IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: 5090/2024

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

JAN ABRAHAM CHRISTOFFEL DRY Defendant

Coram: Reddy J

Judgment reserved: 27 February 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be on 27 March 2026 at 16h00.

Summary: Civil Procedure — Summary Judgment — Application for payment of mortgage debt and special executability of immovable property.

Deposition — Founding Affidavit — Validity of commissioning — Commissioner of Oaths serving as a panel attorney for the plaintiff bank — Requirement of independence and impartiality under Regulation 7(1) of the

Justices of the Peace and Commissioners of Oaths Act 16 of 1963 — Direct or indirect financial interest creating reasonable doubt as to objectivity and compliance with peremptory regulations.

Locus Standi — Cession of Rights — Debt and mortgage bond originating with a predecessor in title (Saambou Bank Limited) — Necessity of proving a registered cession of the mortgage bond at the Deeds Office to enforce real rights *in rem* — Procedural non-compliance with Uniform Rule 18(6) regarding the annexing of written agreements establishing the "chain of entitlement".

Evidence — Admissibility — Personal knowledge of the deponent — Hearsay concerns where claims pass through successive corporate entities — Requirement for the deponent to establish the reliability of acquired accounting records rather than merely regurgitating stored data.

Liquidated Claim — Calculation of Debt — Inclusion of unliquidated and untaxed legal costs in the capital balance — Effect of such inclusion on the liquidity of the claim and the reliability of interest calculations — Contractual provisions cannot override Rule 32 liquidity requirements.

National Credit Act 34 of 2005 — Section 129 Notice — Accuracy of reflected arrears as a jurisdictional prerequisite — Inflated figures due to untaxed legal costs rendering the notice defective and providing a *bona fide* defence.

Summary Judgment Refused — Identification of multiple triable issues concerning standing, statutory compliance, and the nature of the claim — Interests of justice requiring the matter to proceed to trial.

JUDGMENT

REDDY J:

Introduction

[1] The plaintiff, FirstRand Bank Limited ("FirstRand"), applies for summary judgment against the defendant, Jan Abraham Christoffel Dry ("Dry"), for payment of the amount of R 264 308.70, together with interest, and for an order declaring Remaining Portion 2 of Erf 1[…], Lichtenburg Township, specially executable. Dry has since made payments, and the monetary judgment now sought makes for this adjustment.

[2] The application is opposed. Dry has raised several points *in limine* which have the effect, conjunctively or disjunctively, of a substantive defence directed at FirstRand's standing, compliance with statutory prescripts, and the correctness and liquidity of the amount claimed.

Factual background

[3] The claim is predicated on a mortgage bond originally registered by Saambou Bank Limited over Dry's immovable property situated at 1[…] D[…] N[…] M[…] (M[…]) Drive, Lichtenburg. Following the curatorship of Saambou Bank Limited, its assets and liabilities were transferred to BOE Bank Limited and thereafter to FirstRand.

[4] FirstRand alleges that Dry defaulted on his contractual obligations. A notice in terms of section 129 of the National Credit Act 34 of 2005 ("the NCA") was dispatched as a peremptory prelitigation step. As of 5 July 2025, the outstanding balance was alleged to be R460 843.23, with arrears of R38 839.82.

[5] Dry entered an appearance to defend. What followed was the present application for summary judgment.

Points in limine

Validity of the founding affidavit

[6] Dry contends that the founding affidavit is defective because it was commissioned by a commissioner of oaths who is a panel attorney for FirstRand. The affidavit in support of the summary judgment application was deposed to by one Roy Gomes, employed by FirstRand as Manager Legal Recoveries. The affidavit was commissioned at Fairlands on 6 February 2025 by Mrs Rita Nel, a practising attorney and Head of the Legal Department of Glover Kannieoppan Inc. Dry contends that Glover Kannieoppan Inc. forms part of the panel of attorneys which FirstRand utilises for its recovery's litigation, and that this relationship renders both Roy Gomes and Rita Nel not completely independent of FirstRand and each other. It is accordingly submitted by Dry that the purported affidavit is invalid for non-compliance with Regulation 7(1) of the Regulations governing the administering of an oath or affirmation published under GN R1258 in GG3619 of 21 July 1972, as amended, read with section 10 and section 7 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, and that in terms of section 7 of the Act, Mrs Rita Nel was not permitted to commission the affidavit. FirstRand disputes this contention and submits that the commissioner is not the attorney of record in these proceedings and that no disqualifying interest is established.

[7] In *S v Munn*[1], the court held that the purpose of obtaining the deponent's signature to an affidavit is primarily to obtain irrefutable evidence that the

[1] 1973 (3) SA 734 (NC) at 737E–F.

relevant deposition was indeed sworn to. Non-compliance with the regulations does not, per se, invalidate an affidavit if there was substantial compliance with the formalities. The requirement of impartiality and the prohibition on a commissioner attesting an affidavit in a matter in which they have an interest derive from Regulation 7(1) of the Regulations promulgated under the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, which has been consistently upheld in the case law.

[8] In *LexisNexis South Africa (Pty) Ltd v Minister of Justice and Constitutional Development*[2] confirmed that strict compliance with the Regulations is required. The Court held that the requirement that the deponent sign the affidavit in the presence of the commissioner of oaths is peremptory, and that remote commissioning does not comply with the Regulations. The SCA stressed that the commissioner must be physically present and impartial, with no interest in the matter.

[9] In *Radue Weir Holdings Ltd t/a Wiers Cash and Carry v Galleus Investments CC t/a Bargain Wholesalers*[3]the court emphasized that a commissioner must be impartial. While a panel attorney's interest may be indirect, where the validity of the very document initiating a drastic remedy like summary judgment is questioned, the court must lean toward caution.

[10] Considered holistically, these authorities make clear that the impartiality of the commissioner of oaths is not a mere formality but a substantive safeguard. The enquiry, however, is not confined to any apprehension of bias, but concerns compliance with Regulation 7(1) of the Regulations promulgated

[2] 2026 1 All SA 293 (SCA) paras [19 -41].
[3] 1998 (3) SA 677 at para 681 (F).

under the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, which prohibits a commissioner from attesting an affidavit in a matter in which that commissioner has an interest.

[11] Given the drastic nature of summary judgment proceedings, trial courts have consistently required strict compliance with procedural and evidential requirements. A verifying affidavit which does not clearly comply with the Regulations cannot readily be relied upon.

[12] Designating a commissioner as a panel attorney implies an ongoing professional relationship with the litigant. Regulation 7(1) is mandatory. A panel attorney has an indirect financial interest in the bank's litigation, which strongly emphasizes the appearance-of-impartiality requirement under the Regulations. Whether this constitutes a disqualifying interest is, at the very least, a matter that raises reasonable doubt. In the context of summary judgment proceedings, such doubt cannot be resolved in favour of FirstRand.

<u>*Locus standi* and the chain of entitlement</u>

[13] Dry further disputes FirstRand's *locus standi*, pointing out that the debt and mortgage bond originated with Saambou Bank Limited. The challenge raises issues relating to both the enforceability of the security and the core evidence of the claim. FirstRand asserts that it is the lawful holder of the rights and that the mortgage bond and Certificate of Balance annexed to the papers provide sufficient *prima facie* proof of its *locus standi*.

[14] While a personal right of action may be ceded, the real right of security created by a mortgage bond is enforceable only by the party in whose favour it

is registered. A mortgage bond is accessory to the principal obligation. In our law, a mortgage bond has a dual nature[4].

[15] In the absence of proof of the registration of any cession of the bond at the Deeds Office, it remains a triable issue whether FirstRand is entitled to seek relief *in rem*, including an order of special executability.

[16] This failure of FirstRand to properly clothe itself with *locus standi* is compounded by a procedural lack of compliance with Rule 18(6) of the Uniform Rules of Court. To this end, Dry claims that FirstRand failed to annex a complete and legible copy of the contract. Rule 18(6) requires, amongst others, that a party who relies upon a written agreement in their pleading, annex a true copy thereof or of the part relied on in the pleading to that pleading. The written agreement serves as a vital link in the chain of a party's cause of action.[5] Failure to attach it may result in the pleading being excepted to on the ground that the pleading does not sustain a cause of action or does not disclose a cause of action.

[17] In the present matter, the absence of the necessary transfer certificates between Saambou, BOE, and FirstRand leaves the paper trail incomplete and FirstRand's entitlement in question.

[18] Aside from the contract being a vital chain in FirstRand's cause of action, there is the question of the deponent's personal knowledge as set out in the verifying affidavit in support of summary judgment. When a claim has passed through successive corporate entities, a deponent must explain how they

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[4] *Lief NO v Dettmann* 1964 (2) SA 252 (A) p261.

[5] *South African Railways and Harbours v Deal Enterprises (Pty)* Ltd 1975 (3) SA 944 (W) at 953A-H.

acquired knowledge of the original records. This necessitates establishing the reliability of the collated accounting records passed through the various entities. An affidavit that merely regurgitates stored data, without establishing a basis for its admissibility, raises serious concerns of hearsay and is legally insufficient to meet the evidential threshold required for summary judgment. This point, viewed collectively with the accompanying collateral legal nuances, raises a triable issue.

Liquidity and the interest calculation

[19] Dry points out that the amount claimed includes capitalized legal costs, which have not been taxed. FirstRand relies on contractual provisions that permit the capitalization of such costs.

[20] For purposes of summary judgment, however, the claim must be liquid, in the sense of being capable of prompt and exact computation. The inclusion of unliquidated legal costs in the capital balance undermines that requirement. Contractual provisions cannot override Rule 32's liquidity requirements.

[21] The proposition that untaxed or unagreed legal fees folded into a capital claim render that claim unliquidated, and therefore incapable of summary judgment, finds direct support in *Sasfin Bank Limited and Another v Makatsang Cleaning Services (Pty) Ltd and Others*[6], where the Free State High Court refused summary judgment after plaintiff's counsel conceded that the amount claimed for legal costs could not be sustained, yet those amounts formed part of

[6] (5691/2019) [2021] ZAFSHC 6 (28 January 2021). See also *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 383A–C (certificate of balance constitutes prima facie proof only and may be rebutted by specific factual discrepancies); *Changing Tides 17 (Pty) Ltd N.O. v Congwane* (2015/94919) [2016] ZAGPJHC 128 (30 May 2016) at paras 46–47 (veracity of certificate of indebtedness declined where deponent lacked sufficient knowledge of underlying records).

the total capital sum certified in the certificate of balance. The certificate contradicted the underlying statements of account and could not reliably establish the debt. Furthermore, a certificate of balance constitutes no more than prima facie proof of indebtedness and may be rebutted where specific accounting discrepancies are identified: *Senekal v Trust Bank of Africa Ltd*; *Changing Tides 17 (Pty) Ltd N.O. v Congwane*. Dry has identified specific accounting discrepancies in FirstRand's own documentation, which go to the face of the Certificate of Balance and rebut its conclusive proof clause. Where those discrepancies raise a genuine dispute as to the accuracy of the certified figure, the certificate cannot be accepted as reliable proof of the debt for purposes of summary judgment.

[22] Moreover, when interest is calculated on a balance that includes disputed or unliquidated components, the calculation becomes unreliable. In such circumstances, the claim as a whole cannot properly be classed as a liquidated amount in money and is deficient of summary judgment.

[23] It is further observed that the underlying contractual documents, originating from the era of Saambou, contain numerous references to the Usury Act 73 of 1968, particularly in relation to the calculation of finance charges and bond cancellation costs. As the regulatory landscape has shifted significantly since the inception of this debt, the plaintiff's transition from these older statutory frameworks to the current NCA, and its standing to do so as a successor in title, constitute a technical legal nexus best ventilated through trial testimony rather than summary judgment proceedings.

<u>Rule 46A</u>

[24] Dry submitted that the application for an order of executability is premature until a money judgment has been secured. FirstRand places store on ABSA *Bank Limited v Mokebe* [7]which mandates that the money claim and the executability claim must be heard together.

[25] The *Mokebe* decision was intended to protect debtors by ensuring a court considers all circumstances, including the right to housing, at the same time the debt is adjudicated.

[26] The money judgment and the relief sought under Rule 46A are interconnected. That being so, rule 46A presupposes a valid and competent monetary claim. Where summary judgment on the debt is refused, the court's executionary relief becomes moot. This submission does not assist Dry. Accordingly, it must be dismissed.

<u>Section 129 of the NCA</u>

[27] Dry further challenges the delivery and accuracy of the s129 notice. FirstRand claims that the notice was sent to the *domicilium* address and that Dry's default has been continuous. Strict compliance with s129 is a jurisdictional prerequisite to enforcement proceedings under the NCA. In my view, it falls into the category of an inflexible precursor to litigation in cases where the NCA applies.

[28] Given the importance and significance of s129, the notice must accurately reflect the arrears to fulfil its statutory purpose of affording the consumer a meaningful opportunity to remedy the default. If the inclusion of untaxed legal costs inflates the arrears figure, the notice is not accurate, and the right to

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[7] 2018 (6) SA 492 (GJ)

remedy the default is rendered nugatory. As I see it, the notice does not meet that requirement and provides a *bona fide* defence to enforcement.

[29] While s130(4)(b) of the NCA permits a court to adjourn a matter where a notice is defective, such a postponement is inappropriate here. The challenges regarding the validity of the commissioning and the registered standing of FirstRand go to the heart of the application's foundation. They cannot be cured by a mere adjournment for the re-service of a notice.

[30] Dry’s challenge to the claim's liquidity is supported by apparent discrepancies in FirstRand’s own documentation. A Section 129 notice issued in November 2021 reflected arrears of R38,839.82. By the time the Certificate of Balance was presented in February 2026, this figure had escalated to R224,443.31.

[31] Furthermore, FirstRand’s Certificate of Balance explicitly states that interest is calculated and compounded monthly in accordance with Regulation 40 of the NCA. Given Dry’s specific denial of the correctness of the balance, the application of this statutory formula to the historical debt constitutes a material dispute. The mathematical accuracy of these calculations, especially given the fluctuating interest rates cited in the papers, cannot be determined without the benefit of cross-examination.

<u>The law</u>

[32] To resist summary judgment, a defendant must show a *bona fide* defence under rule 32(3)(b). In *Breitenbach v Fiat SA (Edms) Bpk* [8] We were reminded that the defence must not be "set out .. baldly vaguely or laconically".

[33] In *Maharaj v Barclays National Bank Ltd* [9] "the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law" and *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*.[10] "no bona fide defence to an action." The courts have consistently held that summary judgment should only be granted if the plaintiff has an "unanswerable case." (own emphasis).

[34] Summary judgment is a procedural mechanism designed to prevent sham defences. It is not intended to shut a defendant out of court where triable issues are disclosed. The defendant is required only to set out facts which, if established at trial, would constitute a defence good in law. The court does not weigh probabilities at this stage.

[35] Where material disputes arise concerning standing, statutory compliance, admissibility of evidence, or the liquidity of the claim, summary judgment is not appropriate.

<u>Discussion</u>

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[8] 1976 (2) SA 226 (T) p228H – 229.

[9] 1976 (1) SA 418 (A) at p423G.
[10] 2009 (5) SA 1 (SCA) at para 29B.

[36] The issues raised regarding the validity of the founding affidavit, the plaintiff's right to enforce the bond, the deponent's personal knowledge, the significant variations in the arrear figures, and the statutory interest calculations under Regulation 40 of the NCA are neither contrived nor peripheral.

[37] Furthermore, insofar as the ancillary relief sought by FirstRand for an order for special executability, as alluded to a finding that Dry has disclosed *bona fide* defences which warrant a trial, the ancillary relief sought by FirstRand, namely the declaration of the immovable property as specially executable under Rule 46, is rendered moot for this application. It falls to be refused alongside the main claim.

[38] Dry has disclosed facts which, if proven, would defeat or materially affect FirstRand's claim. In sum, FirstRand's case cannot be described as unanswerable. In these circumstances, the interests of justice require that the matter proceed to trial.

<u>Order</u>

[39] Resultantly, the following order is made:

1. The application for summary judgment is refused.
2. The defendant is granted leave to defend the action.
3. The costs of the application are costs in the cause.
4. The action when certified trial ready is to be enrolled before Reddy J on a date arranged with the Offices of the Registrar and the Judge President.

A REDDY

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the Plaintiff: Advocate C Wessels

Instructed by: Van Hulsteyns Attorneys

C/O Maree and Maree Attorneys Inc

For the Defendant : Advocate H P Van Nieuwenhuizen

Instructed by: Bosman & Bosman Attorneys

C/O Labuschagne Attorneys