



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 20486/2024

In the matter between

FIRSTRAND MORTGAGE COMPANY (RF)

Plaintiff

PROPRIETARY LIMITED

Registration Number 2015/042866/07

And

MR JAMES PAUL WILKINSON

Defendant

Identity Number 8[...]

Coram: Magona-Dano AJ

Heard: 05 February 2026

Order: 05 March 2026

Summary : Summary Judgment application – failure to raise a defence on the plea filed- raising new defence in the founding affidavit- request for payment plan or special arrangement not tantamount to an agreement- Referral for debt

review without more not a defence to summary judgment application-Rule 46A application consideration – partly residential and business property-absence of viable alternative to execution-declaration of executability-market value consideration not to frustrate execution under the guise of debtor protection-reserve price consideration

ORDER

1. Summary judgment is granted in favour of the Plaintiff against the defendant for:
 - a. Payment of the sum of R3 415 893.19.
 - b. Interest on R3 415 893.19, calculated daily and compounded monthly from 30 June 2024 to date of final payment, both days inclusive, at a variable rate which is linked to the Plaintiff's mortgage bond base rate, which variable interest rate was 11.18%, nominal per annum, as at the date of the certificate of balance.
2. An order declaring SECTION 45 NAUTICA & SECTION 57 NAUTICA held by virtue of Deed of Transfer No. S[...] executable for the said sum.
3. That the Registrar of this Court is directed to issue a warrant of execution to enable the sheriff to attach and execute upon the immovable property as described above, in satisfaction of the judgment debt, interest and costs.
4. That this Court sets a Reserve Price of R3 150 000 for the sale in execution.
5. That the Plaintiff be and is hereby entitled to approach the Court on the same papers (duly supplemented) for a variation of the Reserve Price, if a change in the factors influencing the reserve price necessitates a change

of the Reserve Price. The application may be brought before any judge of this division.

6. That the Defendant is advised that, the provisions of Section 129 (3) and (4) of the National Credit Act 34 of 2005 ('the NCA'), may apply to the judgment granted in favour of the Plaintiff.
7. The Defendant may prevent the sale of the property referred to above if Defendant pay the Plaintiff all of the arrear amounts owing to the Plaintiff, together with the permitted default charges and reasonable costs of enforcing the agreement up to the time of the re-instatement, prior to the property being sold in execution.
8. The arrear amounts, enforcement costs and default charges referred to above may be obtained from the Defendant.
9. The Defendant is advised that the arrear amount is not the full amount of the Judgment debt, but the amount owing by the Defendant to the Plaintiff, without reference to the accelerated amount.
10. Costs of suit on the scale as between attorney and client.

JUDGMENT

Magona-Dano AJ

INTRODUCTION

[1] This is an application for summary judgment in which the Plaintiff seeks judgment against the Defendant in the sum of R3 415 893.19 plus interest at the rate of 11.18% per annum as at the date of the certificate of balance. The debt allegedly arises from the defendant's breach of a home loan agreement concluded between the parties on 17 November 2020.

[2] The Plaintiff also seeks an order in terms of Rule 46A of the Uniform Rules of Court declaring the property of the defendant to be especially executable for the amounts together with interests calculated daily and compounded monthly from 30 June 2024 to date of final payment.

[3] Further that the Registrar of this Court is authorised to issue a warrant of attachment that the Sheriff will execute and sell the immovable property at a reserve price of R 2 784 950.90 alternatively such reserve price as may be set by the Court.

[4] I turn now to deal with each application, for the sake of convenience , I will continue to refer to the parties as they appear in the main action.

Factual Background

[5] The following facts are as they appear on papers filed of record by the parties these issues are either common cause or are not in dispute.

- a. That the debt which forms the subject matter of the claim arose out of a written home loan agreement and that therefore the nature of Plaintiff's claim is a contractual one for specific performance in terms of an indemnity agreement concluded between the parties secured by an indemnity bond registered over the immovable property of the defendant. The structure of the transaction was summarized as follows.

a.a A loan agreement was concluded between the lender, First Rent Bank Limited and the defendant in terms of which monies were lent and advanced in the capital amount of R3 465 000.

a.b the Plaintiff issued a written guarantee in favour of the lender for the due compliance of the defendant's obligations in terms of the loan agreement.

a.c the defendant in turn signed an indemnity agreement to indemnify and hold harmless the Plaintiff against any claims which may be made against it by the lender by virtue of the aforesaid guarantee and should the defendant breach the loan agreement.

a.d as security for the defendant's obligations under the indemnity agreement, she registered an indemnity bond in favour of the Plaintiff. Next, once the defendant breached his obligations in terms of the loan agreement Plaintiff was subject to a lawful claim by the lender in terms of the guarantee. This in turn triggered the indemnity agreement in terms where of the defendant indemnified the Plaintiff against any such claim by the lender.

b. On 23 December 2020 the indemnity bond was registered over the property by the defendant in favour of the Plaintiff subject to the conditions contained thereon. The relevant material expressed terms of the indemnity bond were that:

the defendant is lawfully indebted and bound to the Plaintiff its order successors entitled or assigned in the capital sum of R3 465 000 as continuing covering security arising from but not limited to present and future indebtedness or obligations arising from the defendant's failure to fulfil the obligations to the Plaintiff in terms of the indemnity including all interest fees charges and costs incurred and damages suffered by the Plaintiff in the event of default by the defendant.

[6] Defendant would therefore be indebted to Plaintiff pursuant to the indemnity agreement which indebtedness is secured by the indemnity bond registered over the property.

In dispute

Plaintiff's case to the summary judgment application

[7] Plaintiff alleges that the Defendant has failed to make punctual payment to the lender of the instalments due and payable under the loan agreement and was in arrears and continues to be in default of the obligations in terms of the loan agreement.

[8] On 27 June 2024 the lender delivered a section 129(1)(a) notice of the National Credit Act 34 of 2005 (the NCA) to the Defendant by registered post.

[9] On 18 July 2024 the lender made written demand by registered post to the Defendant to perform under and in terms of the guarantee.

[10] On 19 August 2024 the lender acting on behalf of the Plaintiff in terms of the indemnity sent a second letter of demand to the Defendant calling upon him to perform under and in terms of the indemnity within seven days.

[11] The Defendant did not respond in terms of the letter of demand and notwithstanding the lapse of the said seven days Plaintiff elected to enforce the indemnity and rely upon the security granted in its favour by the indemnity bond seeking the full outstanding amount due in terms of the indemnity. That it

has become due and payable and the Plaintiff was entitled to claim the payment of the full amount due as well as execution against the property.

[12] A certificate signed by an authorized employee of the lender set out the entire outstanding balance due by the Defendant to the Plaintiff as well as the rate of interests due in terms of the loan agreement, the guarantee and the indemnity in the sum of R3 465 000 together with interest a variable of 11.18% nominal per annum calculated daily and compounded monthly from 30 June 2024.

[13] The Plaintiff alleges further in the particulars of claim and in support of this application that the Defendant has breached the terms of the agreement as he had failed to pay instalments as reflected in the certificate of balance and the statement of account.

[14] In support of the summary judgment application Plaintiff alleges that :

- a. Defendant has submitted a self-contradictory plea where he denies breaching payment obligations in terms of the loan agreement but also admits to being in arrears with his home loan account.
- b. Plaintiff has established the delivery of the notice of section 129 notices in compliance with Section 129(7) of the NCA. The track - and -trace reports attached constitute written confirmation from the Post Office confirming that the notice reached the relevant post office.
- c. There never was any agreement to a payment plan and any payments made by him towards the debt were on his own accord and not in terms of an agreed payment plan. This is not a *bona fide* defence and fails to raise a triable

- d. The Defendant's request to refer the matter to a debt counsellor in terms of s85(a) of the NCA does not constitute a defence on the merits of the Plaintiff's claim.

[15] The Plaintiff further alleged that the Defendant has no *bona fide* defence or a triable issue and therefore summary judgment ought to be granted.

[16] Plaintiff also seek an order declaring the Defendant's property especially executable in terms of the bond which relief will be subject to an application in terms of Rule 46A of the Uniform Rules to be heard together with the application for summary judgment.

[17] The Defendant filed a plea defending the action that instigated the application for summary judgment. He also opposed the summary judgment application and filed an opposing affidavit mostly defending the Rule 46A application.

Plaintiff's case to the Rule 46A application

[18] Mr Roy Gomes an authorised agent acting on behalf of the Plaintiff deposed to affidavits in support of the Summary Judgment and Rule 46A applications averred that this Court should grant the order declaring the immovable property of the Defendant's specially executable.

[19] Plaintiff's attempts to assist the Defendant were not successful in that none of those attempts have resulted in the successful rehabilitation of the home loan account.

[20] Defendant remains indebted to Plaintiff; the mortgage bond is the only real security which Plaintiff has in respect of the claim. The order should be granted simultaneously with the summary judgment application. Plaintiff bases its claim in that at the time of the parties entering the loan agreement it was agreed to expressly, alternatively tacit, alternatively implied that in case of any breach of its terms by the Defendant, the Plaintiff would be entitled to approach this Court for an order moving for the property be declared executable immediately.

[21] That there has now been a breach which entitles the Plaintiff to the relief sought.

[22] The immovable property was specifically purchased for residential purpose and appears not to be the primary residence of the Defendant's anymore,

[23] The outstanding amount is substantial (arrears of R355 307.30 with a total outstanding balance of R3 579 055.65), selling of any movable property of the Defendant's will satisfy merely a small portion of the outstanding amount. Such a process will not be viable as it will further increase the Defendant's hardship and delay the inevitable sale of the immovable property.

[24] The sale of the immovable property will circumvent the further delays that will prejudice the parties due to the interest, charges and service fees continuing to accrue to the outstanding balance with the result that the equity in the property will be diminished. Selling the property will guard against deterioration of the property and secure a reasonable selling price.

[25] That the court should set a reasonable minimum reserve price taking into account the bank evaluation (R4 500 000) latest municipal valuation

(R3 850 000) and any outstanding rates and taxes (R61 805.67) and/or levies (R75 743.43) on the immovable property. Considering such a formula an amount of R2 784 950.90 is suggested as a fair and just reserve price.

Defendant's Case

To the Summary Judgment application

[26] As indicated above and in his plea the Defendant does not dispute having entered in a loan agreement and also executed an indemnity with and in favour of the Plaintiff on 17 November 2020. Defendant further confirmed to having executed a guarantee in favour of the Plaintiff on 16 March 2021.

[27] He denied the allegations of having breached the obligations of the loan agreement in that he failed to make punctual payments to Plaintiff and that he was now in arrears.

[28] Defendant alleges that it was on 29 August 2024 that he became aware of the Section 129 notice of demand that was allegedly sent to him by the Plaintiff in June 2024. On the former date he sent a payment proposal to the Plaintiff to pay off the arrear amount and also paid an amount of R30 000.

[29] On 7 November 2024 he made a further payment of R40 000.

[30] He indicates that he is over indebted as he is self employed and earns some R80 000. He has various other creditors he entered into credit agreements with and has fallen in arrears with them too. He has to pay a total monthly instalment of R83 500 towards his debt with his creditors. His living expenses amount to R9 000.

[31] He is therefore factually insolvent and has not previously gone before to a debt counsellor as he believed he qualifies for a debt review and therefore it would be just and equitable for this Court to refer him for such in terms of Section 85(a) of the NCA for an assessment and possibly a potential debt restructuring.

[32] That it would not be just and equitable for the immovable property be declared executable and that it is his primary residence. He therefore seeks that the relief sought by the Plaintiff be dismissed with costs.

[33] He further avers that whilst the section 129(1) notice was sent to him dated 27 June 2024, he did not receive it straight away and therefore could not respond immediately in terms of the time stipulations thereon.

[34] Only on 29 August 2024 did he respond to the Plaintiff explaining that he had fallen on hard times but things were getting better, hence he sent to the Plaintiff a proposed payment plan mentioned above to settle the full amount that was due which was a total of R141 743 in arrears. He also made a payment of R30 000,00 as the first payment.

[35] He confirms that this payment plan proposed to the Plaintiff was declined by way of correspondence dated 24 September 2024 which came through via email. He expected there would be a counter proposal in response or reasons given by the Plaintiff with regards to why there was such a rejection.

[36] On the same email however an employee of the Plaintiff advised him that he may apply for a special arrangement, a PBL special arrangement and forward it to FNB with supporting documentation.

[37] On 1 October 2024 he prepared and submitted the special arrangement application with all the necessary documents. Part of the documents that he submitted was proof of some funds which would be paid out of a R2 million investment policy meant to mature on 1 March 2025.

[38] He undertook to utilize such funds in full to pay off the arrears and that also he would use the relevant immovable property for business i.e. as an Airbnb for the November/January holidays (2024) to generate income to pay the arrears. There was no response from the Plaintiff to this proposed special arrangement.

[39] On 7 November 2024 he paid towards the bond R40 000 as a sign of his commitment to honour the new special arrangement proposed plan whilst he was still waiting for the official response to it.

[40] On 16 November 2024 and to his surprise, he was served by a Sheriff of the High Court with a combined summons. The summons showed that it was issued on 20 September 2024, some three weeks after he submitted his first payment plan which included the R30 000 payment. He feels that it was unfair of the Plaintiff to give him an illusion that they were negotiating with him in good faith when in reality, they had already filed their case with the registrar.

[41] This is why he raised the defence that Plaintiff has breached section 130 in particular subsection(3)(ii)(bb) of the NCA which stipulates that :

“3. Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

....

(c) that the credit provider had not approached the court –

...

(ii) despite the consumer having-

...

(bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement.”

To the Defendant the Plaintiff breached the above provisions, acting prematurely as he had made a proposal to the latter in good faith instead they turned around and approached this Court. The application should be dismissed.

Defence case to the Rule 46A application

[42] The Defendant used defences he raised in the application for summary judgment with some amplification, that he acted in good faith with the Plaintiff as he forwarded the proposed payment plan in August 2024, which was declined in September without any counter proposal or reasons thereto.

[43] The second attempt was him sending a request to enter into a special arrangement with Plaintiff in September 2024, he showed to the Plaintiff that he expected a pay out of funds to the value of R2million out of an investment policy which was to mature on 01 March 2025.

[44] To show his good faith he had also made payments in August and November 2024 to the total of R70 000.

[45] Thirdly that he also made an undertaking to the bank that he would be pro-active and put his apartment on Airbnb over holiday season(November-January 2024) where he would continue making payments towards arrears

whilst waiting for the investment to be paid out on the maturity date. There was no response from the Plaintiff on the above special arrangement application.

[46] On 16 November 2024 when he was served by a Sheriff with the combined summons regarding this matter. He felt betrayed by the Plaintiff who gave him the impression that there was an arrangement being discussed whilst it was preparing and issuing its papers for the action. The Plaintiff gave him an illusion that he was negotiating in good faith when it had already filed and issued the summons(in September 2024) a few days prior to declining his proposed payment plan in of August 2024.

[47] Defendant felt this was against the spirit and purport of the National Credit Act in particular Section 130(3)(c)(ii) (bb) which speaks against a credit provider approaching a court where there is an agreement to a proposal made between the credit provider and the debtor.

[48] This Court should not grant the relief of the execution of the house because Plaintiff acted prematurely by approaching this Court on 20 September 2024, when only formally declining the August payment plan submitted on 24 September 2024. He also made an arrangement to pay the arrears and had paid a total of R70 000 towards the payment plan before being served by the Sheriff.

[49] Defendant averred further that regarding sale in execution, this court should consider that the suggested reserve price will leave him further indebted to the Plaintiff and such would be unfair after all the above attempts he made and it should be set to the value of the 12 months of no repayments (R4 076 393) to avoid a large shortfall and a judgment in his name. He uses the property as his primary residence and on holidays opens it up for an Airbnb.

[50] He sought for this Court to dismiss the relief sought that of declaring the property specially executable and to also reject the reserve price. This Court instead should refer him for debt counselling in terms of S85(a) of the NCA which will assist him to have the debt counsellor declare the investment agreement reckless and he would get his R2 million pay out to then settle with the Plaintiff any outstanding amounts owed.

ISSUES TO BE DETERMINED

(Summary Judgment Application)

[51] Whether the Defendant has disclosed facts which, if proved at trial, would constitute a *bona fide* and legally cognisable defence to the Plaintiff's claim, or

[52] Whether the defence raised is illusory and intended merely to delay judgment.

(Rule 46 Application)

[53] Whether execution against the Defendant's primary residence is a proportionate and constitutionally permissible means of enforcing the judgment debt, given the Defendant's resistance to the sale; and

[54] Whether there are available (or none) less intrusive alternatives.

APPLICABLE LEGAL PRINCIPLES

(Summary Judgment)

[55] Summary judgment is an extraordinary but legitimate procedural mechanism designed to prevent sham defences and to ensure that a Plaintiff with a clear cause of action is not unduly delayed in the enforcement of its rights.

[56] The Plaintiff bears the onus of establishing a complete cause of action and a liquidated claim, after which the Defendant must disclose facts which, if proved at trial, would constitute a *bona fide* defence (*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)).

[57] Bold denials, vague allegations or reliance on unsubstantiated negotiations do not suffice.

[58] At the same time, summary judgment proceedings are not intended to shut out a Defendant who has raised a defence which is genuinely advanced and legally sustainable. A Defendant is not required to prove the defence on a balance of probabilities, but must set out material facts with sufficient particularity to demonstrate that the defence is *bona fide* and not raised merely for purposes of delay (*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W)). Where a triable issue is disclosed, the matter ought to proceed to trial.

[59] The court must therefore adopt a balanced approach. As emphasised in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), courts should not be overly reluctant to grant summary judgment where no genuine defence exists, nor should they strain to find a defence where none has been properly disclosed. Conversely, where material facts are

disputed or where the defence requires the ventilation of evidence, summary judgment is inappropriate.

[60] The court must determine whether the Defendant has disclosed a *bona fide* defence which, if established at trial, would constitute an answer to the Plaintiff's claim. The Defendant need not persuade the court of the probability of success but must set out facts which are legally sufficient and genuinely advanced.

(Rule 46A Application)

[61] The Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) held that execution against a person's home without judicial oversight may constitute an unjustifiable infringement of section 26, and that a court must consider whether such execution is just and equitable in the circumstances of each case.

[62] In *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC), the Constitutional Court confirmed that a court must exercise a discretion in Rule 46A matters and may not permit execution as a matter of course, even where a valid judgment debt exists. The court must actively engage with all relevant circumstances, including the nature of the debt, the personal circumstances of the debtor, whether the property is a primary residence, the proportionality between the debt and the value of the property, and whether less invasive means of debt recovery are available.

[63] The onus rests on the judgment creditor to place sufficient information before the court to enable it to determine whether execution is just and equitable. It has been held that a mere refusal by a debtor to consent to the sale

does not bar execution, but the creditor must demonstrate compliance with Rule 46A and that the constitutional considerations have been properly addressed.

[64] Opposition by the debtor must be *bona fide* and supported by evidence; bare assertions or speculative alternatives do not constitute a defence to execution.

[65] Courts are further enjoined to consider whether the imposition of a reserve price is necessary to prevent an unjust sacrifice of the property. In *Standard Bank of South Africa Ltd v Hendricks and Another* 2019 (2) SA 620 (WCC), the court endorsed the fixing of a reserve price as an important safeguard to balance the rights of the creditor and debtor, ensuring that the execution process does not result in disproportionality or unjust enrichment, while still permitting the creditor to enforce its judgment.

DISCUSSION AND ANALYSIS

Submissions made in Court

Summary Judgment

[66] Mr Jonker for the Plaintiff submitted that the Defendant did not deliver an opposing affidavit to the summary judgment application as was required by rule 32(3)(b), that the only opposing affidavit filed was in response to the Rule 46A application.

[67] That it can be accepted that the Defendant raises no defence on the merits but confines himself to addressing the reasons why he contends that his property should not be declared executable. The Defendant in his plea has not disputed

any of the allegations contained in the Plaintiff's particulars of claim insofar as they relate to the monetary relief sought, the summary judgment application remains unopposed and should be granted.

[68] He further submitted that even if the court considers the defenses raised in the plea, they do not raise a *bona fide* defence to the summary judgment application. The Defendant's attempt, in the answering affidavit, to advance a defence based on allegations that the parties had reached an agreement pursuant to his proposal—and thus, in terms of section 129(1) read with section 130(3)(c)(ii)(bb) of the NCA, contending that the Plaintiff acted prematurely in initiating legal proceedings — cannot be sustained.

[69] Mr. Jonker made strong submissions against this that firstly the defense was never pleaded therefore it is without merit, further that even if it was to be hypothetically accepted, there was no agreement to any proposal or payment rearrangement between the Plaintiff and the Defendant as contemplated in section 130(3) of the NCA. Such was also confirmed by the Plaintiff's attorneys by way of correspondence dated 24 September 2024.

[70] On this correspondence, the Defendant was expressly advised that his proposed payment plan was declined on behalf of the Plaintiff therefore the court must hold that the Defendant has failed to raise any *bona fide* defence to the Plaintiff's monetary claim and the summary judgment based on the above ought to be granted.

[71] The Defendant who appeared in person made submissions stating that he has made numerous attempts to resolve the matter with the Plaintiff in good faith but out of all those genuine attempts he was either ignored or rejected. He felt manipulated by the Plaintiff.

[72] According to the Defendant the Plaintiff acted prematurely by approaching this court on 20 September 2024 yet only formally declining his payment plan (4 days later) on 24 September 2024.

[73] The Defendant further referred this court to an FNB home loan journey brochure that is dealing with how FNB is open to making arrangements to repay area amounts with creditors from a single lump sum payment to payment over a period not more than 12 months.

[74] He felt that Plaintiff created this illusion to him that there was a possibility of a payment plan that could be arranged and it was all possible, it stopped him from going for debt counselling which he would have gone for, had he known that there was no negotiation or agreement between them.

[75] He does not deny that he owed the Plaintiff the monies due but that he has a defence to the summary judgment application as stated above. He requested that this Court not to grant summary judgment on those basis but dismiss it so that he can go for debt counselling which will assist in getting his (R2 million) investment paid out, and within months he will in turn pay the outstanding amount due to the Plaintiff.

Analysis-Summary Judgment

[76] I have considered that there was no evidence to show that there was any reasonable inference created that there was an agreement to a payment plan, the first application was declined the second one there was no response to it after he had applied for the special arrangement.

[77] Defendant could show no follow up emails where it can be shown that Plaintiff replied, giving him hope that they were either looking into his request or not.

[78] I find that the Defendant's own interpretation of Plaintiff's silence after he forwarded his special arrangement application in September 2024 to mean that there was negotiation or an agreement between them was wrong.

[79] The Defendant's reliance on an unanswered request for a special arrangement does not disclose a *bona fide* defence. A mere hope that negotiations might result in indulgence is insufficient to resist summary judgment (*Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek JV supra*).

[80] Silence or non-response does not constitute acceptance in the absence of a duty to speak (*McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A)). Any reliance on attempted negotiations may, at best, be relevant to proportionality in execution proceedings, but does not affect the Plaintiff's entitlement to judgment (*Gundwana v Steko Development CC supra*).

[81] The Defendant's contention that the matter ought to be referred to debt review, such does not constitute a defence to summary judgment where it was invoked after the institution of legal proceedings, (or where it has been lawfully terminated in terms of section 86(10) of the National Credit Act).

[82] A mere intention to apply for debt review as raised by the Defendant, absent proof that the agreement was under debt review prior to enforcement, does not amount to a *bona fide* defence (*Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA)). Debt review is not a bar to summary judgment unless it was

timeously and lawfully invoked prior to the institution of proceedings and remains extant.

[83] In that regard I am convinced that the Defendant has failed to raise a *bona fide* defence and summary judgment application stands to be granted.

Rule 46A Application

Plaintiff's submissions

[84] Mr Jonker referred me to relevant case law and submitted that the grounds advanced by the Defendant to prevent the property from being declared specially executable should be rejected by this Court.

[85] The payment plan was rejected in writing and as clarified in reply to this application, the reasons are given as to why the R2million investment was not acceptable to the Plaintiff. It was not a policy capable of being redeemed on notice, and therefore not a liquid asset in the manner of publicly listed shares. In any event to date this investment has not been realised further proving its illiquidity.

[86] The Defendant continues to be in arrears and his last payment to the bond has increased to R663 970.02 representing approximately 19.8 months in arrears. He provides no evidence on how he would settle these and maintain the required monthly instalments.

[87] Mr Jonker further submitted that a payment arrangement which was not accepted does not constitute an agreement and/or a bar to execution.

[88] The Defendant has not alleged that he would be rendered homeless should the property be declared executable nor does he contend that his section 26(1) constitutional rights be infringed. There are no reasonable alternative means to satisfy the judgment debt other than by execution against the property.

Defendant's submissions

[89] The Defendant's submission was a repeat of his defence above

[90] That he requests the court to find that the Plaintiff acted *mala fide* by giving him the impression that there was a negotiation through arrangements being made.

[91] He has attempted to make payments , though the last one in November 2024, there is still a chance to access funds in his investment policy and if he is referred for debt counselling will be paid out.

[92] He does have alternative accommodation but there was no need to declare the house executable when he could secure the funds in a few months' time.

[93] The execution of the immovable property would still leave him deeply in debt and lower his credit worthiness.

[94] If the Court is not with him on execution, the house ought to be sold at the value of the closing balance after 12 months of no repayments totalling R4 076 393.

[95] The reserve price of R2 700 000 sought by the Plaintiff is completely unreasonable and unfair towards him and ought to be rejected. It would leave

him nearly 1million rand in debt to the home loan with a judgment against his name.

Analysis-Rule 46A Application

[96] I have taken into account that Rule 46A requires a balancing exercise in which the court must weigh the creditor's right to execute and realise its security against the debtor's constitutional rights, ensuring that execution against immovable property is a measure of last resort and is carried out only where it is proportionate, just, and equitable in all the circumstances.

[97] Judicial oversight under Rule 46A, as explained in *Gundwana v Steko Development supra*, is concerned with proportionality in execution and does not oblige a creditor to postpone enforcement indefinitely. In the absence of any viable alternative to execution, the declaration of executability, subject to a reserve price, is just and equitable.

[98] The Defendant has failed to place before this Court any facts demonstrating a realistic alternative to execution. The reliance on an unanswered request for a special arrangement does not outweigh the Plaintiff's right to enforce the judgment.

[99] The Defendant's advanced amounts were no more than a speculative hope that indulgence might have been granted, which is insufficient in law as a defence to executability of the property (*Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture supra*).

[100] As indicated many times above, a unilateral proposal, without acceptance, does not give rise to an agreement, and silence or non-response by the Plaintiff

herein did not amount to acceptance (*McWilliams v First Consolidated Holdings (Pty) Ltd supra*).

[101] Further, the expected investment policy never materialised a year ago on 01 March 2025, I accept Mr Jonker's submission that this was not a liquid asset. It is a year later, there has been no payment towards the bond; Defendant has been residing on the property for free, his last payment towards the bond was an amount of R40 000 in November 2024.

[102] I have considered that the property is of high value, the debt increases daily, a sale at a regulated reserve price is a realistic approach and it will preserve dignity and proportionality.

[103] The Defendant has not placed any evidence before the Court demonstrating that execution would result in homelessness, nor that alternative accommodation is unavailable. When asked in court, he mentioned that he can move in with a family member (his mother).

[104] In that regard I find there are no reasonable alternative means to satisfy the judgment debt other than by execution against the property. The property accordingly stands to be declared especially executable, subject to the reserve price determined by this Court.

Reserve price

[105] This Court has to actively exercise its constitutional oversight in accordance with *Jaftha v Schoeman*; *Van Rooyen v Stoltz supra* and *Gundwana v Steko Development (supra)*.

[106] I am mindful of the Defendant's concern that execution may result in a substantial residual indebtedness. The property, while partly used as a residence, is also utilised for business purposes, and the proportionality enquiry is therefore informed by both residential and commercial considerations.

[107] I have also considered the Plaintiff's submission of the daily increment of the debt to its prejudice and the value proposed as reasonable reserve price mentioned above.

[108] It is important to state upfront that execution remains a distressed process and cannot be expected to achieve market value, which serves only as a guide (*FirstRand Bank Ltd v Folscher and Another* 2011 (4) SA 314 (GNP)).

[109] Notwithstanding the Court's sympathetic consideration of the Defendant's position, the prolonged failure to service the bond by him while retaining occupation and deriving commercial benefit weighs against the fixing of a market-value sale or an inflated reserve as he suggested.

[110] In my view a carefully adjusted and realistic reserve price accordingly constitutes an appropriate judicial intervention that balances the competing interests and accords with the approach endorsed in *Standard Bank of South Africa Ltd v Hendricks and Another supra*. Reserve prices are discretionary, must be realistic, and should not be used to frustrate execution under the guise of debtor protection.

[111] In balancing the above interests and taking into account the provisions of Rule 46A(9)(b) and also using the Court's discretion for the matter to reach finality an amount of R3 150 000 is set as it remains fair and balanced reserve price.

COSTS

[112] It is trite that the award of costs remains a matter within the discretion of the Court, which discretion must be exercised judicially, having regard to fairness and all the circumstances of the case (*Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69; *Fripp v Gibbon & Co* 1913 AD 354 at 363). In proceedings under Rule 46A, that discretion is further informed by the constitutional imperative of judicial oversight. (*Gundwana v Steko Development CC supra*).

[113] The Plaintiff is the successful party there is no reason why the costs should not follow the cause.

[114] I find that opposition in this matter was unmeritorious or served merely to delay enforcement, the mixed-use nature of this immovable property also weighs against a departure from the contractual costs regime. In that regard I find that the agreed scale of costs remains to be enforced.

CONCLUSION

[115] Taking all the above into account, the following order must follow:

- (a) Summary judgment is granted in favour of the Plaintiff against the Defendant for:
 - (i) Payment of the sum of R3 415 893.19.
 - (ii) Interest on R3 415 893.19 calculated daily and compounded monthly from 30 June 2024 to date of final payment, both days inclusive, at a variable rate which is linked to the Plaintiff's mortgage

bond base rate, which variable interest rate was 11.18%, nominal per annum, as at the date of the certificate of balance.

- (b) declaring SECTION 45 NAUTICA & SECTION 57 NAUTICA held by virtue of Deed of Transfer No. S[...] executable for the said sum
- (c) That the Registrar of this Court is directed to issue a warrant of execution to enable the sheriff to attach and execute upon the immovable property as described above, in satisfaction of the judgment debt, interest and costs
- (d) That this Court sets a Reserve Price of R3 150, 000.00 for the sale in execution.
- (i) That the Plaintiff be and is hereby entitled to approach the Court on the same papers (duly supplemented) for a variation of the Reserve Price, if a change in the factors influencing the reserve price necessitates a change of the Reserve Price. The application may be brought before any judge of this division.
- (e) That the Defendant is advised that, the provisions of Section 129 (3) and (4) of the National Credit Act 34 of 2005 ('the NCA'), may apply to the judgment granted in favour of the Plaintiff.
- (f) The Defendant may prevent the sale of the property referred to above if Defendant pay the Plaintiff all of the arrear amounts owing to the Plaintiff, together with the permitted default charges and reasonable costs of enforcing the agreement up to the time of the re-instatement, prior to the property being sold in execution.
- (g) The arrear amounts, enforcement costs and default charges referred to above may be obtained from the Defendant.
- (h) The Defendant is advised that the arrear amount is not the full amount of the Judgment debt, but the amount owing by the

Defendant to the Plaintiff, without reference to the accelerated amount.

- (i) Costs of suit on the scale as between attorney and client.

**MAGONA-DANO, AJ
ACTING JUDGE OF THE
HIGH COURT OF SOUTH
AFRICA, WESTERN CAPE
DIVISION, CAPE TOWN**

Appearances:

For the Plaintiff:	Adv. JW Jonker
Instructed by:	Minde Schapiro & Smith Inc.
For the Defendant:	In person – Mr. Wilkinson