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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **2022-005106**

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

DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED

First Applicant/Plaintiff

**ABSA HOME LOANS GUARANTEE
COMPANY (RF) (PTY) LTD**

Second Applicant/Plaintiff

and

LARA NTSUNDENI MULAUDZI

Respondent/Defendant

JUDGMENT

WENTZEL -THOMPSON J

Introduction

[1] This is an application for summary judgment, coupled with an application under Uniform Rule 46A to declare residential leasehold rights held by the respondent in property situated at Waterfall Country Estate specially executable.

[2] Under Part A, the applicants seek payment of R9 819 037, together with interest at 8.39% per annum from 8 June 2022 and costs on the attorney-and-client scale. Under Part B, they seek an order declaring specially executable all

of the respondent's right, title and interest in and to the notarial cession and assignment of the long-term lease over Erf 9[...] Jukskei View Extension 19. The notice of motion contemplates that the sale should be subject to a reserve price to be fixed by the Court.

- [3] The proceedings have had a somewhat protracted history. The summons was served during October 2022. The respondent eventually delivered his plea during November 2024, after which the applicants launched the present application for summary judgment. The affidavit resisting summary judgment was delivered late and is accompanied by an application for condonation. The applicants subsequently delivered supplementary material containing updated information relevant principally to the Rule 46A enquiry.
- [4] Four questions ultimately require consideration. The first is whether the respondent has disclosed a *bona fide* defence to the monetary claim. The second is whether the statutory preconditions for enforcement imposed by the National Credit Act 34 of 2005 ("the NCA") have been established. The third concerns the requirements of Rule 46A, including service and the appropriate approach to a reserve price. The fourth arises because, for reasons which will appear later in this judgment, the NCA presently prevents the Court from entering final judgment notwithstanding the absence of a *bona fide* defence. This involves a consideration whether the proceedings should simply be postponed or should be retained by this Court for completion once the statutory impediment imposed by section ("s") 129 of the NCA has been cured.

The underlying transaction

- [5] Waterfall Country Estate WUQF (Pty) Ltd ("Waterfall") is the registered owner of the underlying land. The respondent does not own Erf 9[...] in the conventional freehold sense; he holds long-term leasehold rights under Notarial Deed of Lease K3886/2013L, which were ceded and assigned to him by Notarial Deed of Cession and Assignment K5214/2017L. The particulars of claim record that the respondent thereby became the legal holder of the leasehold rights.

- [6] To finance the acquisition or settlement of the consideration associated with those rights, the respondent entered into a mortgage finance agreement with the first applicant. He requested the second applicant to guarantee his indebtedness to the first applicant and furnished an indemnity secured by an indemnity bond over the leasehold rights.
- [7] The contractual arrangements specifically contemplate the realisation of the leasehold security upon default. The pleaded terms provide for a “forced disposal” of the leasehold rights and contemplate payment, from the proceeds of such a disposal, of amounts owing to Waterfall before the balance is applied. The documents also regulate the assignment of the leasehold rights while the secured indebtedness remains owing.
- [8] The existence of the loan, guarantee, indemnity and security arrangements are not genuinely disputed. Their material terms are substantially common cause.

Default and the claim for payment

- [9] The applicants allege that the respondent failed to pay the stipulated instalments and that, following default and compliance with the applicable contractual and statutory provisions, the outstanding indebtedness became immediately payable.
- [10] As at 7 June 2022, the pleaded indebtedness was R9 819 037; the arrears were R1 590 106.55, representing approximately 21 monthly instalments in the amount of R73 583.34. The pleaded indebtedness is supported by a certificate of balance, that constitutes *prima facie* proof in terms of the mortgage documents.
- [11] The defendant pleads that he “*has been making the prescribed monthly instalments*”, denies that he was in arrears in the amount alleged and puts the plaintiffs to the proof thereof.
- [12] That assertion is repeated but is not ever particularised; no payment date, amount, banking reference or account entry upon which the defence depends is identified.

The test for summary judgment

- [13] The principles governing summary judgment remain those stated in *Maharaj v Barclays National Bank Ltd*.¹ A defendant is not required at this stage to establish the defence on a balance of probabilities, but must disclose fully the nature and grounds of the defence and the material facts upon which it rests. Those facts must, if ultimately established at trial, constitute an answer in law to the plaintiff's claim.
- [14] The amendment of Rule 32 did not displace that substantive requirement. Its effect is that the pleaded defence is available before summary judgment is sought and the plaintiff must explain briefly why the defence as pleaded does not raise an issue for trial. *Tumileng Trading CC v National Security and Fire (Pty) Ltd*² explains the relationship between the plea, the verifying affidavit and the defendant's obligation to disclose a defence genuinely advanced rather than one raised merely to delay judgment.
- [15] The respondent advances essentially four defences to the monetary claim. He contends that the loan agreement had not been cancelled and that acceleration was therefore incompetent; that a further common-law demand was necessary; that he did not receive the notice contemplated in s 129 of the NCA; and that he was not in the state of default alleged. Further arguments concerning s 103(5) and the inclusion of legal costs were introduced in the opposing material.

Cancellation and acceleration

- [16] The respondent's principal special plea proceeds from the proposition that the applicants were obliged to cancel or terminate the loan agreement before claiming the accelerated balance. Because s 129 does not itself cancel a credit agreement, he contends that a further notice of cancellation was required.
- [17] This argument conflates cancellation and acceleration: Cancellation brings the contractual relationship to an end; acceleration renders amounts which would

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A–E; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B–H.

² *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E & D Security Systems CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC). The subsequent application for leave to appeal is reported as [2020] ZAWCHC 52.

otherwise have fallen due in future immediately claimable. Whether cancellation is necessary depends upon the remedy sought and the contractual terms. A contractual right to accelerate does not, without more, require the credit provider first to cancel the agreement.

[18] Clause 17 of the loan agreement affords the credit provider alternative remedies following default and compliance with the statutory enforcement process. It permits, depending upon the circumstances, termination or proceedings for recovery of the outstanding indebtedness. The plaintiffs elected to claim the accelerated debt; they were not obliged first to cancel the agreement.

[19] The related contention that no written demand was made is likewise contradicted by the documents incorporated into the particulars. The June 2022 demand recorded the breach, referred to the earlier s 129 notice, demanded the outstanding indebtedness and warned of proceedings to enforce the agreement and realise the security.

[20] The special plea based upon the absence of cancellation or demand accordingly does not disclose a defence in law.

The National Credit Act

[21] Section 129(1) of the NCA forms part of the mandatory pre-enforcement requirements. Where a consumer is in default, the credit provider is required to draw the default to the consumer's attention in writing and to propose the statutory avenues through which the default may be addressed. Section 130 regulates when enforcement proceedings may thereafter commence.

[22] Section 130(3) is directed to the Court. It provides, in substance, that the Court may determine enforcement proceedings only if satisfied that the procedures required by s 129 have been complied with.

- [23] In *Sebola and Another v Standard Bank of South Africa Ltd and Another*³ the Constitutional Court held that delivery does not require proof that a notice in fact came to the subjective attention of the consumer. But where registered mail is selected, proof merely that a letter was posted does not ordinarily complete the enquiry; the creditor must establish dispatch to the address selected by the consumer and that the article reached the appropriate post office from which collection would ordinarily occur.
- [24] *Kubyana v Standard Bank of South Africa Ltd*,⁴ in turn, emphasised the reciprocal responsibility resting upon a consumer. Once the credit provider has taken the steps required to place the notice within the prescribed delivery mechanism, a consumer cannot frustrate enforcement by failing unreasonably to collect or attend to it.
- [25] Sections 129(5) - (7), subsequently introduced into the Act, now regulate the permitted methods and proof of delivery more expressly. In the case of registered mail, s 129(7)(a) recognises written confirmation by the postal service or its authorised agent of delivery to the relevant post office or postal agency.
- [26] Two distinct propositions therefore emerge; actual collection by or subjective receipt of the notice by the consumer is unnecessary - but the credit provider must establish the statutory delivery events which make the consumer's subsequent failure to collect the article attributable to the consumer rather than to a failure in the creditor's chosen mode of delivery.
- [27] I considered substantially the same requirement in *SA Taxi Finance Solutions RF (Pty) Ltd v Nzuza*,⁵ where a track-and-trace record reflecting that the registered article remained "in transit" did not establish that it had reached the relevant post office. I held that the evidence therefore did not establish the statutory delivery required before enforcement. The present matter differs

³ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC); [2012] ZACC 11.

⁴ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC); [2014] ZACC 1.

⁵ *SA Taxi Finance Solutions RF (Pty) Ltd v Nzuza* (2024/123018) [2026] ZAGPJHC 552 (28 April 2026).

factually in that the plaintiffs have produced a registered-post receipt proving dispatch to the correct address, but no track-and-trace record or other written confirmation establishing arrival at the relevant post office. The underlying statutory difficulty is thus, nevertheless, the same.

The pleaded defence and the plaintiffs' proof of delivery of the s 129 notice

[28] The respondent's plea alleges essentially that he did not receive the s 129 notice and that, had he received it, he would have pursued an available dispute-resolution process. His pleaded case does not specifically allege that registered post was never used, that the address was incorrect, or that the item failed to reach the relevant post office. To the extent that the defence is confined to subjective non-receipt, it is insufficient in law. If statutory delivery is proved, the fact that the respondent did not personally collect or read the notice does not defeat enforcement.

[29] The difficulty is that statutory compliance is an element which the plaintiffs themselves must establish before the Court may enforce the agreement.

[30] Paragraph 11.2 of the particulars of claim allege that the respondent was in default for the requisite period and that more than ten days had elapsed after delivery of the s 129 notice. It is expressly stated that a copy of the notice is annexed as "J", and paragraph 11.3 identifies the alleged proof of delivery as annexure "K".

[31] Annexure "J" is dated 10 June 2022. It is addressed to Lara Ntsundeni Mulaudzi at 9 Victoria Falls Avenue, Jukskei View Extension 19, Waterfall Country Estate, Midrand. It states expressly that delivery is to occur through Legal Dispatch "BY REGISTERED AND ORDINARY MAIL."

[32] The content of the notice is not defective; it records overdue instalments of R1 590 106.55, requires the arrears to be addressed, warns of the possible enforcement of the agreement and sale in execution, and draws attention to debt intervention, debt counselling and alternative dispute resolution. The address itself is not shown to be incorrect. Indeed, the combined summons was subsequently served personally upon the defendant at 9 Victoria Falls Avenue.

[33] The papers also contain a South African Post Office registered-letter receipt. It identifies “Miss LN Mulaudzi” and records the same Waterfall address. It bears a registered-mail article number and constitutes evidence that an article correctly addressed to the respondent entered the registered postal system.

[34] What I have not been able to find in the papers before me is a track-and-trace report or other written confirmation from the postal service establishing that the identified article subsequently reached the post office or postal agency serving that address.

[35] It is crucial to note that the registered-mail slip proves posting; it does not, by itself, prove the further event contemplated in *Sebola* and s 129(7)(a).

The attachment of the s. 129 notice to the summons

[36] The s 129 notice was annexed to the particulars of claim. It was therefore physically incorporated in the process served upon the defendant.

[37] There is an earlier line of authority in this Division, including *SA Taxi Development Finance (Pty) Ltd v Phalafala*,⁶ in which the attachment of a s 129 notice to summons was treated in appropriate circumstances as sufficient where the consumer thereafter had ample opportunity to invoke the statutory remedies but failed to do so.

[38] That approach has subsequently been reconsidered. In *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors*,⁷ the Court distinguished between annexing a notice to the summons as evidence of an asserted earlier compliance and treating service of the summons itself as the statutory compliance. The latter proposition was rejected.

[39] I agree with that distinction: Section 129 is designed to afford the consumer an opportunity before enforcement proceedings commence. The commencement of those proceedings cannot itself retrospectively constitute the pre-enforcement step upon which their competence depends.

⁶ *SA Taxi Development Finance (Pty) Ltd v Phalafala* (1512/2013) [2013] ZAGPJHC 55

⁷ *FirstRand Bank Ltd t/a First National Bank v Moonsamy t/a Synka Liquors* (07747/2018) [2020] ZAGPJHC 105; 2021 (1) SA 225 (GJ) (15 April 2020).

[40] This principle was reinforced by the decision of the Supreme Court of Appeal in *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others*,⁸ where the Court held that delivery of the s 129 notice constitutes a material element of the credit provider's cause of action.

[41] The fact that the defendant unquestionably obtained the notice when summons was served is nevertheless relevant: It removes any genuine suggestion that, throughout the litigation, he remained unaware either of the default complained of or of the statutory remedies set out in the notice. But subsequent knowledge is not synonymous with proof that the statutory pre-enforcement step had occurred before summons was issued. A cause of action cannot ordinarily be completed retrospectively by the service of the proceedings based upon it.

[42] I therefore conclude that the attachment of annexure "J" to the particulars does not cure the absence of proof that the earlier registered article reached the relevant post office.

The consequence of non-compliance

[43] That conclusion does not mean that the action fails or that the defendant must receive leave to defend.

[44] Section 130(4)(b) expressly determines the consequence of my finding: If the Court finds that the credit provider has not complied with the relevant provisions contemplated by s 130(3)(a), the Court must adjourn the matter and make an appropriate order setting out the steps the credit provider must complete before the matter may resume.

[45] *Sebola* makes clear that premature enforcement proceedings are not rendered a nullity. The statutory response is an interruption of the proceedings while the defect is cured, not the destruction of the proceedings.

⁸ *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others* (National Credit Regulator as Amicus Curiae) (499/2015) [2016] ZASCA 98; 2016 (6) SA 102 (SCA) (3 June 2016).

[46] *Investec Bank Ltd v Zouzoua*⁹ is particularly apposite: There the Court held that the s 130(4)(b) procedure is available at interlocutory stages, including summary judgment. The existing proceedings may be adjourned to permit proper delivery of the notice and may thereafter resume once the statutory period has expired and the position of the consumer is known.

[47] The defect with regard to the service of the s 129 notice is therefore dilatory; it presently prevents enforcement. It does not disclose a substantive defence to the indebtedness which requires determination at trial.

The alleged discrepancy in the notice

[48] The respondent separately contends that the amount recorded in the s 129 notice does not correspond with the plaintiffs' claim.

[49] That proposition is factually incorrect. The notice records arrears of R1 590 106.55. The particulars plead arrears in precisely that amount. The sum of R9 819 037 is the accelerated balance outstanding under the loan. The one amount represents the default which could then have been cured; the other represents the accelerated indebtedness for which judgment is sought.

[50] The alleged discrepancy accordingly affords the respondent no defence.

Default, quantum and s 103(5)

[51] The respondent's denial of default is likewise insufficiently particularised. He must know the dates, amounts and references of any payments which he says were made; yet neither the plea nor the opposing affidavit identifies them.

[52] Against that absence of particularity stands the contractual certificate of balance relied upon by the plaintiffs that establishes *prima facie* proof of the amount of the indebtedness. The respondent is not obliged to prove his defence at this stage, but he must disclose material facts from which a *bona fide* defence can be discerned. A general assertion that instalments were being paid does not meet that threshold without concrete proof of those payments.

⁹ *Investec Bank Ltd v Zouzoua* (21/44429) [2023] ZAGPJHC 131 (10 February 2023).

[53] The supplementary affidavit records that by July 2026, the arrears had markedly increased: The arrears stood at R7 339 997.07, with an outstanding balance of approximately R15 375 254.57. Although do not rely upon those later figures as evidence proving the Rule 32 claim; the later information is relevant to the contemporary Rule 46A enquiry.

[54] The respondent's reliance on s 103(5) and *Nkata v FirstRand Bank Ltd*¹⁰ does not alter the position; no particular charge said to offend the section is identified or quantified. Nor is it demonstrated that the certified amount of R9 819 037 contains an amount which the NCA prohibits.

[55] The question of reasonable enforcement costs may remain relevant to any reinstatement amount before execution occurs; it does not, on the facts disclosed, constitute a *bona fide* defence to the indebtedness.

Rule 32(2)(b)

[56] The respondent also criticised the verifying affidavit because it did not separately answer his assertion that he personally did not receive the s 129 notice.

[57] I do not consider that omission fatal. The affidavit identifies the NCA defence, while the particulars which it verifies plead the asserted delivery and incorporate the documents relied upon.

[58] More fundamentally, subjective non-receipt is not in itself a defence to proved statutory delivery. The problem which presently prevents judgment in the matter before me is not a failure adequately to address the pleaded defence in the Rule 32 affidavit; it is the plaintiffs' failure to prove one element of the pre-enforcement process.

[59] I accordingly conclude that the respondent has not disclosed a *bona fide* defence to the monetary claim. The cancellation defence is bad in law; the contention that no demand was made is contradicted by the documents, the

¹⁰ *Nkata v FirstRand Bank Ltd and Others* (CCT73/15) [2016] ZACC 12; 2016 (4) SA 257 (CC); 2016 (6) BCLR 794 (CC).

alleged discrepancy in the arrears does not exist, the denial of default is a bare denial, and the s 103(5) point has not been factually substantiated.

[60] Notwithstanding these findings, s 130 presently prevents me from entering judgment because pre-summons statutory delivery has not sufficiently been established.

Rule 46A

a. Primary residence and judicial oversight

[61] It is now sufficiently established that the property constitutes the respondent's primary residence and that of his minor children. The later Rule 46A material itself accepts that this appears to be his home.

[62] Rule 46A accordingly applies.

[63] *Jaftha v Schoeman; Van Rooyen v Stoltz*¹¹ established that execution which may deprive a person of his or her home requires judicial oversight directed at whether execution is constitutionally justifiable in all the circumstances.

[64] *Gundwana v Steko Development CC and Others*¹² reinforced that principle in the mortgage context and held that judicial oversight must be real and must precede the sale of residential immovable property where the debtor's home is at risk.

[65] Rule 46A gives procedural form to those constitutional requirements. The Court must consider whether the property is a primary residence, alternative means by which the judgment debt may be satisfied, whether execution is warranted and the terms upon which execution should occur.

¹¹ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

¹² *Gundwana v Steko Development CC and Others* (National Consumer Forum as Amicus Curiae) (CCT44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

[66] In *Absa Bank Ltd v Mokebe and Related Cases*,¹³ the Full Court of this division held that where foreclosure against a primary residence is pursued, the monetary claim and the claim for executability are intrinsically related and should ordinarily be brought and adjudicated together.

Personal service

[67] Rule 46A(3)(d) provides that an application under the Rule is to be served by the sheriff upon the judgment debtor personally, unless the Court orders service in some other manner. The requirement serves an important purpose. A person should not lose his or her home through a process of which he or she is unaware. Personal service seeks to ensure actual knowledge of the threatened execution and a genuine opportunity to place relevant personal circumstances before the Court.

[68] In default proceedings strict adherence to that safeguard is particularly important. *Standard Bank of South Africa Ltd v Hendricks and Another*¹⁴ describes personal service as the starting point and recognises that alternative service must ordinarily be authorised by the Court upon sufficient information.

[69] The present matter is materially different. The respondent has entered an appearance to defend, delivered a plea, filed an affidavit resisting summary judgment, specifically opposed the proposed execution against his home, disclosed that he and his children reside there, produced a valuation, proposed alternatives to execution and was represented in the argument before me.

[70] There can consequently be no genuine uncertainty that he knows that his home is at risk or that he has had the opportunity which personal service is intended to secure.

¹³ *Absa Bank Ltd v Mokebe; Absa Bank Ltd v Kobe; Absa Bank Ltd v Vokwani; Standard Bank of South Africa Ltd v Colombick and Another* (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 485; 2018 (6) SA 492 (GJ) (12 September 2018).

¹⁴ *Standard Bank of South Africa Ltd v Hendricks and Another and Related Cases* (11294/18 and related matters) [2018] ZAWCHC 175; [2019] 1 All SA 839 (WCC); 2019 (2) SA 620 (WCC) (14 December 2018).

[71] I have considered *Munsami v Standard Bank of South Africa Ltd and Others*,¹⁵ in which this Division dealt with actual knowledge and participation in the context of Rule 46A proceedings. I do not understand that judgment to create a general licence to disregard Rule 46A(3)(d). Rather, the question before me is whether, despite literal non-compliance, the very object of personal service has beyond doubt already been fulfilled.

[72] Rules governing service are safeguards and should not lightly be treated as optional. But they exist to secure procedural fairness and informed participation. Where the debtor has actually done everything which service was intended to enable him to do, a direction that the sheriff now personally hand him the same papers would add no substantive protection.

[73] I am therefore satisfied that the respondent's actual, informed and extensive participation constitutes substantial compliance in the exceptional circumstances of this case. I do not regard the absence of sheriff's personal service as an independent impediment to the eventual grant of relief.

[74] This conclusion is confined to the circumstances before me. It does not dilute the ordinary requirement that Rule 46A applications involving a primary residence should be personally served.

Waterfall's interest

[75] There remains the separate question of Waterfall's non-joinder to the present application. The Court is not being asked to sell Waterfall's ownership of the land; rather, it is asked to authorise the forced disposal of a leasehold right derived from Waterfall's title.

[76] The agreements constituting those rights regulate forced disposal, impose conditions upon assignment and contemplate the payment of amounts owing to Waterfall from the proceeds before the balance is applied towards the secured debt.

¹⁵ *Munsami v Standard Bank of South Africa Ltd and Others* (2018/47106) [2022] ZAGPJHC 854 (10 October 2022). The subsequent appeal proceedings should be distinguished from treating the judgment as authority for a general dispensation from Rule 46A(3)(d)

[77] Rule 46A(3)(b) contemplates notice to parties who may be affected by a sale in execution. Waterfall has a direct interest in the proposed disposal and should be afforded an opportunity to place any relevant position before the Court before final executability is ordered.

[78] I do not consider it necessary at this stage finally to decide whether formal joinder to the entire action is indispensable. Service of the Rule 46A papers and this judgment upon Waterfall, together with an opportunity to make submissions concerning the forced disposal, will ensure that its interest is protected before the matter resumes.

The updated Rule 46A information

[79] The plaintiffs' later affidavit records approximately 53 monthly instalments in arrears, arrears of R7 339 997.07 and an outstanding balance of R15 375 254.57.

[80] Those amounts cannot be relied upon to supplement the plaintiffs' Rule 32 case. They may, however, properly be considered in deciding whether execution against the primary residence would presently be proportionate. Rule 46A necessarily concerns circumstances prevailing at the time the Court considers execution.

[81] The applicants have also produced an independent professional valuation assessing the market value of the leasehold property at approximately R11 million as at September 2024. The respondent's valuation is approximately R12 million. The parties are therefore not materially apart on market value.

[82] The bank's valuation records the property as a substantial dwelling in an arket secure estate. It also identifies internal water damage and certain maintenance defects. Those features bear upon what may realistically be obtained in a forced-sale environment.

[83] The Rule 46A affidavit records a municipal valuation of R7 991 000. More importantly, the updated information reflects municipal rates, taxes, services

and associated charges of approximately R648 106.39, together with homeowners' or related levies of approximately R370 040.

Alternative means of satisfying the debt

[84] The respondent contends that he should be afforded an opportunity to sell the property privately. At different stages, periods of approximately six months and twelve months have been proposed by her.

[85] The preference for a private sale is understandable; an ordinary sale may produce a price materially closer to market value than a forced auction and may correspondingly reduce any residual indebtedness remaining after the property has been realised.

[86] Rule 46A requires the Court to consider realistic alternatives to execution. It does not, however, confer an indefinite moratorium merely because a debtor would prefer to sell privately.

[87] An alternative capable of defeating or delaying foreclosure must have some concrete foundation. The debtor should ordinarily identify the proposed mechanism, reasonable timing and evidence that it is capable of producing payment or materially reducing the debt.

[88] That has not occurred here; the default has persisted for years - the current arrears run into millions of rand. The respondent has not identified an income stream from which those arrears can realistically be extinguished and no completed or advanced private-sale arrangement has been placed before the Court.

[89] The original s 129 notice itself drew the respondent's attention to Absa's Help-U-Sell programme, through which a private sale could be pursued with the assistance of professional agents.

[90] I do not therefore consider the proposed twelve-month moratorium justified. The adjournment required by s 130(4)(b) will in any event afford the respondent a further opportunity to pursue a genuine private sale should he wish to do so.

If such a sale is achieved before the matter resumes, the legal consequences can then be addressed.

Reserve price

[91] If execution is eventually ordered, a reserve price should in my view be imposed.

[92] *Mokebe* explains the protective function of a reserve price. A forced sale at a disproportionately low figure may deprive a debtor of the home while leaving a substantial avoidable residual debt. Judicial oversight of price seeks to reduce that risk without depriving a secured creditor of the legitimate benefit of its security.

[93] At the other extreme, a reserve set at or near the highest asserted market valuation may make a forced sale commercially unrealistic. The reserve is a protective minimum, not an estate agent's estimate of what might be achieved after an unrestricted period of private marketing.

[94] The evidence places market value in a range of approximately R11 million to R12 million and municipal value at R7 991 000. There are substantial municipal and levy liabilities. The secured indebtedness now exceeds the market value of the leasehold interest.

[95] The so-called Opperman formula, which has been used in this division as a practical guide, rather than as an inflexible rule, takes the average of market and municipal values, applies an allowance for the forced-sale context and thereafter takes account of property-related liabilities.

[96] Taking R11 million as the conservative market valuation and R7 991 000 as the municipal valuation yields an average of R9 495 500. A 30% forced-sale reduction results in approximately R6 646 850. Deducting municipal charges of R648 106.39 produces approximately R5 998 743.61.

[97] The levies of approximately R370 040 are additionally relevant, although I would not mechanically deduct every liability in fixing the reserve. Rule 46A

requires a judicial assessment of all relevant considerations, not the mechanical application of a formula.

[98] On the evidence presently before me a reserve price of approximately R6 million appears to strike an appropriate balance between protection against an unacceptably low forced sale and the risk of making execution commercially ineffective.

[99] I would, however, not finally fix the reserve at this stage. The matter must in any event stand over for compliance with s 129 and after Waterfall is to be afforded an opportunity to make submissions. If no material change occurs, my present view is that R6 million would be an appropriate reserve price.

Can judgment presently be granted?

[100] The conclusion that the respondent has failed to disclose a *bona fide* defence might ordinarily justify summary judgment. The Rule 46A affidavit, would likewise, subject to Waterfall being heard, justify eventual execution.

[101] But the Court cannot grant either the accelerated monetary judgment or the consequential executability order before compliance with the NCA has been established.

[102] Section 130(3) does not merely regulate execution of an otherwise competent judgment; it restricts the Court's ability to determine enforcement proceedings at all until it is satisfied that the prescribed pre-enforcement procedures have been completed.

[103] The Court therefore cannot grant summary judgment now and simply suspend the writ pending later delivery of the notice; that would subvert the statutory sequence. Compliance is a prerequisite to the judgment- not merely to execution following judgment.

[104] This means that I cannot separate parts A and B of the notice of motion. The Full Court in *Mokebe* regarded the accelerated money judgment and foreclosure against a primary residence as intrinsically connected where both forms of relief are pursued in the same mortgage enforcement proceedings.

Final adjudication should therefore occur together once the statutory impediment has been removed.

Retention of the matter

[105] The remaining question is whether the matter should simply be postponed *sine die* and left to be re-enrolled in the ordinary course, potentially before another judge, or whether it is appropriate that it return to me once the statutory requirements have been completed.

[106] In my view the latter course is preferable.

[107] The purpose of an adjournment under s 130(4)(b) is not to undo the litigation which preceded the discovery of non-compliance. The Act contemplates the continuation of the same enforcement proceedings after the credit provider has taken the steps directed by the Court.

[108] *Sebola* characterises the effect of the statutory defect as dilatory rather than destructive. The proceedings remain extant; the Court merely pauses enforcement and prescribes what must occur before adjudication can be completed.

[109] This approach has found favour in *Investec Bank Ltd v Zouzoua*.¹⁶ There the Court recognised that an order under s 130(4)(b) can be made at the summary-judgment stage and that the main proceedings may thereafter resume following compliant delivery and expiry of the prescribed period.

[110] There is a substantial practical reason for that approach. Considerable judicial time has already been devoted to the contractual defences, the pleaded payment defence, s 103(5), the effect of the s 129 notice, the competing property valuations, the Rule 46A enquiry and the respondent's proposed alternatives to execution. It would serve neither the interests of the parties nor the proper administration of justice for a differently constituted Court to be required to reconstruct and rehear all of those questions after the applicants perform what is now a limited statutory step.

¹⁶ *Investec Bank Ltd v Zouzoua* supra.

[111] Finality also favours retention. The findings in this judgment identify what has and has not been determined. The respondent has failed to establish a *bona fide* defence to the debt. What remains unresolved is not whether those defences should be retried but whether the statutory impediment to enforcement has been removed, what response the respondent makes to the fresh s 129 notice, whether Waterfall raises any material matter relevant to execution, and whether the Rule 46A financial information requires updating.

[112] Retention of the matter must not, however, deprive the respondent of the very statutory opportunity which the fresh notice is intended to afford him; the s 129 process cannot be treated as a formality whose outcome has already been decided.

[113] If, during the statutory period, the respondent validly invokes a remedy which under the NCA affects the applicants' entitlement to resume enforcement, that consequence must be considered when the matter returns. Equally, if he cures the default, reinstates the agreement where legally competent, or effects a private sale sufficient to alter the factual position materially, the Court will have to give effect to those developments.

[114] What the respondent should not be permitted to do is use the adjournment as an occasion to reconstruct defences to the original indebtedness which have already been considered and rejected. The resumed hearing should be confined to the consequences of compliance with this judgment and genuinely updated Rule 46A circumstances.

[115] In those circumstances it is appropriate that the matter be adjourned and, insofar as judicial administration permits, re-enrolled before me. I use "retained" in that practical sense. It does not purport to bind the Judge President or Registrar in the exercise of administrative powers, but records that continuity before the same Court is, for the reasons given, strongly desirable.

Condonation

[116] The respondent's affidavit resisting summary judgment was delivered only marginally late. The issues are important, the matter concerns a primary

residence and no irremediable prejudice has been demonstrated. Condonation should therefore be granted.

[117] I would likewise condone the procedural delays associated with the respondent's heads of argument and practice documents. The costs occasioned thereby can appropriately be considered when the matter is finally determined.

Conclusion

[118] The respondent has failed to disclose a *bona fide* defence to the indebtedness claimed by the applicants.

[119] The contention that cancellation was a prerequisite to acceleration is bad in law. The alleged absence of demand is inconsistent with the documentary record. The arrears recorded in the s 129 notice correspond with the pleaded arrears. The respondent's general assertion that instalments were paid is unsupported by the material facts required to make the defence *bona fide*.

[120] His assertion that he did not personally receive the s 129 notice does not itself constitute a defence. Actual receipt is not the statutory standard.

[121] The plaintiffs have nevertheless failed to establish one necessary fact: that the registered s 129 article which was dispatched before summons reached the relevant post office as contemplated by the statutory delivery regime.

[122] The fact that a copy of the notice was annexed to the particulars of claim establishes that the respondent thereafter had actual knowledge of its contents. It does not retrospectively supply the pre-enforcement delivery which the cause of action required. The consequence prescribed by s 130(4)(b) is an adjournment, not dismissal and not leave to defend.

[123] I am satisfied that the respondent's complete participation in the Rule 46A proceedings means that the absence of personal service of Part B upon him does not, in the exceptional circumstances, provide an additional reason for postponement.

[124] The financial information now before the Court is sufficient to enable a reserve price to be assessed. On the presently available evidence a reserve of approximately R6 million appears appropriate, although the final amount should be confirmed when the matter resumes after Waterfall has had an opportunity to be heard and any genuinely necessary updates have been placed before the Court.

[125] The existing proceedings will therefore be retained and adjourned for compliance with s 130(4)(b), service upon Waterfall, and the limited further matters identified below.

Order

[126] I accordingly make the following order:

1. The respondent's applications for condonation of the late delivery of his affidavit resisting summary judgment, heads of argument and associated practice documents are granted.
2. In terms of s 130(4)(b) of the National Credit Act 34 of 2005, the application for summary judgment and the application under Uniform Rule 46A are adjourned.
3. Before the proceedings may resume, the first applicant shall cause a notice complying with s 129(1) of the National Credit Act to be delivered to the respondent by a method authorised by s 129(5), and if registered mail is utilised, shall obtain the proof contemplated by s 129(7)(a) that the registered article reached the relevant post office or postal agency.
4. A copy of the notice referred to in paragraph 3 shall additionally be transmitted to the respondent's attorneys of record.
5. The proceedings shall not resume until:
 - 5.1 the applicants have complied with paragraph 3;

5.2 the period prescribed by s 130(1)(a) has elapsed; and

5.3 the respondent has either not responded to the notice or has responded in circumstances in which the NCA permits enforcement proceedings to resume.

6. Nothing in this judgment prejudices the legal effect of any response which the respondent may make pursuant to the fresh s 129 notice.

7. During the adjournment, the applicants shall serve the Rule 46A application, this judgment and this order upon Waterfall Country Estate WUQF (Pty) Ltd and afford it a reasonable opportunity to deliver an affidavit, should it wish to do so, confined to matters affecting its interest in the proposed forced disposal of the respondent's leasehold rights.

8. Upon compliance with paragraphs 3 to 7 the applicants may request that the matter be re-enrolled, preferably before me, on a date arranged through my Registrar, subject to the directions of the Judge President and the exigencies of the Court roll.

9. For purposes of the resumed hearing:

9.1 the applicants may deliver a supplementary affidavit confined to proof of compliance with this order, any response received from the respondent, any submissions made by Waterfall and such updating of the Rule 46A information as is reasonably necessary because of the passage of time;

9.2 the respondent may answer those matters;

9.3 neither party may, without leave of Court, reopen a monetary defence determined in this judgment.

10. The Court records that:

- 10.1 the respondent has not disclosed a *bona fide* defence to the monetary claim;
- 10.2 the absence of personal service of the Rule 46A application upon the respondent does not, in the exceptional circumstances identified in this judgment, constitute an independent bar to relief;
- 10.3 On the evidence presently before the Court, a reserve price in the region of R6 000 000 appears appropriate, subject to final determination when the proceedings resume.
11. The applicants' supplementary affidavits containing updated indebtedness shall not constitute additional evidence in proof of the monetary claim for purposes of Rule 32(4), but may, insofar as relevant and otherwise admissible, be considered for purposes of Rule 46A and compliance with this order.
12. The costs of the summary-judgment application, the Rule 46A application and the applications for condonation are reserved for determination when the matter resumes.

**WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the applicant:	Adv. C Erasmus instructed by Smit Sewgoolam Inc.
For the respondent:	Adv. I Mureriwa instructed by CSM Attorneys
Date of the hearing:	28 July 2026
Date of the judgment:	7 September 2026

