IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No.: **22542/2023**

In the matter between:

NEDBANK LTD Plaintiff

and

MANDLA STEPHANS Defendant

Coram: Montzinger AJ

Heard: 11 March 2026

Delivered: 26 March 2026

Summary: Application for summary judgment – Plea filed but no affidavit opposing summary judgment – Defendant represents himself but not present at court when summary judgment application is heard – Whether a court considering a summary judgment application is obliged to consider the defences raised in the plea where there is no opposition under oath in the summary judgment application – Consideration of whether Rule 46A justifies the immovable property being sold in execution – Summary judgment and Rule 46A granted.

ORDER

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1. Summary Judgment is granted against the defendant for payment in the amount of R 1,683,966.55.

2. Interest on the amount in paragraph 1 at the rate of 10.75% per annum from 1 November 2023 calculated daily and compounded monthly, to date of payment.

3. Costs on a party and party scale, with counsel's fees on a party and party scale.

4. The immovable property described as Erf 2[...] Sandown, in the City of Cape town, Cape Division, Western Cape Province, in extent 336 square metre and held by deed of transfer number T[...] is declared especially executable.

5. The Registrar of this Honourable Court is authorised to forthwith issue a warrant of attachment as envisaged in terms of Rule 46(1)(a) of the Uniform Rules of Court.

6. The sale in execution of the Property shall be subject to a reserve price of R1,700 000,00.

JUDGMENT

Montzinger AJ

Introduction

[1] This is an application for summary judgment together with an application in terms of Uniform Rule 46A for an order declaring the mortgaged immovable property executable.

[2] The matter was enrolled on the unopposed motion court roll on 11 March 2026. The defendant was served with the summary judgment application, the Rule 46A application, and a notice of set-down enrolling the matter on the aforementioned date. The defendant failed to appear and to file an affidavit in opposition to either application.

[3] The plaintiff's claim arises from a home loan agreement concluded between the parties on 3 November 2017, pursuant to which the plaintiff lent and advanced monies to the defendant in the amount of R1,746,800.00. The loan agreement was in respect of the defendant’s immovable property situated at 7[...] C[...] Crescent, Sandown, also known as Erf 2[...] Sandown.

[4] A covering mortgage bond was registered over the immovable property, in favour of the plaintiff. In terms of the bond, the defendant acknowledged indebtedness to the plaintiff in the capital sum of R1,746,800.00, together with interest and an additional cover amount of R437,000.00 for costs and charges.

[5] The defendant has fallen in arrears with the repayment of the monthly installments in a rather substantial amount. As of 28 October 2025, the outstanding balance had escalated to R2,071,326.47 and the defendant's arrears had grown to approximately R444,921.14. By February 2026, the arrears stood at R512,475.18. The plaintiff issued action proceedings claiming payment of the sum of R1,683,966.55, together with interest thereon and an order declaring the immovable property executable, and costs.

[6] At the hearing of the matter I raised with plaintiff’s counsel, Ms Van Zyl, whether the court can grant summary judgment, without considering the allegations in the plea, even though no affidavit opposing the summary judgment was filed. Ms Van

Zyl submitted that the court could grant judgment, but that it would probably be prudent for the court to consider the defences raised in the plea even though it was not raised in an affidavit as required by the rule.

Litigation history

[7] The plaintiff issued summons in December 2023. After the defendant failed to enter an appearance to defend, the plaintiff pursued and was granted default judgment on 3 February 2025 and obtained an order in terms of rule 46A to sell the property at a public auction.

[8] However, shortly before the scheduled sale in execution was due to take place the defendant served the plaintiff with an application to rescind the default judgment. The auction was cancelled and ultimately the plaintiff agreed to an order rescinding the default judgment. This meant that the defendant was required to file a plea. The defendant delivered the plea consisting of a special plea and a plea on the merits on 14 October 2025. The plaintiff then applied for summary judgment.

[9] The summary judgment application was served on the defendant on 3 November 2025 at his *domicilium citandi et executandi* address being Zone 2[...], Block 2[...], Unit [...], Langa. That street address is different from where the property that forms the subject of this matter is located, being 7[...] C[...] Crescent, Sandown. The summary judgment application was served on Ms N Stephans, the defendant's mother. The summary judgment application was also served on 7 November 2025 by leaving a copy on the principal door of the mortgaged property at 7[...] C[...] Crescent, Sandown. The Rule 46A application was similarly served at the Langa address, being the defendant's *domicilium* address.

[10] Despite having received proper notice of both the application for summary judgment and Rule 46A application, no affidavit in opposition to either application was filed by the defendant.

Legal requirements to granted summary judgment

[11] The requirements for a party seeking summary judgment is set out in Uniform Rule 32. The legal principles that have developed around the requirements and the application of the rule are well established. However, since the amendment of the rule in 2019, a plaintiff may, only after the defendant has delivered a plea, apply to court for summary judgment on any of the bases contemplated by the rule.

[12] A defendant facing summary judgment has three options. Consent to judgment or give security for the claim amount or convince the court, on affidavit, that a *bona defence*[1] exist to the plaintiff's claim. The affidavit must disclose fully the nature and grounds of the defence, and the material facts relied upon. However, the defendant need not prove the defence. What must be set out is merely facts which, if proved at trial, would constitute an answer to the plaintiff's claim[2].

[13] Rule 32 also requires the plaintiff's affidavit in support for summary judgment to engage with the defendant's pleaded defence. As was noted in *Tumileng Trading*[3], the amended rule requires the plaintiff's founding affidavit to address the defendant's pleaded defences, and a failure to do so could be fatal to the application.

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[1] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T)
[2] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)
[3] *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) paras 21 - 23

[14] In respect of evaluating whether summary judgment should be granted or not and what is expected of a defendant seeking to successfully oppose a summary judgment application the court said, also in *Tumileng Trading*[4], that the classical formulations in earlier cases such as *Maharaj*[5] and *Joob Joob Investments*[6], despite the 2019 amendment to rule 32, remain.

[15] However, even if a defendant's defence appears weak or insubstantial, the court retains a residual discretion to refuse summary judgment[7]. This discretion allows the court to consider whether granting summary judgment might result in an injustice, particularly where there is a reasonable possibility that a fuller exploration of the issues at trial could reveal a valid defence[8].

The defences raised in the plea

[16] The distinctive feature of this matter is that the defendant filed a plea, but failed to deliver an affidavit opposing the summary judgment application. This raises a procedural question: must the court in the absence of an opposing affidavit, still have regard to the defences raised in the plea? Or is it open to the court to treat the matter as entirely unopposed and proceed to consider the summary judgment application without reference to the plea?

[17] Under the pre-2019 version of the rule, summary judgment was applied for after entry of appearance to defend, and the defendant's plea would not ordinarily have been delivered by the time the application was heard. Under the amended rule, by

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[4] *Tumileng Trading* para 13
[5] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)
[6] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)
[7] *Tesven CC v SA Bank of Athens [1999] 4 All SA 396 (A), 2001 (1) SA 268 (SCA)*
[8] *Breitenbach* at 227 D

design, the plea precedes the summary judgment application, and the plaintiff is required by the rule to engage with the pleaded defence in its affidavit seeking summary judgment.

[18] There are two possible approaches to the present situation. The first is that, since the defendant has not filed an opposing affidavit and has not given security, the court should treat the matter as entirely unopposed and proceed to grant summary judgment, if such a case has been properly made out, without reference to the plea. The second approach is that, even in the absence of an opposing affidavit, the court retains a discretion to have regard to the defences appearing from the plea, particularly considering the current design of the rule, which places the plea at the heart of the summary judgment enquiry.

[19] Uniform Rule 32(5) provides that if the defendant does not give security or satisfy the court as provided in Uniform Rule 32(3), the court *may* enter summary judgment. The use of the word *"may"* imports a discretion. Summary judgment is described in the authorities as *"an extraordinary and stringent remedy"*[9] that closes the door on the defendant. The court retains an overriding discretion not to grant summary judgment[10] even where the defendant has not appeared.

[20] Moreover, as I have stated Rule 32 now requires from the plaintiff to engage with the plea, not with the opposing affidavit, since at the time the plaintiff's affidavit is prepared, no opposing affidavit yet exists. A court hearing the summary judgment application will thus have the defendant's plea before it, together with the plaintiff's affidavit explaining why the pleaded defences raise no issue for trial. It

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[9] *Maharaj*, above, at 425H

[10] *Collet v FirstRand Bank* 2011 (4) SA 508 (SCA) para 18

would be incongruous with the design of the amended rule for the court to ignore the plea entirely simply because no opposing affidavit was filed.

[21] The principle articulated in *Uphuhliso*[11] is instructive and support my approach. In that case, the court held that a defendant's affidavit resisting summary judgment must disclose fully the nature and grounds of the defence, and that the plea, as read with the affidavit, with due regard being had to any divergence between them, would have to be considered in assessing whether it is sufficient to stave off summary judgment[12]. The court in *Uphuhliso* also gave expression to what has been termed the "divergence principle", the rule that a defendant may not raise defences in an affidavit resisting summary judgment that are not foreshadowed in the plea.

[22] The converse of the "divergence principle" leads logically to the following proposition. Where no opposing affidavit has been filed, the plea stands as the sole basis through which the defendant has communicated a defence. In such circumstances, the court should consider the plea to determine whether, even accepting the best possible interpretation of the defendant's case, the pleaded defences could constitute a *bona fide* defence in law that would warrant the granting of leave to defend.

Application of the Legal Principles to the Facts

[23] I am satisfied that the plaintiff has complied with all of the procedural requirements of Rule 32. The defendant also received proper notice of the

[11] *Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and Others* 4 All SA 827 (GJ)
[12] *Uphuhliso* para 26

application. Having considered the defendant’s plea, the special plea, is in substance no plea at all, but rather a request for documents. On the merits the defendant makes three critical admissions in his plea that are wholly destructive of a defence to the claim. He admits the existence of the loan agreement, the registration of the mortgage bond, and the existence of the arrears and an outstanding balance.

[24] The balance of the plea consists of bald denials that are not substantiated by any material facts. The defendant's denial that the copy of the mortgage bond annexed to the particulars of claim is the correct bond document is inherently implausible given the other facts that are admitted.

[25] The defendant also offered only a bald denial of the plaintiff's compliance with sections 129 and 130 of the National Credit Act (“NCA”). The defendant does not allege that he failed to receive the notice, does not allege any specific non-compliance with the relevant sections, and does not identify any failure by the plaintiff. This cannot constitute a *bona fide* defence.

[26] Accordingly, I find that the defences raised in the defendant's plea, read with the most generous interpretation of the plea do not constitute *bona fide* defences capable of preventing the grant of summary judgment. There is also no basis on which I can exercise my discretion against granting summary judgment. The plaintiff is therefore entitled to judgment being granted.

Application to declare property executable

[27] This aspect of the application engages the defendant's constitutional right of access to adequate housing under section 26(1) of the Constitution of the Republic of South Africa, 1996 and the court’s judicial oversight obligation in all cases where execution is sought against a person's primary residential home. The requirements of judicial oversight are entrenched in Rule 46A.

[28] Rule 46A now represents the primary procedural pathway for giving effect to the constitutional mandate in mortgage foreclosure matters. Ultimately, a court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless, having considered all relevant factors, it considers that execution against such property is warranted having considered various factors.

[29] Rule 46A(9) provides that, in an application to sell a defendant’s primary residence by way of public auction a court must consider whether a reserve price is to be set while Rule 46A(10) sets out the factors to be considered in deciding the amount of the reserve price.

Application to the facts

[30] Having regard to the evidence before the court, there is support in the record for a conclusion that the property is not the defendant's primary residential home. However, out of an abundance of caution, since the defendant represented himself, I will rather treat the property as if it is, as the evidence is not conclusive that the defendant does not reside at the mortgage property.

[31] In any event, the court's ability to exercise its discretion is limited as the defendant placed no facts before the court regarding housing rights, primary residence, or the impact of a sale in execution on his housing circumstances.

[32] I have had regard to the affidavit filed in support of the Rule 46A application. I am satisfied that the plaintiff has complied with the procedural requirements of the Rule. The evidence before me establishes that the plaintiff made numerous attempts to resolve the defendant's indebtedness without recourse to execution. The defendant has made no payments from July 2023 to October 2024 and also for the entire 2025. The last successful payment was on 10 December 2024 in the amount of R16,092.58, which is less than the monthly instalment. The defendant has also demonstrated an unwillingness to engage with the plaintiff and no inclination to service the debt or propose any alternative arrangement.

[33] The judgment debt is substantial, amounting to R2,071,326.47 as of October 2025, with arrears of R512,475.18 by February 2026. The debt is not trifling. The defendant consciously and voluntarily hypothecated the property as security for the loan advanced by the plaintiff, in the full knowledge that execution against the property could follow from a default. There is accordingly no other satisfactory means of satisfying the judgment debt. Considering all relevant factors that appear from the record, I am satisfied that execution against the property is warranted.

[34] In respect of a reserve price I must, pursuant to Rule 46A(9), consider whether a reserve price should be set, and if so, at what amount. Considering the uncertainty regarding whether the defendant regards the property as a primary residence, a reserve price should be set.

[35] In respect of what that reserve price should be, I have considered the factors prescribed by Rule 46A(10)(i-ix). I have also kept in mind that the objective of a reserve price is to align the interest of the plaintiff and defendant as far as it is possible[13] to realise as much value in the property as reasonably possible.

[36] In the exercise of my discretion in determining a reserve price I took into the account the market value of the property of R3,000,000, the forced sale value R2,400,000, the amount owing under the bond R2,071,326.47, and the outstanding levies R392,590.45 and all the other available factors that appear from the record. In my view it would serve the interest of both the plaintiff creditor and the defendant debtor best if an amount as close as possible to the market value of the property could be obtain at the auction. However, I am mindful that it is highly unlikely that the market value would be achieved considering the circumstances, being a court ordered sale in execution. The force sale value therefore becomes more prominent to serve as a guide in determining the reserve price.

[37] In this case I find that a reserve price of R1,700,000 is reasonable. The reserve price represents 56% of the market value and 70% of the forced sale value. Although ordinarily I would prefer a reserve price closer to 100% of the force sale value in this instance I am having regard to the high outstanding levies amount of R392,590.45 that would likely be higher by the time the auction is held. That is also a cost the prospective buyer will have to consume. In this instance the amount of R1 700 000.00 sufficiently protects the defendant's equity interest in the property while ensuring that the plaintiff is not prejudiced by a sale at an unrealistically low price that would yield no meaningful reduction in the judgment debt.

[13] *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) par 65

[38] In respect of costs, I am mindful that the defendant agreed to costs on an attorney and client scale. However, in this instance the plaintiff is not out of pocket. There was no seriously contested litigation, the defendant represented himself and cannot be accused of vexatious conduct in doing so. The primary purpose of a cost order is to minimize the extent to which a successful litigant will be out of pocket because of litigation such party not have to endure[14]. There is no suggestion that this matter warrants a punitive scale. A cost order on a party and party scale in this case would therefore suffice.

Conclusion and order

[39] In the result the following order is made:

1. Summary Judgment is granted against the defendant for payment in the amount of R 1,683,966.55.

2. Interest on the amount in paragraph 1 at the rate of 10.75% per annum from 1 November 2023 calculated daily and compounded monthly, to date of payment.

3. Costs on a party and party scale, with counsel's fees on a party and party scale.

4. The immovable property described as Erf 2[...] Sandown, in the City of Cape town, Cape Division, Western Cape Province, in extent 336 square metre and held by deed of transfer number T[...] is declared especially executable.

[14] *Mkhatshwa & Others v Mkhatshwa & 6 Others* (2021) ZACC 15 para 20

5. The Registrar of this Honourable Court is authorised to forthwith issue a warrant of attachment as envisaged in terms of Rule 46(1)(a) of the Uniform Rules of Court.

6. The sale in execution of the Property shall be subject to a reserve price of R1,700 000,00.

A MONTZINGER

Acting Judge of the High Court

Appearances:

Attorneys for applicant:	Harold Gie Attorneys
Counsel for applicant	Ms Van Zyl