiliates and UniGro, asserting that there is no proof that all obligations or conditions were complied with. The respondents criticise Land Bank for attaching voluminous documents specifically in excess of 500 pages without proper reference to the relevant parts.

[40] The respondents argue that Land Bank is not entitled to the relief sought claiming its papers are skewed. Land Bank seeks interim relief but its own papers indicate it will pursue an action proceedings. They allege further that the Land Bank is misrepresenting facts knowing that funds were actually advanced by UniGro and not Land Bank.

[41] The respondents dispute that any rights to debts were ceded to Land Bank, as alleged. They aver that the credit agreement were entered into with UniGro several years after the alleged cession took place in 2011 or 2012 before the debts arose. Basically, they contend that even if there was a cession, it could not validly include future debts.

Issues

[42] The central issue is whether UniGro ceded its rights to claim debts to GroCap which then was allegedly transferred to Land Bank. Essentially, this court must make a determination on Land Bank's *locus standi* to the relief sought.

The Legal principles

[43] It is well-established that the applicant must allege and prove its *locus standi.*[1] In *Firm-O-Seal CC v Prinsloo & Van Eeden Inc. and Another*[2],the Supreme Court of Appeal (SCA) per Ponnan JA and Kathree-Setiloane AJA(with Meyer JA concurring) held:

'*Locus standi in iudicio* is an access mechanism controlled by the court itself. Generally, the requirements for *locus standi* are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant's interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant.'(footnotes omitted).

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[1] *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at par 10; see also *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H-I; *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533J-534E.

[2] (483/22) [2023] ZASCA 107 (27 June 2023] at para 6.

[44] In *Rinaldo Investments (Pty) Ltd v Giant Concerts CC and Others*[3]the SCA referenced to *Ferreira v Levin NO & Others, Vrybehoek & Others v Powell NO & Others*[4] and reiterated that *locus standi* is a factual question. The SCA added that the applicants should demonstrate their necessary interest, and the facts establishing interest must appear on the record.

[45] Gleaning from the notice of motion, Land Bank seeks monetary judgment as well as an order in terms of the Act. The Act empowers the Bank to take legal action and apply for an order to attach and auction the properties if the debtor defaults on payment under the credit agreements.

[46] The relevant provision which governs the remedies in case of default provides:

> '33. (1) Despite anything to the contrary in any other law or any agreement and without prejudice to any other remedies the Bank may have, the Bank may in respect of advances that it has made take any action envisaged in subsection (3) if any of the circumstances in subsection (2) exist.
>
> (2) The circumstances contemplated in subsection (1) are if-
>
> (a) payment of any sum of money, due in respect of any advance made in terms of this Act. is in arrear, whether it is the capital sum or interest thereon…'

[47] Pursuant to s 33(4)(a) of the Act, for the applicant to succeed in an application in terms of s 33(3)(b), there must be evidence supported by an affidavit. The affidavit must state that a liquidated amount is due and payable to the Bank and that the Bank intends, without undue delay, to institute an action in that court against the debtor to recover the debt.

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[3] (311/2021)[2012] ZASCA 34; [2012] 3 A11 SA 57 (SCA) (29 March 2012) at para 15.

[4] 1996 (1) SA 984 CC paras 230-231; see also *Jacobs & 'n ander v Waks & andere* [1991]ZASCA 152;1992(1) SA 521 (A) at 534C-E.

[48] The deponent must also state that the debtor has no bona fide defence to the intended action and that if such action were instituted, the court would have jurisdiction over the debtor and the cause of action. Furthermore, it must be demonstrated that the debtor has property at their disposal from which the debt or part thereof could be satisfied if the property were available for execution after the judgment.

[49] The affidavit must clearly state that a substantial danger exists that the debtor will dispose or remove the property from the court's jurisdiction to evade payment, or that delay in instituting the action would cause the property to lose value due to its perishable nature. It must also be clearly stated that arrangements, including the giving of security, have been or will be made by the Bank to protect the interests of the debtor, or any other person whose interests might be affected by the granting of the order.

[50] Section 33 (3) (b) the Act provides that , as contemplated in subsection (1), the Bank may after 7 days' written demand for repayment of the advance addressed to the debtor's stated address, and notice to the holder of a preferred security and if appropriate, the Registrar of Deeds apply to the court for an order as contemplated subsection 4 of the Act.

[51] If the requirements set out in s 33(4)(a) of the Act are met, a court may authorise the Bank to attach and sell by public auction or tender so much of the debtor's property to cover the debt, interests and costs.

[52] It is worth noting that in the alternative, the Land Bank seeks an order in terms of Rule 46A of the Uniform Rules of Court.

The parties' legal submissions

[53] On the contentious issue of *locus standi in iudicio*, both parties cited interesting authorities with similar and differing discussions on Land Bank's

standing compared to other institutions. In *Waldech N.O & Others v Land and Agricultural Development Bank of South Africa*[5](Waldeck), a case that this court was referred to by Mr Van Rensburg on behalf of the respondents, the applicant sought an order in terms of Rule 35 (12) of the Uniform Rules of Court against Land Bank aiming to get copies of the documents listed in the schedule.

[54] The land Bank opposed the application citing confidentiality concerns about the agreements. The court remarked that the recordal did not prove a valid cession between UniGro and Land Bank. Essentially, the court stated that a cessionary requires a valid cession to have *locus standi.*

[55] The respondents' counsel also referred this court to *Trackman N.O. and Others v The master of the High Court and others*[6], where the Land Bank was found wanting in producing the required cession agreements to prove its *locus standi.*

[56] In contrast, Mr Van Der Merwe for the Land Bank, referenced to differing authorities where the courts confirmed the Land Bank's *locus standi.*[7] As already noted, the land Bank's counsel persisted that the respondents failed to launch a substantive Rule 7 application to challenge *locus standi.*

Analysis

[57] The record, in particular the founding affidavit of Ms Mathaphuna ex facie supports the Land Bank's claims to prove its *locus standi.* It is common cause that Ms Mathaphuna is a legal advisor in Land Bank's Recovery and

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[5] Under case number 4013/2018, Mpumalanga Division.

[6] Unreported judgment Case number 2020/12432 delivered on 21 May 2021.

[7] See *Land and Agricultural Development Bank of South Africa v Casparus Johannes Rynhardus Cilliers* unreported judgment under Case Number 4201/2019 delivered on 19 December 2019; also, *The Land and Agricultural Development Bank of South Africa and Jaques Du Toit N.O AND others* and *The Land and Agricultural Development Bank of South Africa and Carel Aron Van Der Merwe (SNR) N.O and Others,* unreported judgments Mahikeng Case Number: N557/2021and Kimberly Case Number: 2436/2021.

Insolvency Legal Services. By virtue of her portfolio, she is duly authorised to represent Land Bank. The resolution annexed as FA1 confirms her authority to represent Land Bank in terms of Declaration of Authority.

[58] She is by virtue of her authority in possession and control of the loan agreements, security agreements between UniGro and the respondents. This also encompasses related documents evidencing the Land Bank's legal standing regarding the book debts sold to it.

[59] Annexure FA5, the recordal confirms the sale, cession and delegation of rights to the book debts from GroCap/Unigro to Land Bank, as per the sale level agreement. This recordal was concluded on 14 April 2014, with its representatives of Land Bank, UniGro and GroCap affixing their signatures at page 3 of the recordal, thereby confirming Land Bank's *locus standi* in respect of all matters pertaining to the relevant sale book debts.

[60] The respondents' insistence on being provided with the agreement of cession between UniGro and Land Bank appears unwarranted, given the presence of the recordal confirming the Land Bank's *locus standi* as well as other related documents found in the papers filed. In addition, the argument positing that the recordal entered into and signed by all the parties on14 April 2014 including the sale agreement with GroCap and UniGro, are insufficient to prove *locus standi* lacks merit.

[61] Furthermore, Clause 8 of the Deed of Suretyship addresses the possibility of UniGro ceding its rights against the sureties to a third party, and reads:

> '8. Assignment
>
> 8.1 Should UNIGRO cedes, delegate, assign any of its rights or obligations under the Suretyship in accordance with its terms UNIGRO shall be entitled to cede, delegate or assign any of its rights or obligations under this Suretyship without the consent of the Surety (ies)…'

Therefore, the respondents were cognisant to the possibility of UniGro exercising its rights in terms of clause 8.

[62] It is noted that the authorities cited by the respondents' counsel have distinct dissimilarities to the present case. To be specific, *Waldeck* dealt with the Land Bank's failure to adhere to a request for discovery in terms of Rule 35 (12) of the Uniform Rules of Court. The documents were available for inspection, as indicated in the papers filed, hence the court compelled Land Bank to disclose them.

[63] In *casu*, the documents filed and affidavits deposed to by Ms Mathaphuna based on her personal knowledge evidence Land Bank's adequate, direct and actual interest in the subject matter of this litigation. The Land Bank's interest in this litigation is not remote, given the substantial sums owed by the respondents, stemming from the credit agreements with UniGro, which are common cause. The respondents' mere assertion in their affidavits that the respondents' indebtedness to UniGro was never ceded to Land Bank constitutes a bare denial, unsupported by primary facts.

[64] Finally on this issue, in the answering affidavit, the respondents deny that the deponent to the founding affidavit, as Executive Manager of Legal Services of Land Bank is duly authorised to launch these proceedings. This is equally a bald statement with no supporting facts.

[65] *In Unlawful Occupiers, School Site v City of Johannesburg*[8], the SCA per Brand JA (with Scott JA, Streicher JA, Lewis JA and Maya AJA concurring) remarked as follows:

> '[14] …The issue raised had been decided conclusively in the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred to with approval by this Court in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615

[8] 2005 (4) SA p199.

> (SCA) at 624I - 625A. The import of the judgment in *Eskom* is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court…
>
> [16] However, as Flemming DJP has said, now that the new Rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, be answered only in the negative.'

[66] Accordingly, the respondents' approach in raising the deponent's authority to act on behalf of Land Bank, without a substantive application as envisaged in Rule 7 of the Uniform Rules of Court is not supported by the authorities.

[67] The next issue is the Land Bank's reliance on s 33 of the Act. As previously noted, to rely on s 33 of the Act, certain requirements must be satisfied. The founding and replying affidavits of Ms Mathaphuna lack sufficient detail to support an application in terms of this provision.

[68] Specifically, Land Bank seeks monetary judgment and the order declaring the immovable properties specially executable. I agree with the respondents' counsel that the provisions of s 33 of the Act will only be invocable where there are intended action proceedings pursuant to s 33(4)(a) of the Act. In *casu*, no such intended action proceedings are envisaged.

[69] Moreover, the credit agreements entered into between the Land Bank's predecessor (UniGro) and the respondents were not concluded in terms of the Act. Gleaning from the papers filed, Land Bank envisioned this difficulty, hence it prayed for an alternative order in terms of Rule 46A of the Uniform Rules of Court as an alternative.

[70] Regarding this issue, the respondents contend that they are all residing on the farms as set out in paragraph 1 of the notice of motion. They state that it is inevitable that they will be rendered homeless if the order as prayed for by Land Bank is granted.

[71] In contrast, Land Bank argues that it is inconceivable that the trust would be a primary residence. This brings this court to an enquiry on the applicability or otherwise of the provisions of Rule 46A[9] of the Uniform Rules of Court.

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[9] The relevant Rule 46 of the Uniform Rules of Court provides:

'46 Execution- immovable property

1 (a) Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless-

(i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or

(ii) such immovable property has been declared to be specially executable by the court…'

'46A Execution against residential immovable property

(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2) (a) A court considering an application under this rule must-

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment

debt, other than execution against the judgment debtor's primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted

[72] Land Bank's assertion that it is unlikely that the trust is a primary residence is not in conformity with the Constitutional Court's (CC) sentiments expressed in *Petrus Johannes Bestbier and Others v Nedbank Ltd*[10](Petrus). In *Pretrus,* the CC per Tshiqi J (with Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ, Theron J, and Van Zyl AJ concurring) stated:

> '[74] …the following is clear; there are three categories of immovable property with which the Uniform Rules 46 and 46A deal with in relation to execution. There is "immovable property" in general, which is dealt with in rule 46. This includes, but is not limited to residential immovable property. Then there is "residential immovable property", to which rule 46A applies. This is a subcategory of "immovable property". Rule 46A adds additional provisions which apply when one is dealing with residential immovable property. Finally, there is immovable property which is the "primary residence of the judgment debtor". This is a sub-subcategory of the subcategory "residential immovable property". Only some parts of rule 46A apply to this sub-subcategory of "primary residence" property.'
>
> [75] As stated above, whether property can be classified as "residential immovable property" is determined by the characteristics and actual use of the property. It does not matter that the judgment debtor is not herself occupying the property. <u>It also does not matter that the judgment debtor is a trust. If a trust owns a residential house, it is "residential immovable property", if the beneficiaries reside in it, even though the trust itself as a legal entity cannot reside in the property.</u> Among the provisions which apply to all "residential immovable property" is rule 46A(3)(b), which requires notice to be given to persons who may be "affected" by the sale and execution. And that is the provision which is the focus of the present case…' (accentuation added)

[73] Notably, in his submissions, the respondents' counsel failed to adequately address its reliance on Rule 46 A of the Uniform Rules of Court. Fortified by the CC in *Jaftha v Schoeman and Others*, *Van Rooyen v Stoltz and Others*[11], this

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(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property…'

[10] [2024] ZACC 2.

[11] (CCT74/03)2004 ZACC 25, 2005(2) SA 140 (CC);2005(1) BCLR 78 (CC) (08 October 2004) at para 53.

court will adopt an inquisitorial approach despite the factors relevant to the rule not adequately addressed.

[74] In *Petrus*[12], the CC emphasised the importance of judicial oversight in these kinds of applications. The court held at para 75,

> 'The importance of judicial oversight over all residential immovable property, and not only primary residential immovable property is that it would be risky to leave it to the judgment creditor to determine whether the property is used as primary residence without this question being ventilated or determined by a court.'

[75] Gleaning from the papers filed, the properties listed in the present instance fall under the category of the 'residential immovable property which is the primary residence of the judgment debtor'. The relevant provisions applicable in this instance are rule 46A(a)(i), 46A(2)(b) and 46A (8)(d). These provisions as stated in *Petrus*[13], require the court not to order execution against a primary residence unless there is no other satisfactory means of satisfying the judgment debt.

[76] It is well-established that if the judgment debtor can be satisfied without involving the drastic consequences of execution, that alternative course should be judicially considered before granting the execution order.[14]

[77] Therefore, the enquiry which in the present instance is fact-based, is whether there are alternative means to satisfy the judgment debt. In a multitude of cases[15], it has been accepted that in certain circumstances, execution cannot be avoided. In this matter, the failure by the respondents to pay the debt amounting to over 20 million rand is a consideration. There is no evidence to suggest that alternative means of satisfying the debt exist.

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[12] Fn 10 above.

[13] *Petrus* fn 12 (supra).

[14] *Gundwana v Steko Development* CC [2011] ZA CC 14; 2011 (3) SA 608 (CC);2011 (8) BCLR 792 (CC) at para 53.

[15] *Jafth*a fn 13 supra at paras 54-60, Petrus above para 42.

[78] Considering the facts of this particular case, I will, as I hereby do, follow the approach adopted by Daffue J in *Land and Agricultural Development Bank of South Africa v Du Plessiss NO*[16], where he ordered both the monetary judgment as well as an order declaring the hypothecated properties specially executable.

Costs

[79] The general rule is that a successful party is entitled to costs. In this case, there is no reason to deviate from the general rule. In accordance with the sale agreements, the costs shall be on a scale as between attorney and client.

Order

[80] In the result, the following orders shall issue:

1. Judgment is granted against in favour of the applicant against the first to fifth respondents, jointly and severally, the one paying the other to be absolved, for payment in the amount of:

   1.1 R14 352 821,66 (Fourteen Million, Three Hundred and Fifty-two Thousand, Eight Hundred and Twenty-One Rand and Sixty-six cents) together with further compounded interest at a rate of 12,5% *per annum*, such interest to be calculated daily and capitalised monthly from 30 November 2024 to date of payment;

   1.2 R3 568 263.25 (Three Million, Five Hundred and Sixty-eight Thousand Rand and Twenty-five cents), together with further compounded interest at a rate of 13% *per annum*, such interest to be calculated daily and capitalised monthly from 30 November 2024 to date of payment;

[16] 2020 JDR 1670 (FB) p1.

1.3 R1 652 713.02 (One Million, Six Hundred and Fifty-two Thousand, Seven Hundred and Thirteen Rand and two cents) together with further compounded interest at a rate of 13% *per annum*, such interest to be calculated daily and capitalised monthly from 30 November 2024 to date of payment, and

1.4 R1 459 423.44 (One Million Four Hundred and Fifty-nine Thousand, Four Hundred and twenty-three Rand and Forty- four cents), together with further compounded interest at a rate of 17,75% per *annum*, such interest to be calculated daily and capitalised monthly from 30 November 2024 to date of payment.

2. Judgment is granted against the sixth respondent, jointly and severally, the one paying the other to be absolved, for payment in the amount of R11 000 000 (Eleven Million Rand).

3. The first to third respondents' immovable properties described hereunder are declared specially executable in favour of the applicant:

3.1. Portion 1 of the farm Klipdrift 426, district Graaf-Reinet, Eastern Cape Province measuring 50,2654 hectares, held in terms of Deed of transfer T[...];

3.2. Portion 2 of the farm Klipdrift 426, district Graaf-Reinet, eastern Cape Province, measuring 71.2892 hectares, held in terms of Deed of Transfer T[...];

3.3. Portion 3 of the farm Klipdrift 426, district Graaf-Reinet, Eastern Cape Province, measuring 533,6397 hectares, held in terms of Deed of Transfer T[...];

3.4. The remainder of Portion 6 (North Kendrew) of the farm Rynheath 417, district Graaf-Reinet, Eastern Cape Province, measuring 5343,0648 hectares, held in terms of Deed of Transfer T[...].

4. The properties referred to in paragraphs 3.1 to 3.4 above shall be sold by the Sheriff of the court in conjunction with the applicant or its appointed agent by public auction.

5. The respondents shall pay costs of suit on a scale as between attorney and client.

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N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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c/o Wheeldon, Rushmere&Cole Inc.

Makhanda

Counsel for the respondents : Adv Van Rensburg

Instructed by	:	Geyser Attorneys c/o Neville Borman& Botha Makhanda
Heard on	:	09 September 2025
Judgment Delivered on	:	03 February 2026