



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not reportable

Case no:5563/2024

In the matter between:

ABSA HOME LOANS GUARANTEE COMPANY

(RF) PROPRIETARY LIMITED

FIRST PLAINTIFF

ABSA BANK LIMITED

SECOND PLAINTIFF

and

TSENOLO JOYCE PHILLIPS

DEFENDANT

Coram: Wessels AJ

Judgment reserved: 8 June 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 16h00 on 8 September 2026.

Summary: National Credit Act 34 of 2005 — default judgment and Rule 46A application refused — security held only under an indemnity and indemnity bond in favour of a guarantee company affiliated with the registered credit provider — indemnity making the consumer liable on her own default alone, independently of any liability under the guarantee — effect being to bypass her remedies under the Act.

JUDGMENT

Wessels AJ

Introduction

[1] This matter came before me as a combined application for default judgment against the defendant and for an order under Rule 46A of the Uniform Rules of Court declaring her home specially executable. The first plaintiff, Absa Home Loans Guarantee Company (RF) Proprietary Limited, sues on an indemnity and an indemnity bond. The second plaintiff, Absa Bank Limited, sues in the alternative on the underlying mortgage loan agreement. When referred to individually, I will refer to the first plaintiff as ‘AHLGC’, to the second plaintiff as ‘Absa’, and to the defendant as ‘Ms Phillips’.

[2] At the hearing on 8 May 2026, I raised three issues relating to the parties’ relationship and AHLGC’s standing to bring this claim. The plaintiffs filed supplementary written submissions on 19 May 2026. I have not received any written argument from Ms Phillips.

Background facts

[3] On 8 October 2019 Ms Phillips concluded a written mortgage loan agreement with Absa, a registered credit provider, for the purchase of immovable property at Holdings 262, Lindequesdrif Agricultural Holdings Extension 2, Potchefstroom. Absa advanced R795 000 to Ms Phillips in terms of that agreement. The mortgage loan agreement itself gave the parties a choice of security. Its definitions clause, defines the security instrument as follows.

‘Bond means the Continuing Covering Mortgage Bond or Continuing Covering Indemnity Mortgage Bond to be registered over the Property in the Office of the Registrar of Deeds as security for all amounts loaned to you under this Agreement.’

[4] Clause 11.1 of the mortgage loan agreement provides that security is a condition of the loan.

‘It is a condition of this Agreement that you provide us and/or the Guarantee SPV with the Bond as security and any additional Security Document that we may require. The Property and any additional security for your Mortgage Loan may not be used as security for any other purpose or transaction without our written consent.’

[5] Absa and Ms Phillips adopted the second alternative, a continuing covering indemnity mortgage bond in AHLGC’s favour, rather than a mortgage bond in Absa’s own name. No mortgage bond was registered in Absa’s favour.

[6] In terms of that structure, AHLGC gave Absa a guarantee, an undertaking to pay any amount Ms Phillips owed Absa under the loan agreement should she default. Ms Phillips in turn signed an indemnity in AHLGC’s favour and caused an indemnity bond to be registered over the property in AHLGC’s favour on 13 November 2019, securing R795 000 plus a further R159 000. I return to the details of these three instruments below, because their interaction lies at the heart of this judgment.

[7] Ms Phillips fell into arrears and on 11 June 2024, Absa’s attorneys sent her a notice in terms of s 129(1) of the National Credit Act¹ (‘NCA’). On 22 August 2024, AHLGC demanded payment under the indemnity from Ms Phillips.

¹ National Credit Act 34 of 2005.

Summons was issued on 18 October 2024, in AHLGC's name as first plaintiff and Absa's name as second plaintiff and served on Ms Phillips personally on 11 November 2024. Ms Phillips gave notice of her intention to defend and deposed to an answering affidavit, without legal representation. As at 18 August 2025, the outstanding balance stood at R852 224.26, with arrears of R247 895.79 against a contractual instalment of R15 941.80. Ms Phillips's subsequent offer to pay R7500 a month was rejected. On 1 July 2025 the plaintiffs launched the present application.

[8] The plaintiffs seek payment of R793 909.20, together with interest at 15.25 per cent per annum from 28 May 2024, costs on the attorney-and-client scale, a declaration that the property is specially executable, authorisation for the Registrar to issue a writ of execution and a determination of a reserve price in terms of Rule 46A(8) and (9). They also seek condonation under Rule 46A(3)(d) for any non-personal service of the Rule 46A notice.

The defendant's opposition

[9] Ms Phillips does not dispute that she is in arrears. Her affidavit explains that she is a pensioner on a fixed income, that she has continued to pay R7 500 a month against a contractual instalment of R15 941.80 and that Absa refused her request to extend the term of the loan to bring the instalment within her means. She asks this Court, on humanitarian and 'housing grounds', not to order the sale of her home. The plaintiffs characterise this as no defence at all, submitting that Ms Phillips's affidavit discloses only a request that the Court agree to a repayment, which the plaintiffs say is incompetent in law because it asks the Court to rewrite the parties'

contract. For the reasons that will follow, I do not need to deal with the nature of the defence.

The issues raised by the Court

[10] Two plaintiffs claim, in essence, in respect of one default. AHLGC sues primarily on the indemnity and the bond. Absa sues alternatively on the loan agreement. Absa's own s 129 notice was addressed in its own name, yet it is AHLGC, not Absa, that seeks to execute against Ms Phillips's home. At the hearing I directed the parties to address, with specific regard to ss 8, 40 and 89 of the NCA, (a) the relationship between AHLGC and Absa, (b) why the notice in terms of s 129 of the NCA was given in Absa's name alone, and (c) the role and standing of AHLGC to bring this claim. Those three issues reduce to a single question, whether a structure of this kind, in which an unregistered entity affiliated with the registered credit provider holds the only security over the consumer's home under an indemnity, and may demand payment and execute independently of the credit agreement, escapes the National Credit Act and the protections the Act gives the consumer.

The plaintiffs' answer, and the authorities relied on

[11] The plaintiffs' supplementary written submissions answer as follows. AHLGC and Absa are related but distinct entities. Absa is the registered credit provider on the credit agreement in the matter. AHLGC's function is confined to providing security in place of a mortgage bond. Because AHLGC's indemnity is not itself a credit agreement, s 129 of the NCA does not apply, and Absa alone gave notice. AHLGC needed no registration under s 40 of the NCA to conclude the

indemnity, and it has full standing to sue and to execute independently of the loan agreement.

[12] For this the plaintiffs rely principally on *SB Guarantee Company (RF) Proprietary Limited v Botes*,² decided on materially identical facts, and on *Shaw and Another v Mackintosh and Another*,³ in which the Supreme Court of Appeal held that a guarantee escapes the Act only to the extent that the debt it secures is not itself a regulated credit agreement. They also cite *ABSA Home Loans Guarantee Company (Rf) (Pty) Ltd v Gramoney* (in which matter an application for leave to appeal had been dismissed),⁴ *Changing Tides 17 (Pty) Ltd v Pasiya*,⁵ and *SB Guarantee Company (RF) Pty Ltd v Infinity Petroleum CC*.⁶

[13] Of these, only *Botes* addresses the question identified above, whether a structure of this kind escapes the NCA and the protections it gives the consumer. It does so on similar, but not identical, facts. In *Botes*, the registered credit provider, Standard Bank, was not a party to the litigation at all. Only the guarantee company sued, in its own name, for the full outstanding debt. There was no second plaintiff pleading in the alternative, and no question of two plaintiffs claiming in respect of one default. *Botes* accordingly never had to confront the difficulty that arises here, where AHLGC and Absa both appear as plaintiffs on one default, with Absa's claim left dormant.

²*SB Guarantee Company (RF) Proprietary Limited v Botes* [2024] ZAGPPHC 143 (15 February 2024) para 16.1-16.6.

³*Shaw and Another v Mackintosh and Another* [2018] ZASCA 53; 2019 (1) SA 398 (SCA).

⁴*ABSA Home Loans Guarantee Company (Rf) (Pty) Ltd v Gramoney and Another* (Leave to Appeal) [2026] ZAGPJHC 978.

⁵*Changing Tides 17 (Pty) Ltd NO v Pasiya and Others* [2024] ZAECMKHC 13.

⁶*SB Guarantee Company (RF) Pty Ltd v Infinity Petroleum CC* (2024-102183) (GJ) (9 September 2025).

[14] *Botes* was also decided on summary judgment, not default judgment. The defendant in that matter defended the action and pleaded, as a specific defence, that the guarantee company ought to have registered as a credit provider. The court in *Botes* rejected the registration argument. The debt guaranteed in *Botes*, like the debt guaranteed here, was a mortgage loan concluded by a registered credit provider, a regulated credit agreement in every sense. *Botes* is the only authority cited that addresses this question directly, but on a simpler pleaded structure. None of the other cases cited assists the plaintiffs on this question either.

The structure and application of the agreements

[15] To understand what AHLGC actually claims, and why, it is necessary to trace the three instruments (the Guarantee, Indemnity and Indemnity Bond) that comprise the guarantee structure, and how they interact.

[16] The Guarantee is the first instrument. AHLGC undertook, in Absa's favour, to pay any amount Ms Phillips owed Absa under the loan agreement, should she default. The Indemnity is the second instrument. Ms Phillips undertook, in AHLGC's favour, to indemnify AHLGC against its exposure under the Guarantee. Clause 1.2 of the Indemnity, however, goes further than an ordinary indemnity. It reads as follows:

'I/we undertake to pay the Guarantee SPV on written demand, as a separate and independent primary obligation, the amount for which the Guarantee SPV is liable under the Guarantee, including any amount arising as a result of a redraw, re-advance and/or further advance to me/us under the Loan or any amount arising as a result of my/our failing to duly and punctually perform any of my/our obligations to the Lender under the Loan (and the Guarantee SPV shall be deemed to have suffered a loss and incurred a liability as a result thereof equal to the amount claimable by the Lender) or as a result of any of my/our

obligations to the Lender under the Loan being or becoming void, voidable, illegal, invalid, unenforceable or ineffective in any respect for any reason (and the Guarantee SPV shall be deemed to have suffered a loss and incurred a liability as a result thereof equal to the amount claimable by the Lender).’

[17] Clause 1.2 of the Indemnity causes Ms Phillips’s obligation to AHLGC to arise on independent grounds. The first is an amount for which AHLGC is liable under the Guarantee. The second, described in the clause itself as ‘a separate and independent primary obligation’, arises from her own failure to perform her obligations to Absa under the loan. It does not depend on AHLGC ever having paid Absa, or become liable to Absa, under the Guarantee. The clause goes further still. It extends AHLGC’s claim to a third ground, where Ms Phillips’s obligations to Absa under the loan are or become void, voidable, illegal, invalid, unenforceable or ineffective for any reason. On that ground, AHLGC could claim from Ms Phillips even if the loan agreement itself were unenforceable.

[18] The Indemnity Bond is the third instrument. To secure Ms Phillips’s obligations under the Indemnity, a bond was registered over the property in AHLGC’s favour on 13 November 2019. It secures her obligations to AHLGC. It does not, on its terms, secure her obligations to Absa under the loan agreement. Clause 3.3 of the Indemnity, at bundle page 001-87, which governs when that bond may be realised, reads as follows.

‘If I/we do not immediately pay any amount due and payable by me/us in terms of the demand issued in terms of clause 1.2, the Guarantee SPV shall be entitled: 3.3.1 to take all such steps as may be reasonable or necessary in order to exercise its rights in respect of the security given by me/us to the Guarantee SPV for my/our obligations under this Indemnity which may include (following a court process), selling the Property, or exercising any other rights it may have in law, and otherwise to enforce the claim against me/us pursuant to this Indemnity and: 3.3.2 out of the proceeds of that security and amounts recovered

pursuant to this Indemnity, to pay the claims of the Lender in accordance with the provisions of the Guarantee and the costs referred to in clause 12 below.’

[19] The practical effect is this. On Ms Phillips’s default, Absa need not sue on the loan agreement to execute the property. It need only notify AHLGC of the default. Under the Indemnity, clause 1.2’s second and third grounds then entitle AHLGC to demand, directly from Ms Phillips and the full amount outstanding in terms of the loan, and clause 3.3 entitles AHLGC to realise the bond to recover it, without AHLGC having paid Absa in terms of the Guarantee.

[20] The reason follows directly from clause 1.2 itself. AHLGC’s entitlement to claim from Ms Phillips does not depend on AHLGC first having paid Absa, or having become liable to Absa, under the Guarantee. Nothing on the particulars as pleaded suggests that AHLGC ever did so. Because AHLGC has paid Absa nothing, the claim it presents for default judgment cannot be a claim for its own loss under a guarantee it has honoured. It is, in substance, Absa’s own debt under a regulated credit agreement, recovered through AHLGC as an unregistered intermediary, and secured by a bond that Absa itself does not hold. Absa is the registered credit provider on the only credit agreement in this matter. AHLGC is not registered and holds the only security over the property.

The particulars of claim

[21] I should note two shortcomings in the drafting of the particulars of claim, before turning to their substance. Paragraph 7.6 refers to repayment of the principal

debt by ‘the Defendants’, in the plural, although there is only one defendant before me. Paragraph 7.11 permits a certificate signed by AHLGC’s manager to prove an amount owing under the loan agreement, an agreement to which AHLGC is not a party. Neither shortcoming is fatal on its own and I do not need to decide what consequence, if any, they would carry.

The role of Absa

[22] A further difficulty arises on Absa’s side. Absa pleads its loan agreement claim only in the alternative. The notice of application for default judgment removes any doubt about who actually pursues that claim. In the application for default judgment, the plaintiffs state that:

‘the **First Applicant/Plaintiff alone herein** intends to apply for Default Judgment together with an order in terms of Rule 46A, against the Respondent/Defendant as claimed in the summons, in accordance with the attached draft order, as follows’. (emphasis added)

[23] The consequence is twofold. First, AHLGC’s claim having failed, there is no relief in Absa’s favour left for me to consider, because none was sought. Second, even had Absa pressed its claim, a judgment in its favour could only ever have been an ordinary money judgment. Absa holds no bond over the property, and a money judgment against Ms Phillips in Absa’s favour could not, on these facts, support an order under Rule 46A declaring the property specially executable. The only route to the property is through AHLGC’s bond. Absa’s function in these papers has been limited to giving the s 129 notice as the registered credit provider, while taking no part in the claim actually pursued or the execution actually sought.

Application of the law

[24] On 11 June 2024, Absa's attorneys gave Ms Phillips the s 129(1) notice, because she was already in default under the loan. Section 129 gives a consumer in default several ways to respond. Ms Phillips could refer the matter to a debt counsellor, initiate alternative dispute resolution, approach an ombud, or bring her payments up to date. Each option aims to cure her default under the loan. But clause 1.2 of the Indemnity does not care which path she takes, or whether she takes one at all. It triggers AHLGC's claim to the moment of Ms Phillips's default itself, not to anything she does about it afterwards. By the time Ms Phillips could even consider her options under s 129, AHLGC's claim to the property was already ripe, regardless of the remedies the NCA provide. Whichever route she chooses, debt counselling, mediation, an ombud, or simply catching up her arrears, none of it has any effect on AHLGC's claim. Section 129 protects her relationship with Absa, not her relationship with AHLGC. Against this construct, every remedy s 129 offers has no effect on the envisaged execution process in relation to the property.

[25] Section 129(3) of the NCA reads as follows.

‘(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.’

[26] Section 129(3) entitles a consumer in Ms Phillips's position to reinstate a credit agreement, even after summons and judgment, by paying the arrears and default charges before the property is sold, unless one of the events in s 129(4) has

intervened. That right is fundamental to the scope of the Act, and it attaches only to the credit agreement between Ms Phillips and Absa. It does not attach to the Indemnity or the bond, which are separate instruments AHLGC holds against Ms Phillips in her personal capacity. The inevitable consequence is that even if Ms Phillips reinstates her agreement with Absa by paying, at minimum, the arrears and default charges, without settling the full outstanding balance, AHLGC's claim in terms of the Indemnity and its right to realise the bond remains unrestricted. Reinstatement cures Ms Phillips' default under the loan. It does not impede the independent obligation AHLGC says she owes under clause 1.2 or 3.3 to sell the property. AHLGC could accordingly still execute against the property after a valid reinstatement, leaving the protection provided by s 129(3) as mere lip service.

[27] Section 26(3) of the Constitution provides that no one may be evicted from their home without a court order made after considering all relevant circumstances, and that no legislation may permit arbitrary evictions. The Constitutional Court explained in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*⁷ that any measure that deprives a person of their existing access to adequate housing limits a right protected by the Constitution. Judicial oversight exists so that a court can weigh all the relevant circumstances before ordering execution. The Constitutional Court recognised that consumers facing execution are often vulnerable and poorly placed to protect themselves once the process is underway. Ms Phillips, a pensioner conducting her own defence, is the kind of consumer that this protection was intended for.

[28] Section 129(3) is the method by which the CPA protects a consumer's rights. Rule 46A is the method by which the Uniform Rules do the same at the

⁷ *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25 paras 43, 47 and 55.

point of execution. Both underpin the same constitutional purpose. Section 39(2) of the Constitution provides for the following:

‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

[29] If AHLGC could execute against Ms Phillips's home while these protections apply only to Absa and the loan agreement, the purpose as alluded to in s 39(2) of the Constitution would be defeated. The general principles laid down in *Nkata v FirstRand Bank Limited and Others*⁸ in this context. In *Nkata*, the Constitutional Court held that a credit receiver's right to reinstate a credit agreement under s 129(3) of the NCA arises automatically, by operation of law, once she pays the arrears and default charges, with no need to notify the credit provider. Only the arrear instalments need be paid to reinstate the agreement, not the full accelerated debt, even where the agreement contains an acceleration clause. *Nkata*⁹ described s 129(3) as a rescue mechanism correcting the historically harsh common law position as follows:

‘Reinstatement is predicated on "a credit agreement that is in default". It is a rescue mechanism that is available to the consumer precisely when she has fallen into arrears and may be liable to pay the full accelerated outstanding debt.’

[30] The bar in s 129(4) arises only once a sale in execution has actually been realised, and not at any earlier occasion such as attachment or the issuing of a notice of sale.

⁸ *Nkata v FirstRand Bank Limited and Others* [2016] ZACC 12.

⁹ *Ibid* *Nkata* par 108.

[31] For present purposes I do not need to decide whether AHLGC's Guarantee to Absa is itself a credit guarantee falling within the NCA, or whether AHLGC ought to have registered as a credit provider under s 40 of the NCA. That is a wider question than this application requires me to answer. It is enough to decide this application on the narrower ground already identified. What it has established is an entitlement, drawn from the Indemnity alone, to collect Absa's debt from Ms Phillips and to execute against her home, through a route that does not allow her to invoke any remedy provided by the NCA. Her right to reinstate the credit agreement under s 129(3) operates against the credit agreement and the registered credit provider. It has nothing to say about a claim brought under the Indemnity by an unregistered guarantee company, so it affords her no real protection against AHLGC's claim. Section 89 of the NCA renders void a credit agreement concluded by an unregistered credit provider. Whatever the correct characterisation of the Indemnity, the effect of this construct is to bypass the remedies the CPA affords Ms Phillips as a consumer.

[32] AHLGC has accordingly not established the standing it asserts to the relief it seeks. Absa's claim is pleaded only in the alternative and has not been prosecuted to judgment. In those circumstances, the Rule 46A enquiry into the proportionality of executing against a primary residence does not arise for decision, because no plaintiff has yet established an entitlement capable of supporting it.

Conclusion

[33] For these reasons the application for default judgment, and for an order declaring the property specially executable, cannot succeed on the papers as they now stand.

Order

[34] I make the following order.

1. The application for default judgment against the defendant is refused. In consequence, the application for an order declaring the immovable property known as Holdings 262, Lindequesdrif Agricultural Holdings Extension 2, Registration Division IQ, North West Province, measuring 2,1933 (two comma one nine three three) hectares, held by Deed of Transfer T[...], specially executable, does not arise for consideration and is likewise refused.
2. There is no order as to costs.

M WESSELS

**ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

Appearances:

For the plaintiffs: Mr G Labuschagne

Instructed by: Velile Tinto & Associates Inc, Pretoria
c/o Labuschagne Attorneys, Mahikeng

For the defendant: In person

