REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) ~~REVISED.~~

[redacted]
SIGNATURE

20/02/2026
DATE

CASE NUMBER: 2024-070953

In the matter between:

CHANGING TIDES (PTY) LTD N.O. Applicant/ Plaintiff

and

ITUMELENG TSAPI Respondent/ Defendant

Heard: 12 November 2025

Delivered: 20 February 2026

JUDGMENT

YACOOB, J:

[1] The applicant/ plaintiff (Changing Tides) sought default judgment against the respondent/ defendant (Mr Tsapi) in terms of Rule 31(5) read with Rule 46A of the Uniform Rules on the basis of a summons in which it sought a money judgment and declaration that the property put up as security by Mr Tsapi for a home loan is specially executable. The application for default judgment was, in my view, hopelessly flawed, and I dismissed it. Changing Tides requested reasons for the dismissal. These are those reasons.

[2] A person's home can only be declared specially executable by a judicial officer who is required to exercise their discretion after considering all relevant factors. The principles have been established by a number of judgments of the High Court, Supreme Court of Appeal and the Constitutional Court,[1] and have found articulation in the insertion of Uniform Rule 46A into the Uniform Rules of Court, in November 2017.

[3] The reasons for these requirements are set out in the relevant judgments and do not need to be repeated. In summary, they seek to ensure fair judicial process which balances and protects the constitutional rights to housing[2] and not to be arbitrarily deprived of property,[3] as well as the rights to be economically active and enter into commercial agreements.

[4] The Constitutional Court held in *Japhta v Schoeman*:[4]

> *In summing up, factors that a court might consider, but to which a court is not limited, are: The circumstances in which the debt was incurred; any attempts made by the debtor to pay of the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.*[5]

[5] In *Nedbank Ltd v Mortinson*,[6] a Full Court of this Division determined that a creditor seeking default judgment simultaneously with an order declaring hypothecated immovable property executable must file an affidavit including the amount of the arrears at the date of application, whether the immovable property was

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[1] These include *Japhta v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W); *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA); *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC); *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP), and *Absa Bank Ltd v Lekuku* [2014] ZAGPHC 244 (14 October 2014).
[2] Section 26 of the Constitution of the Republic of South Africa, 1996
[3] Section 25(1) of the Constitution.
[4] Note 1 above.
[5] At para [60].
[6] Note 1 above.

acquired with a state subsidy; whether the property is occupied or not; whether it is used for commercial or residential purposes and whether the debt sought to be enforced was incurred to acquire that property.[7] I set this out to demonstrate that credit providers have known for at least twenty years that that information was necessary in this Division when seeking this kind of relief.

[6] This Division then inserted Chapter 10.17 into its Practice Manual, setting out exactly what an application must put before the court to enable the court to exercise its discretion judicially when dealing with property which may be the primary residence of the defendant. This paragraph specifies that it is to be read with Rule 46A. It sets out a number of requirements, dealing with service and the manner in which an application is to be considered.

[7] Chapter 10.17 requires the applicant to provide details of attempts made by the applicant to contact the respondent to negotiate how foreclosure may be avoided, and that the information referred to in Rule 46A (5) and (9)(b) must be included. It also refers to the fact that Rule 46A (6) sets out the rights of the respondent.

[8] The template for the affidavit in terms of Chapter 10.17 of the Practice Manual requires the applicant's attorney to confirm that the relevant requirements are fulfilled in the papers before the court and to refer the court to where in the papers the necessary information can be found. This is clearly an attempt on the part of the court to ensure that a legal practitioner drafting papers keeps those requirements in mind from the outset, knowing that they would eventually have to depose to an affidavit showing that they are there.

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[7] At para [33].

[9] Unfortunately, these affidavits seem to be considered to be a matter of rote and substantive fulfilment of the requirements is rare.

[10] In addition to referring to the relevant judgments dealing with foreclosure, Chapter 10.17 refers to the *locus classicus* when it comes to affidavits, *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*,[8] in which the court clearly sets out how evidence must be placed before the court in an affidavit. Every legal practitioner ought to be familiar with the section of the judgment titled "The law relating to the content of affidavits generally".[9] Of particular importance are that the (primary) facts "must be set out simply, clearly and in chronological sequence and without argumentative matter",[10] and that

> *it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.*[11]

The Chapter 10.17 affidavit is in my view clearly intended to assist legal practitioners with doing this last.

[11] Too often, an applicant for default judgment and special executability pays lip service to the requirements, either referring to information that is not before the court or making assertions that are not supported by the papers. There is no compliance with the basic rules of evidence and affidavits, let alone the specific requirements for applications of this type. Applicants in this situation seem unfazed by repeated

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[8] 1999 (2) SA 279 (T)
[9] 323G-325C.
[10] 324D
[11] 324F-G

removals from the roll because of shortcomings in their applications, and take advantage of the leniency of the court allowing them to repeatedly supplement their applications. Not only does this result in unwieldy court files, the clogging of court rolls with matters that ought not to be there, and a waste of judicial resources with judges having to read and re-read multiple affidavits on multiple set down dates, there is also the risk of unnecessary compounded costs being added to the account of the hapless respondent/ defendant whose loan agreement makes them liable for debt recovery costs.

[12] In this case, as I have suggested, there are a number of shortcomings in the application for default judgment and special executability, which mean it cannot be granted. The dismissal of an application for default judgment does not cause any prejudice to the plaintiff, as it does not determine the main action. Leave to supplement is an indulgence, not a right. It is as simple, if not simpler, for the plaintiff to bring a fresh application for default judgment and special executability, which fulfils the requirements and makes out a case. A court and a defendant/respondent would not then have to wade through a number of affidavits and documents in order to determine either what case to meet or whether an order may granted.

[13] In addition, counsel for Changing Tides's only submission in support of a removal from the roll with leave to supplement was that the dismissal would lead to delay. It is not clear how there would be any more delay if a proper affidavit were filed as a founding affidavit than if it was filed as a supplementary affidavit. There would still need to be proper service, and in fact, Changing Tides having obtained an order authorising substituted service on Mr Tsapi for all process in this matter, that would be as easily accomplished with a fresh application.

[14] I cannot think of any other factors that would prejudice Changing Tides, nor did counsel suggest any to me. These, in general, were the reasons why the application for default judgment was dismissed. However I deal with all the shortcomings of the application in more detail below.

[15] Changing Tides's affidavit in support of the application in terms of Rule 46A makes the following allegations, with shortcomings as identified.

(a) Mr Tsapi has made no payments since 1 June 2024. There is no reference to a specific annexure from which this can be determined. The same paragraph refers to a certificate of balance dated 1 June 2024, but that certificate is not annexed to the affidavit, nor does the affidavit inform the court where it may be found.

(b) Mr Tsapi's last payment was made in November 2023. This is allegation is made as if the allegation regarding no payments since June 2024 had not been made. It raises questions in the mind of the reader regarding the details of the payment history.

(c) There is no allegation regarding when and how Mr Tsapi breached the loan agreement. Mr Tsapi's full payment history is not described.

(d) The paragraph allegedly in fulfilment of the requirements of rule 46A (and to which the Chapter 10.17 affidavit refers) simply says that Changing Tides does not have the necessary information. Nothing is said about what attempts, if any, have been made to procure that information.

(e) The deponent states that Changing Tides does not know anything about Mr Tsapi's financial strength relative to it, but is nonetheless able to make the bald allegation that Mr Tsapi does not have the means to satisfy the debt other than by Changing Tides executing on the property. It is unclear how Mr Tsapi was able to obtain a loan with no information about his financial position, nor how Changing tides knows the debt cannot be satisfied in any other way.

(f) The allegation is made that neither Changing Tides nor the lender with whom the loan agreement was concluded is aware of whether the property was acquired with the assistance of a state subsidy. This allegation is surprising as a lender is required to ascertain the source of funds, and also would know that the question of a state subsidy is relevant in the event of default. The failure to obtain this information in advance is difficult to understand, particularly since, as I have set out above, it has been a requirement in this court for over twenty years. A lender should as a matter of course enquire whether a state subsidy is being used when a home loan is considered.

[16] In addition, it is by now well established that a court must take into account the debtor's payment history, for example whether this is a first default, whether there was full payment for twenty years and then a sudden lapse, continued defaults followed by payment of the arrears in full, or whatever the case may be. However this information is not set out in the affidavit. Instead, there is an annexure of a statement from which Mr Tsapi's payment record must be gleaned. The court is expected to find the number of breaches and date of breaches itself from looking at the payment history. This is clearly inconsistent with the requirements of *Swissborough*.

[17] There is a bald allegation that "numerous attempts" were made to assist Mr Tsapi, without particularising these. There is a list of how many messages were sent

or telephone calls were made but not what the outcome was. There appears to have been only one telephone call. Whether these messages and the telephone call can be considered to have been *bona fide* attempts to avoid foreclosure cannot be determined from the information provided.

[18] In addition, there was no evidence that the application had been served in accordance with the substituted service order that had been obtained.

[19] The 10.17 affidavit filed on behalf of Changing Tides is similarly problematic. The first requirement, as set out in the affidavit template, is that the deponent is satisfied that a proper cause of action has been disclosed and there is not mere reliance on a security instrument, and requires the deponent to refer to the specific paragraphs and the specific pages where each relevant allegation and the loan agreement and other relevant document appears. Instead, this affidavit blandly refers the court to the particulars of claim and its annexures (which total over 90 pages). The court must find out for itself what is where.

[20] The next requirement is that the person must swear that there is compliance with Rule 18(6) and identify the page numbers from which this compliance can be seen. In this affidavit, the deponent merely alleges that he is satisfied that there is compliance with Rule 18(6). Alternatively, the template requires the deponent to state that that sufficient facts have been disclosed and set out for a proper cause of action and to identify the page and paragraph numbers. In the affidavit before me, there is simply a bald allegation that sufficient facts have been disclosed to found a proper cause of action, with no reference to paragraphs and page numbers.

[21] Then, in purported compliances with the judgments of *Mortinson*, *Folscher*, and *Lekuku*,[12] which are named in the affidavit, the deponent confirms that the affidavit in support of the application in terms of Rule 46A "sets out the following information (insofar as it is known to the applicant)". It refers to the paragraphs containing the woefully inadequate information that I have already referred to earlier in this judgment.

[22] While an applicant is only required to set out information that is known to it, this does not release it from the obligations to make reasonable enquiries. Sometimes these enquiries need amount to no more than comparing one part of the debtor's file to another, and the answer will become evident. For example, in this application, there is an affidavit in support of the application to authorise substituted service. It indicates that another address was found for Mr Tsapi. That information is clearly relevant to and should be included in the affidavit in support of the Rule 46A application. It is disingenuous for the deponent in the Rule 46A affidavit to simply say that the plaintiff is unable to say whether the property is occupied by the defendant or is the defendant's primary residence. The information available to the plaintiff must be collated and placed in the affidavit in a cogent manner to enable the court to assess it.

[23] The various requirements put in place are not simply a stratagem by courts to enable more paper to be generated by formulaic affidavits which add no value to court proceedings. They are there to try and mitigate the immense harm that disproportionate foreclosure on people's homes can cause, while still protecting the integrity of the commercial arrangements which give people an opportunity to better themselves economically.

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[12] All listed in note 1 above.

[24] Where a case is not made out, it is in the discretion of the court whether to permit supplementation in terms of Rule 6(6) or to dismiss the application. As I noted earlier, dismissal of a default judgment application does not finally determine anything and the plaintiff is at liberty to bring a proper application.

[25] It is for these reasons that I ordered that:

1. The application is dismissed.

[redacted]

S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines/ Courtonline. The date for hand-down is deemed to be 20 February 2026.

APPEARANCES

For the applicant:	Ms M Beckenstrater
Instructed by:	Moodie & Robertson
For the respondent:	No appearance.