REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2025-006711

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

15 June 2026
DATE

[redacted] SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

TSUANAMI TRADING ENTERPRISE CC First Respondent
(Registration no:2006/068582/23)

KENTSHI JOHANNES MOKOENA Second Respondent

This Judgment is handed down electronically by circulation to the Applicant's Legal Representatives and the Respondents by email, publication on Case Lines and Saflii. The date for the handing down is deemed to be 15 June 2026.

JUDGMENT

MUDAU, J:

Introduction

[1] This is an application by Standard Bank of South Africa Limited (the "Bank") against Tsuanami Trading Enterprise CC (the "first respondent") and Mr Kentshi Johannes Mokoena (the "second respondent") in his capacity as surety. The Bank seeks three principal forms of relief:

i. a money judgment against the respondents, jointly and severally, for amounts owing under a business overdraft and a business revolving credit plan;

ii. the return of three vehicles sold under instalment sale agreements (a MAN truck and two Doosan forklifts) of which the Bank remains the owner; and

iii. leave to return to court after the sale of those vehicles to claim any shortfall between the outstanding balances and the auction proceeds.

[2] The respondents oppose the application. They raise two procedural points *in limine* – alleged non-compliance with Uniform Rule 41A (mediation) and prescription of certain claims – and, in their heads of argument belatedly, a defence based on section 129 of the National Credit Act 34 of 2005 (the "NCA"). They also contend that the parties remain in settlement discussions and that the court should pause the proceedings to allow for alternative dispute resolution.

[3] Having considered the founding, answering and replying affidavits, the heads of argument, and the record as a whole, I find that the respondents have raised no bona fide defence on the merits,[1] that the points *in limine* are without

[1] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I–635A.

substance, and that the Bank is entitled to the relief it seeks. What follows are the reasons for that conclusion.

Background facts

[4] The first respondent is a close corporation. The second respondent is its sole member and bound himself as surety and co-principal debtor under three suretyship agreements dated 15 March 2011 (limited to R250,000), 6 April 2011 (unlimited), and 23 February 2016 (limited to R500,000).

[5] The Bank and the first respondent concluded three instalment sale agreements:

a) First agreement (27 October 2020): Sale of a 2020 MAN TGS truck. Principal debt: R1,514,527. Outstanding balance as at the founding affidavit: R299,981.60 plus interest.

b) Second agreement (30 July 2021): Sale of a 2014 refurbished Doosan forklift. Outstanding balance: R92,020.37 plus interest.

c) Third agreement (21 August 2021): Sale of a 2017 Doosan forklift. Outstanding balance: R99,517.34 plus interest.

[6] The Bank also extended: A business overdraft facility (4 February 2021) with an initial limit of R300,000. As at the founding affidavit, the first respondent owed R298,952.64 plus interest at 19.25% per annum. A business revolving credit plan (BRCP) (22 February 2016) with an initial limit of R200,000. The outstanding balance was R169,648.08 plus interest at 21.95% per annum.

[7] The Bank alleges, and the respondents do not genuinely dispute, that the first respondent defaulted on its payment obligations under all these agreements. A consolidated letter of demand dated 17 October 2023 was sent to the respondents, calling on them to remedy the breach within ten days. They did not do so.

The answering affidavit and its timing

[8] The application was issued on 21 January 2025 and served on the respondents on 22 January 2025. The respondents did not file an answering affidavit within the prescribed time. The matter was placed on the unopposed roll for 12 June 2025.

[9] On the morning of 12 June 2025 – while the unopposed hearing was in progress – the respondents delivered their answering affidavit. No application for condonation of the late filing was filed, either then or subsequently.[2]

[10] The Bank correctly submits that the late filing without condonation is an irregularity that could justify the court in disregarding the answering affidavit. However, in the interest of finality and because the answering affidavit does not materially advance a defence, I will consider its contents but afford them little weight. The dilatory tactic of filing on the day of an unopposed hearing, without explanation or condonation, tends to confirm that the respondents' opposition is not bona fide.

The Rule 41A (mediation) point in limine

[11] The respondents argue that the Bank failed to serve a notice in terms of Uniform Rule 41A, which requires a party issuing proceedings to indicate whether it agrees to or opposes mediation. They contend that this failure is fatal and that the application should be dismissed or stayed pending mediation.

[12] This argument is factually incorrect and legally unsustainable. First, the Bank has filed a notice of opposition to mediation dated 4 March 2025, served on the respondents' erstwhile attorneys (Cox Yeats) by email. A further notice was served on 24 June 2025 by the Bank's current attorneys, Jason Michael Smith Incorporated. There was therefore no non-compliance. Second, Rule 41A does

[2] See generally, *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.

not compel mediation.[3] It requires the parties to state their position. The Bank stated its opposition, and it is entitled to do so. The rule does not give a respondent a veto right over the applicant's choice to proceed directly to court. Third, the respondents' own conduct has frustrated any meaningful mediation. They surrendered the two forklifts – but only after the forklifts had been stripped of essential parts, rendering them of little to no value. They have refused the Bank access to the truck to conduct a valuation. A party cannot simultaneously refuse to cooperate with pre-litigation engagement and then complain that the other party failed to mediate. The mediation point is accordingly dismissed.

The prescription points in limine

[13] The respondents plead that parts of the Bank's claim have prescribed under the Prescription Act 68 of 1969. In particular, they allege that the debt under the BRCP became due on 21 February 2019 (more than three years before service of the application on 22 January 2025) and that the instalment sale debts became due on various dates in 2023 and 2024.

[14] The Bank raises several answers, all of which are sound. First, the claim for the return of the vehicles is not a "debt" as ordinarily understood for prescription purposes. The Bank is the owner of the vehicles under the instalment sale agreements until full payment is made. An action by an owner to recover its property does not prescribe in the same way as a monetary claim. Even if it were a debt, the cause of action arises only upon demand and cancellation, which occurred here on 17 October 2023, well within three years of the application.

[15] Second, in relation to the monetary claims (overdraft and BRCP), the agreements expressly provide that the full outstanding amount is payable *on demand*. The Bank made written demand on 17 October 2023. Prescription

[3] See *Kalagadi Manganese (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2021] ZAGPJHC 127 at para 24; *City of Cape Town v Michels and Others* [2025] 3 All SA 95 (WCC) at para 168.

commenced on that date. The application was served on 22 January 2025, which is less than three years later. The debts had not prescribed.

[16] Third, the respondents have acknowledged liability in ways that interrupt prescription. The payment of R10,000 (or R12,000 as later alleged) after the proceedings were issued is an express acknowledgment of indebtedness. The surrender of the forklifts, even in a stripped condition, is a tacit acknowledgment of the Bank's rights. Section 14 of the Prescription Act provides that an acknowledgment of liability interrupts prescription.

[17] Fourth, the respondents' allegation that the BRCP debt became due on 21 February 2019 is bald and unsubstantiated. The BRCP was a *revolving* facility: The first respondent could draw, repay, and redraw. Under clause 16.4 of the agreement, the Bank was entitled to withdraw the facility at any time. The debt became due only when the facility was called up, which occurred on 17 October 2023. There is no proof that any specific amount was due and payable on 21 February 2019, and the respondents' *ipse dixit* does not discharge the onus that rests on a party pleading prescription. The prescription point is therefore dismissed.

The belated reliance on section 129 of the NCA

[18] In their heads of argument filed on 28 October 2025 – nearly ten months after the application was launched – the respondents for the first time raised a defence under section 129 of the NCA. They argue that the Bank, as credit provider, was obliged to deliver a notice under section 129 before instituting proceedings, and that the failure to do so renders the application premature and invalid.

[19] This defence is not pleaded in the answering affidavit. It appears for the first time in the heads of argument. That is impermissible.[4] A party cannot raise a new cause of action or a new defence at the stage of argument without

[4] See *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) at [43].

amending its pleadings. The respondents have not sought to amend their answering affidavit, nor have they provided any explanation for the delay.

[20] Even if I were to entertain the point on its merits, it would fail. The Bank has consistently maintained – and the respondents have not disputed – that the NCA does not apply to the first respondent because it is a juristic person with an annual turnover or asset value exceeding R1 million. Section 4 (1) (a) (i) of the NCA excludes such juristic entities from the protections of the Act. The instalment sale agreements, the overdraft, and the BRCP were all concluded for business purposes, not as consumer transactions. Section 129 therefore has no application. The argument under the NCA is an afterthought and is rejected.

The merits

Breach and entitlement to relief

[21] The answering affidavit does not meaningfully dispute the existence of the agreements, the terms thereof, the Bank's performance, or the fact of non-payment. To the contrary, the respondents admit that they entered into the agreements, that the certificates of balance are prima facie proof of indebtedness (subject to a right to rebut, which has not been exercised), and that the Bank complied with its obligations.

[22] In relation to the instalment sale agreements: The respondents admit that they are in breach. They have surrendered the two forklifts, thereby conceding that the Bank is entitled to possession. The fact that the forklifts were stripped is not effectively disputed. The Bank has provided photographic evidence (annexure "LT4") showing the stripped condition. The respondents' suggestion that the stripping might have occurred after the Bank took possession is speculative and unsupported by any evidence. No contemporaneous hand over inspection was requested by the respondents, nor did they object at the time of surrender. The inference is inescapable that the stripping occurred while the forklifts were in the respondents' control. As for the truck, the respondents have refused access

for a valuation and have not surrendered it. The Bank remains the owner and is entitled to its return.

[23] In relation to the overdraft and BRCP, the respondents do not deny the amounts claimed. They argue only that settlement discussions should continue. Settlement discussions, however genuine, do not deprive a creditor of the right to pursue judgment where no binding compromise has been reached. The respondents have not made any concrete, bankable proposal that would retire the indebtedness within a reasonable time. The cash flow projection they provided (annexure "LT5") confirms that they lack the financial capacity to liquidate the debt without judgment and execution.

[24] There is accordingly no genuine dispute of fact on the merits. The Bank has established its paper claims, and the respondents have raised no defence that would warrant a trial or a referral to oral evidence.

The alleged compromise and good faith

[25] The respondents submit that they have acted in good faith by proposing debt restructuring and by offering to surrender the forklifts while retaining the truck to continue earning an income. They accuse the Bank of bad faith for refusing mediation and for proceeding with enforcement.

[26] I do not accept this characterisation. The Bank is a commercial lender entitled to enforce its contractual rights. It sent a detailed letter of demand. It engaged in settlement discussions, as the respondents themselves acknowledge. It requested financial information to assess any proposal – information that the respondents have not fully provided. When the Bank finally gained access to the forklifts, they were stripped. This is not the conduct of a borrower acting in good faith; it is the conduct of a borrower attempting to frustrate the creditor's legitimate recourse.

[27] The "compromise" alleged by the respondents is no compromise at all. Surrender of assets that are already subject to a claim for delivery does not

create a new agreement. There is no writing, no meeting of the minds on essential terms, and no variation of the underlying obligations. The respondents cannot unilaterally convert the Bank's right to repossess into a "compromise" simply by handing back property that has been damaged.

Costs

[28] The Bank seeks costs on an attorney and own client scale, relying on the cost clauses in the various agreements (e.g., clause 23 of the instalment sale agreements, which provides for such costs). The respondents have not challenged the validity or enforceability of those clauses.

[29] Given the respondents' dilatory conduct – filing an answering affidavit on the day of the unopposed hearing without condonation, raising meritless points *in limine*, advancing a new NCA defence only in heads of argument, and stripping the forklifts – this is an appropriate case for a punitive costs order. The agreements themselves contemplate attorney and own client costs. I see no reason to depart from that contractual regime.

Order

[30] In the premises, I make the following order:

a. The respondents' points *in limine* are dismissed.

b. The first respondent and the second respondent are hereby ordered, jointly and severally, the one paying the other to be absolved, to pay to the applicant:

i. the sum of R298,952.64 in respect of the overdraft agreement (account number 62835726000), together with interest thereon at the rate of 19.25% per annum, calculated daily and compounded monthly in arrears, from 25 July 2024 to date of final payment;

ii. the sum of R169,648.08 in respect of the business revolving credit plan (account number 410118915), together with interest thereon at the rate of 21.95% per annum, calculated daily and compounded monthly in arrears, from 25 July 2024 to date of final payment.

c. The first respondent is ordered to deliver to the applicant, within five (5) days of service of this order, the 2020 MAN TGS 26.480 BLS LX 6X4 T/T (engine number 51556682865676, chassis number AAM78W8341PX42365), failing which the Sheriff of this Court is authorised and directed to take possession of the said vehicle wherever it may be found and to deliver it to the applicant.

d. The applicant is granted leave to sell the three vehicles (the two Doosan forklifts already surrendered and the MAN truck to be surrendered) by way of public auction, and to hold the proceeds in reduction of the outstanding balances under the respective instalment sale agreements.

e. The applicant is granted leave to approach this Court on the same papers, duly supplemented, for judgment for any shortfall remaining after the sale of the vehicles (the difference between the outstanding balances under the instalment sale agreements and the net auction proceeds), together with interest thereon and costs.

f. The respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to be paid on the scale as between attorney and own client, including the costs of counsel and the costs of the unopposed hearing on 12 June 2025 wasted as a result of the respondents' late filing.

MUDAU J

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing:	25 May 2026
Date of Judgment:	15 June 2026

APPEARANCES

For the Applicant:	Adv M Desai
Instructed by:	Jason Michael Smith Inc
For the Respondents:	No Appearance
Instructed by:	Mokgothu Attorneys