IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Case no: 14838/24

In the matter between:

ABSA HOME LOANS GUARANTEE COMPANY (RF) (PTY) LTD	**FIRST APPLICANT**
ABSA BANK LIMITED	**SECOND APPLICANT**
and	
THULASIVE TWALO	**FIRST RESPONDENT**
CHWAYITA GAIL TWALO	**SECOND RESPONDENT**

Coram: MGENGWANA AJ

REASONS FOR ORDER GRANTED ON 29 OCTOBER 2025

MGENGWANA AJ:

Introduction

[1] This is an opposed application for Summary Judgement and an opposed Application made in terms of Rule 46A of the Uniform Rules of Court brought by the First and Second Plaintiff against the First and Second Defendant.

[2] The applications were initially set down for hearing on 18 March 2025, but had to be postponed by my brother, Acting Justice Kantor, to 27 October 2025 to enable the Defendants to serve and file their opposing affidavits to both applications by no later than 17 April 2025.

[3] The Plaintiffs were ordered to file their Heads of Argument by no later than 6 October 2025, and the Defendants were ordered to file theirs by no later than 13 October 2025. The costs occasioned by the postponement stood over for later determination. The dates set out above were issued and agreed to by the First Defendant personally on 18 March 2025.

[4] The Plaintiffs' Practice Note and Heads of Argument were filed on 8 October 2025; the Heads of Argument of the Plaintiffs were therefore filed out of time. The Defendants' opposing affidavit (Answering Affidavit deposed to by the First Respondent and Confirmatory Affidavit deposed to by the Second Respondent), which also incorporated averments supporting condonation for the late filing of the Answering Affidavit, was filed on 23 October 2025, it was therefore filed way out of time, considering that it was supposed to have been filed on 17 April 2025. This is also despite the fact

that the parties were notified of the date of the hearing and of the judge who will be presiding over this matter on 15 October 2025 already.

[5] The Notice of Motion for Condonation of the late filing of the Answering Affidavit was only filed on 27 October 2025, on the day of the hearing. After a brief appearance in court, the matter was stood down to the afternoon of 28 October 2025 to enable the First Defendant, who was appearing in person, to draft and file the Defendants' Heads of Argument and Answering Affidavits to the Rule 46A application and argue the matter the same afternoon.

[6] The Defendants did indeed file their Heads of Argument and Answering Affidavit to the Rule 46A application as ordered on 28 October 2025. Thereafter, the matter was argued by counsel for the First and Second Plaintiff and the First Defendant, who also argued on behalf of the Second Plaintiff, his spouse. The court reserved judgment until 29 October 2025 in order to consider the papers and the written and oral submissions made in court before making a determination.

[7] After considering the submissions made by both parties, an order as follows was then granted in favour of the Plaintiff on 29 October 2025:

> "Condonation for the late filing of the Answering Affidavit is granted.
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> Summary judgment is granted against the defendants jointly and severally, for:

1. Payment of R2 205 675.65 plus interest at 12.30% p.a. calculated on daily balances and capitalised monthly on the first day of each month from 7 February 2025, both days included; and
2. Costs as between attorney and client, including the costs occasioned by the postponement of 18 March 2025 and 27 October 2025 with costs of counsel on scale B.

It is ordered in respect of the Rule 46A application that:

1. The property described as ERF 3[...] Goodwood, in the City of Cape Town, Cape Division, Province of the Western Cape, held by the defendants in terms of Deed of Transfer T[...] and mortgaged to the plaintiffs by virtue of B4758/2020 is declared executable;
2. The abovementioned property shall be sold by the Sheriff subject to such reserve price of R 2 145 000.00;
3. The following terms and conditions shall be inserted in the conditions of sale that would apply at the auction to be held as provided for in Rule 46A(8)(a);

"Where the execution creditor is the purchaser, the purchaser is relieved of the obligation to pay the deposit or provide any guarantee in respect of the balance of the purchase price or to make payment thereof, but for such amount that would be in excess of the amounts payable under the mortgage bond, it being expressly stated that such obligation would be extinguished by set-off immediately when due and the execution creditor shall provide proof of such set-off to the execution debtor. It is further expressly stated that the commission payable to the sheriff following upon the sale in execution shall be paid within 21 days of the date of sale by the execution creditor to the sheriff if the execution creditor purchased the property at the auction.";

> "No one bidding at an auction shall be permitted to withdraw any bid and where the reserve price was not achieved the court may confirm the sale to the highest bidder at a later stage."; and
>
> 4. The defendants shall pay the plaintiffs' costs in respect of the Rule 46A application as between attorney and client, including the costs occasioned by the postponement of 18 March 2025 and 27 October 2025 with costs of counsel on scale B."

[8] Subsequent to the granting of the aforementioned Order, the Court was requested on 5 November 2025 to furnish the parties with reasons for the Order; these reasons follow hereunder.

Factual Background

[9] On or about 18 December 2019, in Cape Town, the Second Plaintiff, which was duly represented by an authorised person, and the Defendants concluded a written mortgage loan agreement on, *inter alia*, the following terms:

a. That the Second Plaintiff would advance a sum of R1 750 000.00 to the Defendants as a home loan.
b. That the principal debt agreed to by the Defendants and the Second Plaintiff is an amount of R1 758 996.27, which is made up of the loan amount, an initiation fee and an insurance premium payable in respect of insurance over the immovable property.
c. That all amounts owing will bear interest.

d. That interest would vary from time to time, linked to the prime rate of the Second Plaintiff, and the monthly instalments would be adjusted accordingly.

e. That the principal debt is to be repaid by the Defendants to the Second Plaintiff in 360 monthly instalments of R17 437.98 per month, <u>to be adjusted according to the variable interest rate</u>. (my underlining)

f. That the Defendants will be in default under the home loan agreement, *inter alia*, if they fail to pay any amount payable to the Second Plaintiff under the home loan agreement on the due date thereof.

[10] When the Defendants failed to make monthly payments as agreed, the attorneys for the Second Plaintiff addressed letters in terms of Section 129 read together with Section 130 of the National Credit Act 34 of 2005 ("the NCA") on 1 December 2023 to the Defendants. These letters were served on the First Defendant by the Sheriff on 6 December 2023.

[11] Letters of demand requiring the Defendants to pay the First Plaintiff an amount of R2 046 642.05 were also addressed to the Defendants on 19 March 2024; these letters were also served on the First Respondent by the Sheriff on 22 March 2024.

[12] When the correspondence stated above failed to elicit a response which was satisfactory to the Plaintiffs, the Plaintiffs issued and served a Combined Summons on the Defendants. The Combined Summons sought

judgment in the amount of R2 046 642.05, together with interest thereon at a rate of 13.05%, plus one per cent from 16 March 2024 to the date of final payment, both dates inclusive, against the Defendants. The Combined Summons was served on the Defendants on 5 July 2024.

[13] The Defendants served a Notice of Intention to Defend the action on 14 July 2024 and their Plea on 29 January 2025 after being served with a Notice of Bar on 24 January 2025. The crux of the Defendants' defense is as follows:

a. They denied that it was a material term of the home loan agreement that the monthly instalment in the amount of R17 437.98 would be adjusted according to the variable interest rate without their consent.
b. They pleaded that the Plaintiffs have not complied with the provisions of the NCA prior to commencing legal action against them for defaulting. In other words, the Plaintiffs commenced with legal action prematurely.
c. They noted that the Second Plaintiff was entitled to recover from the Defendants payment of all amounts owing under the home loan agreement, including overdue amounts and/or immediate repayment of the balance of the principal debt owing to the Second Plaintiff together with accrued but unpaid interest, but pleaded that such entitlement is subject to the provisions of Section 129 of the NCA.
d. They also pleaded that the alleged arrear amount of R224 955.09 is in dispute since it is a product of the increase in interest rate, which they never consented to.

e. They also pleaded that their failure to make monthly instalments resulted from, *inter alia*, the advent of COVID-19, which hampered their income-generating capabilities. According to them, the COVID period lasted for over two years.

f. They also pleaded that the above situation was worsened by the unilateral increase of the repayment amounts based on the increased interest rate, but despite this situation, they made genuine attempts to remedy the situation of defaulting by making payments showing a desire to remedy the situation.

g. They also pleaded further that they forwarded a payment plan to the legal representatives of the Plaintiffs, but such a plan was ignored. In this payment plan, they proposed to pay a monthly amount of R13 000.00.

[14] The legal documents referred to above were drafted by the First Defendant, who is, for the record, an admitted advocate of this honourable Court.

[15] The Plaintiffs responded to the Defendants' Plea by serving and filing a Summary Judgement Application on 17 February 2025. In this application, the Plaintiffs averred that the following averments that appear on the Defendants' Plea are not triable issues:

a. That their account fell into arrears because of the variable interest rate, and same was unilaterally increased by the Reserve Bank without seeking the Defendants' input.

b. That they fell into arrears due to COVID, which led to them being unable to comply with their obligations in terms of the home loan agreement.

[16] Closely linked to the Plaintiffs' Summary Judgement Application is the application which seeks to have the mortgaged property of the Defendants declared executable in terms of Rule 46A, which was served on the Second Respondent on 10 March 2025.

[17] The Defendants vehemently opposed the suggestion that their defence, as set out in their plea, does not raise any triable issues and passionately averred as follows instead:

a. That the Plaintiffs did not engage with the Defendants in good faith during the section 129 of the NCA proceedings, as they failed to appreciate the sudden change in the circumstances of the Defendants. If they appreciated the sudden change, then they would have given detailed information as to why the Defendants’ payment proposal was unacceptable to them. According to the Defendants, the Plaintiffs would have to give an explanation in court as to why the Defendants' payment proposal was rejected. According to the Defendants, failure to give the aforementioned information is a triable issue.
b. That it is common cause that the Reserve Bank increased the Repo Rate exponentially in a short space of time. It is this increase that had a direct impact on the Defendants’ ability to pay their bond, even though they had already been struggling.

To top it all, so the Defendants aver, they were never consulted by the Reserve Bank before the increases were made. The Defendants submit further that they should have been engaged by the Reserve Bank before the increase. So, the triable issue that comes out of the foregoing, according to the Defendants, would be for the Plaintiffs to explain to the court why they simply chose to accept the position of the Reserve Bank and, by so doing, exercise their discretion adversely against the Defendants.

c. The Defendants further averred that they therefore dispute the amounts that the Plaintiffs are alleging are owed to them by the Defendants as they are a result of the interest rate that has been increased without their consent.

[18] With regards to the Rule 46A application, the First Defendant averred in his answering affidavit, that was only filed on 28 October 2025 and not confirmed by the Second Defendant, that he realized that he may have overlooked the issue during the hearing of 18 March 2025 and unwittingly agreed to an order that the Summary Judgement and Rule 46A be heard together despite non-compliance of the Rule 46A application with court rules relating to Rule 6(5)(b). The First Defendant did not elaborate on this point.

Issues for determination

[19] Based on the above factual matrix, this Court was called upon to make a determination on whether:

a. The Defendants should be granted condonation for the late filing of their answering affidavits.
b. The Defendants' plea, as it currently stands, does not raise any issue for trial as a result whereof the Plaintiffs are entitled to summary judgement.
c. The mortgaged property can be declared executable in terms of Rule 46A.
d. If yes, whether a reserve price in respect of the executable property should be set.
e. The Plaintiffs are entitled to the costs of the Summary Judgement and Rule 46A Applications, and if yes, on which scale.

Applicable legal principles

[20] With regards to the issue of condonation, the Constitutional Court held as follows in *Van Wyk v Unitas Hospital*[1]:

> "[20] This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."[2]

[1] 2008 (2) SA 472 (CC).
[2] Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC).

[21] Rule 32 of the Uniform Rules of Court, which governs Summary Judgement Applications, states the following:

> "(1) The plaintiff may, after the defendant has delivered a plea, apply court for summary judgment on each of such claims in the summons as is only—
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> (a) on a liquid document;
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> (b) for a liquidated amount in money;
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> (c) for delivery of specified movable property;
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> (d) or for ejectment,
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> together with any claim for interest and costs.
>
> (2)
>
> (a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.
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> (b) The plaintiff shall, in the affidavit referred to in sub-rule (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.
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> (c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.
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> (3) The defendant may—
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> > (a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or
> >
> > (b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), 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." (my underlining)

[22] In the unreported but reportable judgement *Cohen N.O. and Others vs Deans*[3] Nicholls JA held as follows:

> "[29] The only decision to trace the history and reasoning behind the amended procedure for summary judgment in detail is Tumileng Trading CC v National Security and Fire (Pty) Ltd; E & D Security Systems CC v National Security and Fire (Pty) Ltd (Tumileng). As observed by Binns Ward J in Tumileng, most of the old authorities still apply in determining whether a defendant has disclosed a bona fide defence. All the defendant is required to do is disclose a genuine defence, as opposed to 'a sham' defence. (my underlining) Prospects 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.
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> [31] The high court failed to consider the test to be applied in deciding whether to grant summary judgment. This was, and remains, whether the facts put up by the defendants raise a triable issue and a sustainable defence in the law, deserving of their day in court. The defendants must fully disclose the nature and grounds of their defence and the material facts on which it is founded. All a defendant has to do is set out facts which if proven at trial will constitute a good defence to the claim."

[23] In *Joob Joob Investments v Stocks Mavundla ZEK*[4], Navsa JA states the following with regard to the Summary Judgement procedure:

[3] 2023 [ZASCA] 56.

“[31] So too in South Africa, the summary judgment procedure was not intended to ‘shut (a defendant) out from defending’, unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are ‘drastic’ for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G-426E.”

[4] 2009 (5) SA 1 (SCA).

[24] Rule 46A which authorizes the execution creditor, with the leave of the court, to execute against the residential immovable property of a judgement debtor is comprehensively set out in the Uniform Rules of this Court.

[25] In *Gundwana v Steko Development CC*[5], stated the following when emphasising the necessity of the court's involvement when execution against residential property is sought:

> "[38] The decisions of this Court in *Chief Lesapo v North West Agricultural Bank and Another*, and in *Jaftha* have challenged the notion that the execution process needs no judicial content.
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> [39] In *Lesapo* the constitutionality of a legislative provision, providing for the seizure of property without recourse to a court of law upon default of payment of a debt, was successfully challenged. In the course of her judgment Mokgoro J stated:
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>> "The judicial process, guaranteed by s 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution and includes the control that is exercised over sales in execution. On this analysis, s 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of s 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land."

[5] 2011 (8) BCLR 792 (CC).

> [40] In Jaftha section 66(1)(a) of the Magistrates' Courts Act was found to violate section 26(1) of the Constitution to the extent that it allowed execution against the homes of indigent debtors, where they lose their security of tenure. In the course of discussing a remedy for the violation, Mokgoro J commented on the suggestion made by the applicants that judicial oversight over the execution process was appropriate in the following terms:
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> > "It is my view that this is indeed an appropriate remedy in this case. Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on ss 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act."
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> [41] The combined effect of these two cases is that execution may only follow upon judgment in a court of law. And where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, further judicial oversight by a court of law of the execution process is a must."

[26] The court then went on to caution as follows in the same matter of *Gundwana*:

> “[53] Some further cautionary remarks are called for. It is rather ironic that the effect of this judgment is to restore to the courts a function that they exercised for close on a century before the introduction of rule 31(5) in 1994. The change to the original position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders.
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> [54] In Jaftha, Mokgoro J, before listing some relevant factors that needed to be considered in judicial oversight of the execution process, warned that “it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight.” Mindful of that warning, I would merely add the following. It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.”

Submissions made with regard to the condonation application.

[27] The crux of the First and Second Defendant’s averments, as made in their answering affidavit, is that they were experiencing marital problems as a result of a change in their lifestyle. These marital problems have resulted

in the Second Defendant refusing to cooperate with the First Defendant as far as the timeous finalisation and the filing of the answering affidavit is concerned. This stalemate was only broken by the intervention of both sets of parents, as is generally the case in the Nguni culture, on 20 October 2025. The Defendants went on to submit that the issues raised in their answering affidavit are not as simplistic as conceived by the Plaintiff, and it's on that basis that they pray to this Court to condone the late filing of the answering affidavit.

[28] Plaintiff's attorneys did not file any affidavit in opposition to condonation, but their counsel submitted from the bar that the explanation for the delay is unreasonable. The least the Defendants could have done when faced with the alleged difficulties was to contact the attorneys for the Plaintiffs and advise them of the difficulties they are facing, which have made it impossible for them to meet the deadline of the filing of the answering affidavit. Plaintiff's counsel also highlighted to the Court that the Defendants have a pattern of not complying with the rules of court in that they had to be served with a Notice of Bar before filing their plea, and that they had failed to timeously file their answering affidavit on the previous hearing date, which then necessitated this matter to be postponed to 27 October 2025.

Submissions made with regard to the Summary Judgement Application

[29] The Plaintiffs' counsel submitted that for one to avoid summary judgement, one has to set out facts (by way of admissible evidence of someone who can swear positively thereto) which, if proven at trial, would

amount to a defence to the Plaintiff's claim with sufficient particularity to enable the Court to judge his *bona fides*. The defence must not be presented in a manner that is needlessly bald, vague or sketchy.

[30] Counsel for the Plaintiffs then proceeded to highlight the factual inaccuracies pertaining to the defences raised by the Defendants as follows:

a. That, contrary to what is now pleaded by the Defendants, the Defendants did agree to a variable interest rate. Paragraph 9.4 of the mortgage loan agreement that was signed by the Defendants clearly states that the Plaintiffs may increase or reduce Defendants' repayment amount according to the change in interest rate to ensure that Defendants mortgage loan is repaid in the same time as it would have been had the interest rate not changed.
b. That the Defendants did receive the section 129 (read together with section 130) notices in terms of the NCA, and that they engaged with the legal representatives of the Plaintiffs in an attempt to reach a payment agreement, which was not concluded within the prescribed period. It is therefore factually incorrect for the Defendants to allege that their payment proposals were ignored, as the Plaintiffs' attorneys made a counterproposal that was not accepted by the Defendants.

[31] Despite the aforegoing, the interest rate argument and the alleged non-compliance with the provisions of the NCA do not, nevertheless, give rise to triable issues, Counsel for the Plaintiffs submitted.

[32] The Defendants submitted that their opposition is threefold:

a. That after receipt of the section 129 notice, the Defendants engaged with the Plaintiffs and made a clear proposal, which was simply ignored. The Defendants, therefore, submit that the Plaintiffs engaged in section 129 of the NCA proceedings simply to comply with the procedural requirements of the NCA.
b. That the Plaintiffs should not have adopted the interest rates of the Reserve Bank, especially if one has regard to the effects of COVID-19, which summarily suspended the income-generating capabilities of the Defendants whilst expecting them to keep up with their bond repayments. The Defendants also submitted that they do not understand why Plaintiffs never saw it necessary to also suspend payments, given that COVID-19 was a Force Majeure.
c. The Defendants therefore dispute the amounts that the Plaintiffs are alleging are owed as they are a result of the interest rate that has been increased without their consent.

[33] They submitted further that none of the issues raised by them in the plea and answering affidavit can be cured without the need for a trial in order to properly traverse them through the direct evidence from the Plaintiffs and their witnesses.

Submissions made with regard to the Rule 46A application

[34] The Plaintiffs' counsel submitted as follows regarding the requirements of a Rule 46A application:

a. The judgment creditor who seeks an execution order against the residential immovable property of the judgement debtor must approach the court for an order in terms of the provisions of Rule 46A.
b. When considering whether to declare immovable property executable or not, the court has to consider all relevant circumstances before granting or refusing such an order so as to ensure that a defendant's section 25 and 26 constitutional rights are protected.
c. Given that such relevant circumstances fall within the knowledge of the defendant, he or she has the duty to place these circumstances before the court.

[35] The First Defendant prefaced his answering affidavit in opposition to the Rule 46A application with condonation for the late filing on his affidavit in response to the Plaintiffs application made in terms of Rule 46A based on the same grounds outlined in the answering affidavit opposing the summary judgement application.

[36] The First Defendant then proceeded to submit that he is of the belief that it is not prudent for this Court to pronounce immediately as to the executability of the property without first pronouncing on whether the summary judgment application should succeed or not.

[37] The First Defendant submitted further that once this Court decides on the fate of the summary judgement application and they are privy to the reasoning, then they can be in a position to advance well-informed submissions against execution.

[38] The First Defendant concluded by saying that it is impossible for him and his spouse to make proper submissions regarding the Rule 46A application.

Discussion and findings

[39] The explanation provided by the Defendants for the delay in filing their answering affidavits to both the summary judgement application and Rule 46A application might not be extensive, but one cannot say that it was unreasonable given the circumstances they found themselves in. Moreover, the nature and consequences of the relief that were sought against them will have far-reaching consequences should they be granted. Therefore, the interest of justice dictated that the condonation applications for the late filing of the answering affidavits in respect of both the summary judgement application and the Rule 46A should be granted herein.

[40] The first attack advanced by the Defendants to the summary judgement application was that the Plaintiffs did not engage in the section 129 proceedings with the Defendants in good faith because they did not furnish the Defendants with an explanation as to why the restructured approach towards the bond repayment tabled by the Defendants was not good enough.

[41] To make a determination on the above, one has to give an analysis of what exactly transpired after the section 129 letter was served by the Sheriff on the Defendants on 6 December 2023. It must be placed on record that the Defendants were already in arrears by an amount of R114 184.12 at that point. The papers filed herein showed that there was no reaction at all received from the Defendants after receipt of this letter.

[42] The Plaintiffs had to send a second section 129 letter by email to the First Defendant on 20 March 2024, whereafter the following occurred:

a. The Defendants committed to making a payment of R60 000.00 at the end of March 2024, whilst the arrear amount was R200 290.54.
b. On 27 March 2024, the Defendants committed themselves to making a monthly payment of R20 000.00, provided that R13 000.00 of this amount is fixed and not affected by the repo rate.
c. On 2 April 2024, the Defendants made a payment of R40 000.00, which reduced the arrears to R160 290.54, but they only made the next payment in the amount of R21 517.19 on 21 June 2024; at this point, the arrears had climbed back to R203 437.90.
d. On 5 July 2024, a Combined Summons was served on the Defendants, to which they reacted by serving a Notice of Intention to Defend and also accepted the offer to mediate attached to the Combined Summons on 14 July 2024.

e. On 15 July 2024, the Plaintiffs' legal representative invited the Defendants to furnish them with a settlement proposal to which they will take instructions from the Plaintiffs. The Defendants reacted to this invitation by proposing the adjustment of the loan agreement to give the Defendants an opportunity to continue paying the original R13 000.00 per month, and that they will try to settle the arrears over a period of twelve months.
f. On 16 July 2024, the legal representatives for the Plaintiffs responded by stating that the loan agreement itself cannot be adjusted, but proposed that the Defendants make a payment of at least the full instalment for the month, which at that stage was R21 554.85. The First Respondent promptly responded to this proposal by saying that "It would appear that the Courts must decide on this issue. We were never party to the decision of the Reserve Bank that now affects us and we intend to challenge that." It was therefore not correct for the Defendants to allege that their payment proposal was "simply ignored".

[43] It must be noted in relation to the above that the proposal of R21 554.85 is not far off from the R20 000.00 that had been proposed by the Defendants in March 2024, and the Defendants also made a payment of R21 517.19 to the Plaintiffs on 21 August 2024, which is also not far off from the amount proposed by the Plaintiffs. This calls into question the *bona fides* of the Defendants when they made the R20 000.00 payment proposal and when they rejected the proposal made by the Plaintiffs on 16 July 2024.

[44] Despite the foregoing, the Plaintiffs only resumed legal proceedings against the Defendants on 24 January 2025 by serving a Notice of Bar on the Defendants after realising that the Defendants' level of indebtedness to the Plaintiffs was increasing substantially while the Defendants were supine and doing nothing to bring it under control.

[45] It is therefore clear from the above set of facts that it was, in fact, the Defendants who had closed the door to further engagement herein. They can therefore not cry foul when the Plaintiffs decided to accept their invitation to a meeting with a judge, *albeit*, six months later. This court therefore found that the Defendants first ground of defence is not supported by material facts and is therefore not a genuine defence.

[46] With regard to the second defence advanced by the Defendants, the following must be recorded:

a. From the Court's reading of the papers filed herein, it’s quite clear that when the interest rate was standing at 11.05% in the first quarter of 2020, the Defendants’ mortgage loan account was not in arrears. It only started to fall into arrears when the interest rate was dropped to 9.05%, and it continued to fall into further arrears even when the interest rate was dropped to 8.3% to such an extent that it had to be adjusted in January 2022.

b. It was this adjustment that resulted in the Defendants' monthly instalments moving up to R16 000.00 per month from R13 987.11 per month, but the Defendants managed it very well until the end of 2022, even though the interest rate had again climbed to 11.8% at that stage. It was only from the beginning of 2023 that the mortgage loan account of the Defendants started getting into serious problems when the interest rate was adjusted upwards, and it has never recovered since then.

c. It should also be recorded that this period was outside of the National State of Disaster, which was brought to an official end on 5 April 2022.

[47] This Court therefore found that the increase in interest rate and COVID-19 are not solely to blame for the unfortunate situation the Defendants found themselves in. The adjustment that cleared the arrears of the Defendants while increasing the bond repayment amount to R16 000.00, which was done in the first quarter of 2022, cannot be excluded as well. The fact that this adjustment is not mentioned in the Defendants' answering affidavit has not gone unnoticed, nor is the fact that the Defendants had agreed to the adjustment of the loan repayment amount in accordance with the variable interest rate when they signed the mortgage loan agreement on 18 December 2019.

[48] The Defendants were also being disingenuous when they lamented not being consulted when there is an interest rate increase, while they did not cry foul for not being consulted when the interest rate was adjusted downwards. This court therefore found that the Defendants' second ground of defence is not supported by material facts as well and is therefore nothing else but "a sham" defence.

[49] This Court has also noted that the Defendants had omitted to give details of what resulted in a change in their lifestyle and home economics. The First Defendant simply states that he is not working but omits to say what the employment status of the Second Respondent is. So, he omits to take this Court into his confidence by disclosing all the material facts on which his defence is premised.

[50] This Court therefore found that the answering affidavit filed by the Defendants in opposition to the summary judgement application of the Plaintiff did not disclose a *bona fide* defence. This Court therefore had no choice but to grant summary judgement against the Defendants.

[51] Having found in favour of the Plaintiff in the summary judgement application; this Court had to make a determination on whether the property, which is the subject of these proceedings, can be declared executable in terms of Rule 46A.

[52] As stated somewhere in these reasons, the Defendants filed a terse affidavit in which they submitted that it is impossible for them to make proper submissions regarding the Rule 46A application. This was submitted after they alleged that they sought the assistance of the Department of Human Settlements to assist them with a housing grant, which will not be less than R250 000.00 should they succeed. This bare averment was not supported by anything else (ie. communication between the Defendants and

the Human Settlement Department). This is all that was submitted on behalf of the Defendants in respect of the Rule 46A application.

[53] Therefore, the Second Defendant having been served with a Rule 46A application on 10 March 2025, the First Defendant having appeared at court on 18 March 2025, the Defendants having failed to make submissions relevant to the making of an appropriate order by this Court in respect of a Rule 46A application despite my brother, Acting Judge Kantor, having made an order, *inter alia*, as follows:

a. That the applications for summary judgement and in terms of Rule 46A are postponed to the semi-urgent roll, on 27 October 2025;
b. That the Defendants shall deliver their answering papers in respect of the Rule 46A application and any affidavit/s opposing summary judgement, if any, by no later than 17 April 2025.

This Court therefore granted an execution order against the property which is the subject of this litigation at a reserved price of R2 145 000.00.

[54] There was no doubt that the postponements of the 18th of March 2025 and 27th of October 2025 were occasioned by the lack of urgency with which the Defendants approached these applications. The court's time and resources were wasted in the process; this Court therefore had to show its displeasure by mulcting the Defendants with a punitive cost order.

TJ MGENGWANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	Mr. L. Wessels
	Cape Bar
Instructed by:	Sandenbergh Nel Haggard
For the First Respondent:	In person
For the Second Respondent:	First Respondent