

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case no 2024-124727

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☒ / No ☐

Date: 04 September 2026

In the matter between:

**FIRSTRAND MORTGAGE COMPANY RF
PROPRIETARY LIMITED**

Applicant/Plaintiff

And

ISAYVANIE CASSIM

First Respondent/
Defendant

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Second Respondent/
Defendant

JUDGMENT

DU PLESSIS J

Introduction

[1] This is an opposed application for summary judgment. The plaintiff seeks judgment against the first defendant, Ms Cassim, for the amount owing under an indemnity arising from a residential mortgage-loan transaction, together with a declaration that her primary residence is specially executable.

[2] Summary judgment exists to enable a claimant with a clear claim to obtain judgment without the delay and expense of a trial where the defendant has not disclosed a genuine defence requiring determination at trial. It is not a procedure designed to deprive a litigant with a triable issue, or with a bona fide defence good in law, of her day in court. Its operation nevertheless requires the court to distinguish a real defence from a conclusion, a bare denial, or a plea which does not disclose material facts capable of sustaining the defence advanced. In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*,¹ the Supreme Court of Appeal held that the defendant must disclose sufficiently the nature and grounds of the defence and the material facts upon which it is founded; the defence so disclosed must be bona fide and good in law. Once that threshold is crossed, summary judgment must be refused. However, should I be with the plaintiffs, I must also determine whether execution against that home is warranted after consideration of all relevant circumstances, as required by Uniform Rule 46A and s 26 of the Constitution.

[3] The material terms of the contract are common cause. On 12 August 2021, FirstRand Bank Limited (“the lender”) and the defendant concluded a written mortgage loan agreement. The lender advanced R2 745 000 to the defendant as a home loan. The plaintiff had executed a guarantee in favour of the lender on 16 March 2021. The defendant thereafter, on 20 July 2021, executed an indemnity in favour of the plaintiff. On 31 August 2021, an indemnity mortgage bond was registered over the property, in favour of the plaintiff.

[4] The loan agreement provided that the loan would be repaid in monthly instalments and that the defendant would be in default if she failed to pay an amount due. It also provided that, upon default, the lender could claim the full outstanding balance, terminate the agreement, or make a claim under the guarantee. The indemnity, in turn, required the defendant to irrevocably and unconditionally indemnify the plaintiff against claims and losses arising from the guarantee and to pay an indemnified loss forthwith upon written demand. The indemnity bond was registered as continuing security for that obligation.

¹ 2009 (5) SA 1 (SCA).

[5] The defendant does not dispute that she defaulted under the loan agreement. The parties also accept that the property is her primary residence. The defendant applied for debt review on 14 September 2023. The debt counsellor recorded on 2 October 2023 that the debt-review application was successful and that her obligations were being restructured. On 21 August 2024, the lender delivered a notice in terms of s 86(10) of the National Credit Act 34 of 2005 ("the NCA"), and on 12 September 2024, the debt counsellor recorded that the provision of services had been suspended due to the defendant's non-cooperation.

[6] On 7 October 2024, the lender demanded performance from the plaintiff under the guarantee. On the same date, the plaintiff demanded performance from the defendant under the indemnity. The plaintiff thereafter instituted action and applied for summary judgment.

[7] The matter was heard on 1 September 2026. The certificate of balance, dated that day, records arrears of approximately R1.03 million, representing about 36 months of instalments. The total outstanding balance is R3 685 499.72; the arrear amount is R1 030 061.35.

Defences raised

[8] The defences are the following:

- a. The loan agreement, credit guarantee, indemnity and indemnity bond constitute reckless credit agreements.
- b. The defendant is over-indebted and seeks relief in terms of s 85(b), read with ss 87(1)(b)(i) and 83(2), of the NCA.
- c. The deponent to the affidavit supporting summary judgment lacks personal knowledge and could not swear positively to the facts; she also contends that no resolution authorised him to depose to the affidavit.
- d. The notice of set down was not personally served upon her and that the summary-judgment application is consequently flawed and defective.

- e. Execution would improperly deny her a remedy under s 85(b) of the NCA.
- f. Special executability will cause her eviction and homelessness, infringing her and her family's right of access to adequate housing under s 26 of the Constitution.

[9] During argument, counsel for the respondent did not persist with either the personal-knowledge or personal service defence. The payment-rearrangement under section 85 was also not persisted with. Instead, the respondent requested that the summary judgment be dismissed to allow for the joinder of the lender and the proper formulation of a reckless-credit defence, or to grant six months in which the respondent may sell the property in the open market.

[10] I nevertheless deal shortly with the defences raised in the pleadings to indicate why I grant the summary judgment.

Reckless credit

[11] The reckless-credit defence cannot resist summary judgment on the papers before the Court. The relevant enquiry under ss 80 and 81 of the NCA is directed to the conduct of the credit provider at the time the credit agreement was made or increased. The lender that concluded the mortgage loan agreement and advanced the loan was FirstRand Bank Limited, not the plaintiff. Instead, the plaintiff's claim is founded on the guarantee, the indemnity and the indemnity bond. It arises because the lender demanded performance under the guarantee, and the plaintiff, in turn, invoked the contractual indemnity provided by the defendant.

[12] The fundamental problem is that on the papers, the defendant did not plead or disclose material facts which would establish a finding of reckless credit against the lender at the time the agreement was concluded. The defendant identifies no particular obligation that was not part of the assessment, any material issues with the assessment, or the factual basis upon which it may be deducted that she did not understand the risks, costs and obligations of the agreement. On the other hand, the plaintiff provided the Court with sufficient information to show that, at the time the

credit was granted, an affordability calculation was performed indicating that, after all monthly deductions, the defendant would still have a surplus. The scarcity of information provided by the defendant does not comply with the requirement that for summary judgment purposes, the affidavit must contain a reasonable measure of verificatory detail and may not be bald, vague or sketchy.²

[13] Instead, the genuine hardship the defendant is experiencing is better explained by events that occurred after the loan agreement was concluded, namely, a decline in the family business, which led to her no longer receiving a salary.

[14] This defence is thus, firstly, not sufficiently particularised to be bona fide and good in law for present purposes. Nor is it appropriate to dismiss the plaintiff's application merely to permit the defendant, after the event, to formulate a case which has not been disclosed in the plea or resisting affidavit.

Over-indebtedness and debt review

[15] The defendant set out that she and her household are under considerable financial strain. She is unemployed, and her partner supports the household through a struggling construction business. There were also health struggles in the family. The debt counsellor told them to pay a monthly amount they could not afford. On the papers, it is clear that the defendant is struggling. But none of these issues raised constitute a defence in this instance.

[16] The defendant went for debt review, and it was unsuccessful. The lender sent the section 86(10) notice. There was no request to resume debt review in terms of section 86(11). There is equally no debt-restructuring proposal that sets out the income, household expenditure, or any other information that would be needed for the court to exercise a discretion in terms of section 85.

[17] The Court's discretion under section 85 must be exercised on a proper factual basis. A conclusion that a consumer is over-indebted cannot be reached without such information. As the plaintiff submitted, material facts and a feasible

² *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 (1) SA 310 (GSJ).

restructuring proposal must be before the Court, particularly where debt review has already been initiated and later terminated or suspended. There is no such proposal here.

[18] The plaintiff also drew attention to payments totalling R178 000 between October and December 2024. Although these payments do not conclusively rule out financial distress, they underscore the absence of a clear, verified account of the household's means and sources of funds. The later payment of R28 000 in April 2026 similarly does not cure the extensive arrears. The defendant has accordingly not placed a case before the Court for an order under section 85, for resumption under section 86(11), or for referral. The over-indebtedness defence cannot defeat summary judgment.

The other defences

[19] Considering *Masako v Masako*,³ the defendant was correct in abandoning the complaint about the deponent of the affidavit. Likewise, the service complaint cannot be raised in these proceedings, as the defendant was clearly aware of the matter.

[20] In the absence of any viable defence against the monetary claim, the question is whether there is a reason why the court should not grant execution. The long line of case law has made it clear that a home is more than a debtor's asset. It is a place of family life, security, and belonging. This is also why courts must take separate considerations into account before a property may be sold in execution. For example, section 26(1) of the Constitution guarantees everyone the right of access to adequate housing. Section 26(3) provides that no one may be evicted from their home, or have their home demolished, without an order of court made after consideration of all relevant circumstances. The Rule 46-procedure gives effect to those constitutional concerns when execution is sought against residential immovable property.

[21] But the right of access to adequate housing is not a right to retain ownership of a particular home irrespective of a valid mortgage debt. In *Jaftha v Schoeman*;

³ [2021] ZASCA 168.

Van Rooyen v Stoltz,⁴ the Constitutional Court stated that where a judgment debtor has willingly put her house up as security for debt, sale in execution should ordinarily be permitted absent an abuse of court procedure. This recognises that homes may be used to raise capital and that the utility of mortgage security rests upon a creditor's ability, where justified, to realise it.

[22] The constitutional protection is therefore neither formal nor absolute. It requires a court to make a context-sensitive assessment of whether execution is warranted, having regard to the debt, the security, the debtor's personal and family circumstances, the availability of other means to satisfy the debt, the risk of unjustifiable homelessness, and the conditions on which the property may be sold. It also requires a court to avoid the needless destruction of value through a sale at an unreasonably lower price. A reserve price and an appropriately tailored suspension may be instruments by which that proportionality is achieved.

[23] The defendant's property is her primary residence. She resides there with her family. However, the arrears on the bond are approximately R1,03 million. There is no evidence of alternative means to cure the default in the near future.

[24] The available valuation evidence places the independent market value at R3 050 000 and the municipal value at R2 921 000. The plaintiff's earlier calculation produced a proposed reserve price of R1 889 940 after applying a 70% forced-sale approach to the average of the two and deducting municipal rates and taxes (the so-called "Opperman formula"). During argument, the defendant's counsel stated that she had recently received an offer of R4.4 million. That alleged offer was not formally proved by a signed offer to purchase, confirmation of finance, or other documentary evidence. It cannot, therefore, determine the value of the property by taking that into account. It does, however, reinforce the practical proposition that an open-market sale may produce a materially better result than a forced sale.

[25] Both counsel accepted, in the alternative, that six months is a suitable maximum period for pursuing an open-market sale. The plaintiff did not agree to an

⁴ 2005 (2) SA 140 (CC) para 58.

indefinite delay but suggested that, if a suspension is reasonable, it should not exceed six months. This is an appropriate accommodation. It respects the plaintiff's right to enforce valid security, shields the defendant from an immediate forced sale, and provides her with a final, clear opportunity to realise the property's market value and reduce or settle the debt.

[26] A reserve price of R2 000 000 is appropriate in the circumstances. It is below the independent and municipal valuations, close to the plaintiff's forced-sale calculation, and provides a measure of protection against an unduly low sale price.

[27] The loan documents provide for costs on the attorney-and-client scale. The defendant asked that costs be awarded on the party-and-party scale because of her current financial position. Courts retain a discretion as far as costs are concerned, and in this instance, a cost order on a party-and-party on scale B seems appropriate.

Order

[28] The following order is made:

1. Summary judgment is granted for the payment of the sum of R3 211 556,10.
2. Interest on the above-mentioned amount at the variable rate of 11.22% nominal *per annum*, calculated daily and compounded monthly from 01 October 2024 to the date of final payment.
3. The immovable property described as:
ERF 6[...] P[...] (JHB) TOWNSHIP
REGISTRATION DIVISION I.R.,
THE PROVINCE OF GAUTENG
MEASURING 991 (NINE HUNDRED AND NINETY-ONE) SQUARE METRES
HELD BY DEED OF TRANSFER NUMBER T[...]
SUBJECT TO THE CONDITIONS THEREIN CONTAINED
be declared specially executable.
4. The registrar of the abovementioned Honourable Court is authorised to issue a writ of attachment;

5. Declaring that the abovementioned immovable property may be sold by the Sheriff subject to a reserve price of R2 000 000.
6. The first respondent is directed to pay the costs of this application on a party-and-party scale B.
7. This order is suspended for a period of 6 months from the date of granting of the order.

WJ du Plessis

Judge of the High Court, Gauteng Division,
Johannesburg

Date of hearing: 1 September 2026

Date of judgment: 4 September 2026

For the applicant: R Peterson instructed by Glover
Kannieappan Incorporated

For the respondent: V Mackenzie instructed by Hilary Shaw
Attorneys