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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2025-037934

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 04 September 2026

SIGNATURE:

In the matter between:

CHANGING TIDES 17 (PTY) LTD N.O.

Applicant / Plaintiff

and

FANUEL JOHN MOTSEPE

Respondent / Defendant

This judgment was prepared and authored by the Judge whose names is reflected herein and is handed down electronically by circulation to the parties' legal representatives by email and by

uploading it to the electronic file of this matter on CaseLines. The date and time for this hand-down is deemed to be 10:00 on 04 September 2026.

JUDGMENT

INTRODUCTION

1. Two applications are before this Court. Although they are separate, they are linked. The first is an application by the plaintiff for summary judgment in terms of Uniform Rule 32 for payment of the sum of R2,177,923.39, together with interest and costs. The second is an application in terms of Uniform Rule 46A for an order declaring the defendant's immovable residential property specially executable, subject to a reserve price. Both applications are opposed. They were enrolled for hearing on the same day.
2. For the reasons set out below, I am satisfied that the defendant has met the requirements of Rule 32(3)(b) as he has disclosed a defence which is *bona fide*, good in law, and which raises triable issues. The application for summary judgment must accordingly be refused and the defendant granted leave to defend. It follows that the application under Rule 46A must stand over.

THE PARTIES

3. The plaintiff is Changing Tides 17 (Pty) Ltd N.O., which sues in its representative capacity as the duly appointed sole trustee of the South African

Home Loans Guarantee Trust (“SAHL Trust”), a trust registered as a credit provider in terms of the National Credit Act¹.

4. The defendant is Mr Fanuel John Motsepe, the registered owner and occupier of the immovable property described as Erf [...] B[...] N[...] Township, Registration Division I.R., Province of Gauteng, situated at 7[...] S[...] Avenue, Bramley North, Johannesburg (“the property”). It is common cause that the property is the defendant’s primary residence.

THE FACTS

5. The plaintiff’s cause of action arises from a series of interrelated agreements concluded during September 2009. How these agreements are to be interpreted, and how they fit together, is central to the dispute between the parties. The agreements are the following:
 - 5.1. a written loan agreement, under which Blue Banner Securitisation Vehicle RC1 (Pty) Ltd (“the Lender”) advanced a home loan in the sum of R1,275,000 to the defendant;
 - 5.2. a written indemnity, under which the defendant indemnified the SAHL Trust against any loss, cost, claim, expense or liability incurred by it as a consequence of the defendant’s failure to perform his obligations under the loan agreement;

¹ 34 of 2005 (“The NCA”).

- 5.3. a written guarantee, in terms of which the SAHL Trust guaranteed to the Lender the due and punctual payment of the defendant's indebtedness, subject to the terms of a Common Terms Guarantee Agreement ("the CTGA"); and
 - 5.4. as security for the defendant's obligations under the indemnity, an indemnity (mortgage) bond was registered over the property on 24 November 2009 in an amount not exceeding R1,400,000.
6. The plaintiff pleads that, as a result of the defendant's default:
- 6.1. the Lender called up the guarantee;
 - 6.2. the SAHL Trust thereby became liable to the Lender; and
 - 6.3. the defendant is, in turn, liable to the SAHL Trust under the indemnity in the amount claimed.
7. The plaintiff further pleads compliance with section 129(1)(a) of the National Credit Act, and relies upon a certificate of balance and demand.

THE PLEADINGS AND PROCEDURAL HISTORY

8. On 19 March 2025, the summons was issued and served on 31 March 2025.
9. On 14 May 2025 the defendant delivered a plea:
- 9.1. In his first special plea, the defendant alleges that the debt was accelerated by demand on or about 2 November 2018 and has

prescribed in terms of section 11(d) read with section 12(1) of the Prescription Act².

- 9.2. The second special plea raises *lis alibi pendens* in respect of an earlier action between the parties.
- 9.3. On the merits, the defendant denies the plaintiff's allegations, disputes the plaintiff's *locus standi* and pleads non-compliance with Rule 46A.
10. On 4 June 2025, the application for summary judgment was launched. On 10 July 2025, the plaintiff brought the application in terms of Rule 46A and on 22 July 2025, the defendant delivered his affidavit resisting summary judgment.
11. The earlier action, referred to in the defendant's special plea, was instituted by the plaintiff under case number 2019/2894 against the defendant on substantially the same facts. An application for summary judgment in that action was refused by the Honourable Justice Kumalo ("Kumalo J"), who held that triable issues existed, including in relation to the HOC premiums and legal costs debited to the account, which had to be dealt with at trial. That action was subsequently withdrawn by the plaintiff during July 2024, and thereafter the present action was instituted.

THE LEGAL FRAMEWORK

² 68 of 1969 ("The Prescription Act").

12. Rule 32(1) of the Uniform Rules of Court, in its amended form, entitles a plaintiff, after the defendant has delivered a plea, to apply for summary judgment on a claim that is founded, *inter alia*, on a liquidated amount in money.
13. In terms of Rule 32(2)(b), the plaintiff must, in its supporting affidavit, verify the cause of action and the amount claimed, identify any point of law relied upon and the facts upon which the claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial. The affidavit must be made by the plaintiff or by a person who can swear positively to the facts.
14. In terms of Rule 32(3)(b), the defendant may resist the application by satisfying the court, on affidavit, that he has a *bona fide* defence to the action. The affidavit must fully disclose the nature and grounds of the defence and the material facts relied on.
15. The nature of the remedy is settled. Although for many years described as extraordinary and stringent, the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*³ cautioned against such labels, holding (at paragraph [32]):

“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. ... Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are ‘drastic’ for a defendant who has no defence.”

³ 2009 (5) SA 1 (SCA).

16. The leading authority remains *Maharaj v Barclays National Bank Ltd*⁴, in which Corbett JA⁵ formulated a two-part enquiry:
 - 16.1. whether the defendant has “*fully*” disclosed the nature and grounds of his defence and the material facts upon which it is founded; and
 - 16.2. whether, on the facts so disclosed, the defence is both *bona fide* and good in law.
17. The defendant is not required to formulate his opposition with the precision of a plea (although, since the amendment of Rule 32, the application follows delivery of a plea), nor to persuade the court of the ultimate correctness of his defence; it suffices that the defence is not inherently or seriously unconvincing and that it carries a reasonable possibility of success at trial. A court satisfied that this threshold has been crossed is bound to refuse summary judgment.
18. There are three further principles, relevant to this application, which I deal with below.

The deponent must swear positively to the facts

19. The supporting affidavit must be deposed to by a person who can swear positively to the facts. The standard is set out in *Maharaj v Barclays National Bank Ltd*⁶:

⁴ 1976 (1) SA 418 (A).

⁵ At 425G–426E.

⁶ 1976 (1) SA 418 (A) at 423.

- 19.1. Where the plaintiff is a corporate entity, first-hand knowledge by the deponent of every fact comprising the cause of action is not required;
- 19.2. It suffices that, having regard to the office the deponent holds and his or her access to the plaintiff's books and records, the deponent is able to swear positively to the facts. Undue formality is to be avoided.
20. That approach was reaffirmed by the Supreme Court of Appeal in *Rees v Investec Bank Ltd*⁷, where knowledge derived from an institution's records under the deponent's control was held sufficient.
21. The plaintiff submits, correctly as a matter of principle, that a defendant may not raise in its affidavit a defence that is not pleaded in its plea, and that the *res judicata*, HOC-premium and legal-costs contentions are impermissible new matter that should be disregarded (*AHMR Hospitality*). The special pleas of prescription and *lis pendens* were pleaded, and the prescription defence, including its dependence on the interpretation of the interrelated agreements, is an elaboration of a pleaded defence rather than a new one.

The claim must be for a liquidated amount in money

22. A claim only qualifies under Rule 32(1)(b) where it is for an amount that is either agreed upon or capable of speedy and prompt ascertainment. An untaxed bill of costs, and an account comprising items which the defendant contends have been wrongly debited, have been held not to constitute liquidated amounts. In

⁷ 2014 (4) SA 220 (SCA) at paras 14 - 15.

determining the question the court does not limit itself to the summons, the defence disclosed in the defendant's opposing affidavit must also be taken into account.

The defendant is, in general, confined to the defence pleaded

23. Since the plaintiff's affidavit is directed at explaining why the defence as pleaded does not raise an issue for trial, the defendant is, in the ordinary course, held to the version advanced in his plea. He may elaborate on a pleaded defence in his affidavit, but he may not raise, for the first time in the affidavit, a defence which has no foothold in the plea, nor advance a version inconsistent with the plea without a reasonable explanation. The full court in *AHMR Hospitality (Pty) Ltd t/a Bakenhof Winelands Venue v Da Silva*⁸, held:

"[I]t would thus be the natural course of progression for a defendant, in the face of a summary judgment application, to expand upon the defence or defences so raised in its plea - in its affidavit. But the cart cannot be put before the horse. In other words ... a defendant cannot for the first time raise defences in its affidavit opposing summary judgment, where no such defences exist in its plea."

24. The full court further cautioned that a court "*is not there to speculate on how litigants intend to prosecute their case,*" and is "*confined to what is before them*".⁹ The mere possibility that a defendant might amend its plea will not save an affidavit that introduces impermissible new matter. Genuinely new matter must therefore be left out of account. That position is to be distinguished from

⁸ 2024 (3) SA 100 (WCC) at paragraph [14].

⁹ At paragraph [16].

the case of a defendant who has pleaded a substantive defence but has not pleaded over fully upon the merits, where the appropriate course may be a postponement to permit amendment and the exchange of supplementary affidavits, rather than the grant of final relief¹⁰.

APPLICATION OF THE LAW TO THE FACTS

The matters not persisted in

25. The special plea of *lis alibi pendens* does not assist the defendant as the 2019 action has been formally withdrawn and the defendant accepts that to be so.
26. The challenge to the plaintiff's *locus standi*, based on the contention that the SAHL Trust, having paid nothing to the Lender, suffered no loss, is no longer pursued. The indemnity was framed as a separate and independent primary obligation.
27. Neither of the above two defences, if taken alone, would have precluded the grant of summary judgment.

Prescription and the construction of the security

28. The plaintiff contends that the indebtedness, being secured by a mortgage bond, prescribes only upon the expiry of thirty years in terms of section 11(a)(i) of the Prescription Act. The defendant's first special plea, by contrast, expressly invokes section 11(d) of the Prescription Act, the three-year period, pleading

¹⁰ *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) and *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC).

that the debt was accelerated during November 2018 and prescribed in consequence. The defendant's answer to the plaintiff's reliance on the mortgage bond is, in essence, one of interpretation. The defendant contends that, on a proper reading of the guarantee and the CTGA:

28.1. the indemnity bond secures the indemnity and not the loan;

28.2. the indemnity and the bond become enforceable only once the Lender has called up the guarantee and the SAHL Trust has assigned its rights to the Lender; and

28.3. the right to call up the guarantee is an ordinary personal right which prescribes within three years.

29. On the defendant's construction, since the underlying loan debt had prescribed, the guarantee could not thereafter be called up so as to trigger the indemnity or the bond. He relies, *inter alia*, on *Kilburn v Estate Kilburn*¹¹ and *Fourlamel (Pty) Ltd v Maddison*¹².

30. Whatever its ultimate merits, this raises a serious question of contractual interpretation, given the interdependence of the loan, the indemnity, the guarantee, the CTGA and the bond. The defendant's contention cannot be said to be *mala fide*, nor bad in law, nor inherently or seriously unconvincing.

¹¹ 1931 AD 501.

¹² 1977 (1) SA 333 (A).

31. It is precisely the kind of question that ought to be determined after evidence has been presented at trial, and not on affidavit. It constitutes a triable issue. This defence is raised in the plea: the special plea expressly pleads prescription under section 11(d) of the Prescription Act, and the construction advanced in the affidavit is an elaboration of this defence and does not amount to new matter as contemplated in *AHMR Hospitality*.

Res judicata and issue estoppel

32. The defendant further contends that the matter is *res judicata*, alternatively that issue estoppel operates, because summary judgment was refused by Kumalo J in the 2019 action and the plaintiff's subsequent withdrawal and re-institution of the action on substantially the same papers. This contention was, however, advanced for the first time in the affidavit resisting summary judgment and was not pleaded. Therefore, on the principle set out in *AHMR Hospitality*, it is impermissible new matter which must be left out of account, and I do not rely on it.

The quantum and the question of liquidity

33. The defendant disputes the Home Owner's Cover ("HOC") premiums and the legal costs debited to his account, contending that the costs have not been agreed or taxed, and cannot be taken into account and that absent the HOC premiums and legal costs, he may not be in arrears at all. Insofar as that dispute is itemised only in the affidavit, the plaintiff is correct that a bald denial of indebtedness in a plea does not, of itself, raise a triable issue (NPGS

Protection and Security Services CC v FirstRand Bank Ltd¹³). The portions of the affidavit resisting summary judgment which are unsupported by the plea must be approached with caution.

34. That, however, does not conclude the enquiry. Whether the claim is for a liquidated amount in money within the meaning of Rule 32(1)(b) is a jurisdictional precondition to the remedy, and the court must satisfy itself that it is met. In determining whether the amount is a liquidated amount in money, the court has regard to the summons and to the defence disclosed in the opposing affidavit. An account incorporating untaxed legal costs and disputed HOC premiums is not capable of speedy and prompt ascertainment.

35. The plaintiff's papers complicate this exercise further, reflecting materially different amounts at different dates:

35.1. R1,917,895.08, as at 23 September 2024, in the letter sent in terms of section 129 of the National Credit Act;

35.2. R2,064,917.17, as at 29 November 2024, in the particulars of claim (paragraph 11);

35.3. R2,177,923.39, as at 29 November 2024, in the particulars of claim (paragraph 12);

¹³ 2020 (1) SA 494 (SCA).

- 35.4. The difference between the amounts mentioned in paragraphs 11 (arrears) and 12 (amount due owing and payable) of the particulars of claim is not clear from the papers and not easily ascertainable.
- 35.5. R2,334,536.64, as at June 2025 in the replying affidavit to the Rule 46A application;
- 35.6. R2,177,923.39 claimed in the application for summary judgment.
36. While a certificate of balance may, in an appropriate case, constitute *prima facie* proof of an amount claimed, it cannot convert a genuinely unliquidated amount into a liquidated one.

The challenge to the deponent's knowledge

37. The defendant has also challenged the deponent's lack of personal knowledge of the salient facts. The allegation is without merit. The deponent, Ms Maraj, is the manager of the litigation department of SAHL, the entity which originated and administers the loan on behalf of the Lender and which administers the affairs of the SAHL Trust. Ms Maraj states that she has under her control, and access to, all files, records and computer data pertaining to the defendant's mortgage loan account, and that her knowledge of the facts derives either personally or from that access. Measured against *Maharaj* and *Rees*, that is precisely the office and means of knowledge which entitle the deponent for a corporate creditor to swear positively to the facts. The defendant, for his part, advances a bare assertion as he identifies no particular averment shown to lie

beyond the deponent's means of knowledge, and each of the underlying transactions is in any event evidenced by the written instruments annexed to the papers. Insofar as the objection relies on the stricter approach in *Le Roux*¹⁴ that approach must, for the reasons given in paragraph 16 above, yield to the authority of the Supreme Court of Appeal. Insofar as the true target is the deponent's authority rather than her knowledge, the answer lies in *Ganes and Another v Telecom Namibia Ltd*¹⁵, where it was held that it is the authority of the attorney to institute the proceedings that is relevant, and the remedy of a defendant wishing to challenge it is a notice in terms of Rule 7(1), which was never delivered. This point *in limine* therefore fails.

The new matter and its consequences

38. I accept the plaintiff's submission, founded upon *AHMR Hospitality*, that a defendant may not raise in his affidavit a defence not pleaded in his plea, and that the contentions of *res judicata*, and the itemised dispute concerning the HOC premiums and legal costs, insofar as they were not pleaded, are new matter to be left out of account. Even when fully accepted, that submission does not assist the plaintiff. The special plea of prescription was pleaded, and the defendant's reliance upon the construction of the security is an elaboration of that pleaded defence and not a new one. *AHMR Hospitality* itself acknowledges that it is natural for a defendant to expand in his affidavit on a defence already raised in his plea. What is not permitted is the introduction of an entirely new,

¹⁴ 2014 (1) SA 475 (WCC).

¹⁵ 2004 (3) SA 615 (SCA) at 624I - 625A.

unpleaded defence. The pleaded defence of prescription accordingly survives, and it alone requires the refusal of summary judgment.

39. The plaintiff submits, correctly as a matter of principle, that a defendant may not raise in its affidavit a defence that is not pleaded in its plea, and that the *res judicata*, HOC-premium and legal-costs contentions are impermissible new matter that should be disregarded (*AHMR Hospitality*). The special pleas of prescription and *lis pendens* were pleaded, and the prescription defence, including its dependence on the construction of the security, is an elaboration of a pleaded defence rather than a new one.

A further point: the affidavit in support of summary judgment has not been commissioned by a commissioner of oaths

40. Upon reading the papers it became apparent that the affidavit in support of the application for summary judgment was commissioned by a Candidate Legal Practitioner, one Lindile Prince Shem. Mr Shem, expressly describes himself on his stamp as a “Candidate Legal Practitioner”. A candidate legal practitioner is not, by virtue of that status, an *ex officio* commissioner of oaths. The stamp further records “Commissioner of Oaths (RSA)” and bears the reference “10/2/9/1”; the latter appears to be a Department of Justice reference associated with appointments of commissioners of oaths.

41. The stamp itself does not establish when, where or in terms of what instrument Ms Shem was appointed as a commissioner of oaths, nor the territorial extent or continued validity of any such appointment.

42. In the circumstances, and insofar as reliance is placed upon an individual appointment under section 5 of the Justices of the Peace and Commissioners of Oaths Act,¹⁶ proof of that appointment is required. His status as a candidate legal practitioner, standing alone, affords no authority to administer an oath. The Justices of the Peace and Commissioners of Oaths Act as well as its Regulations, prescribe which people in what offices may be designated commissioner of oaths as well as the powers assigned to these commissioners of oaths.

THE APPLICATION IN TERMS OF RULE 46A

43. Rule 46A governs execution against residential immovable property which is the primary residence of a judgment debtor. The constitutional jurisprudence, *Jafttha v Schoeman*; *Van Rooyen v Stoltz*¹⁷, *Gundwana v Steko Development*¹⁸ and *Absa Bank Ltd v Mokebe*¹⁹ requires a court, before authorising such execution, to have regard to all relevant circumstances, to consider whether there is any less drastic means of satisfying the debt, and, where execution is warranted, to fix a reserve price.
44. It is an essential requirement of relief under Rule 46A that there be a judgment debt. Summary judgment having been refused, and no money judgment having yet been granted, the application to declare the property specially executable is premature. It cannot be entertained now and must stand over for decision, if still

¹⁶ 16 of 1963.

¹⁷ 2005 (2) SA 140 (CC).

¹⁸ 2011 (3) SA 608 (CC).

¹⁹ 2018 (6) SA 492 (GJ).

necessary, once the action is concluded. I make no finding on the disputed valuations or the proposed reserve price of R1,109,468.13, both of which remain in issue. I further make no finding on the defendant's contention that a sale at approximately one-third of the property's market value could not be justified, or on his challenge to the deponent's averments. These are matters to be determined in due course.

COSTS

45. Costs ordinarily follow the result, and the defendant has succeeded in resisting summary judgment. The established approach, however, is that the costs of an unsuccessful application for summary judgment are best treated as costs in the cause as the application is only a step in the action, and the costs are then ultimately borne by the party who fails at the trial. Exercising my discretion, and because the issues raised will be determined at the trial, I consider it just that the costs of the application for summary judgment be costs in the cause, and that the costs of the application in terms of Rule 46A, which stands over, be reserved.

CONCLUSION

46. The summary judgment cannot be granted and must be refused. The application in terms of Rule 46A is postponed *sine die* and the defendant is granted leave to defend the action. A concise summary of the grounds for this finding follows.

47. The following defences are without merit:

- 47.1. The defence of *lis pendens* is without merit as the 2019 action was withdrawn;
- 47.2. The plaintiff's lack of *locus standi* was abandoned by the defendant in his own affidavit;
- 47.3. the bare denial of indebtedness cannot stand in the light of *NPGS*;
- 47.4. the challenge to the deponent's personal knowledge fails on *Maharaj* and *Rees*;
- 47.5. the authority to institute proceedings fails on *Ganes* absent a Rule 7 notice; and
- 47.6. *res judicata*, as an independent defence, was never pleaded and cannot be raised after the fact.

48. The following defences, however, are such that summary judgment must be refused and the defendant be granted leave to defend:

The first reason, the defendant's special plea of prescription

- 48.1. The first reason is the defendant's special plea of prescription, which turns on a genuine question of interpretation of the interlinked agreements. The plaintiff's answer to prescription is that section 11(a)(i) of the Prescription Act provides that a debt secured by a mortgage bond

prescribes in thirty years. However, the defendant's interpretation of the interlinked agreements and their manner of execution is that:

48.1.1. The indemnity bond secures his obligations under the indemnity, not the loan;

48.1.2. The indemnity only becomes actionable once the Lender calls up the guarantee;

48.1.3. The right to call up the guarantee is an ordinary personal right prescribing in three years; and

48.1.4. Once the loan debt prescribed in 2022, the whole transaction 'chain', guarantee, assignment, indemnity, bond, became unenforceable on the accessory principles in *Kilburn*. The argument engages the actual wording of clauses 4.1, 4.5 and 5 of the guarantee.

48.2. Summary judgment does not require a decision on which interpretation is correct; it requires only that the defence be *bona fide* and arguable in law. An arguable point of interpretation on which the entire claim stands or falls is a triable issue, and since the defendant in fact pleaded prescription as a special plea, this defence has a proper foothold in the plea and the plaintiff's '*new-matter*' objection cannot succeed.

48.3. Under *Maharaj* and *Joob Joob*, with any doubt resolved in favour of a trial, this alone justifies refusal.

The second reason is quantum and liquidity

49. The account includes HOC premiums and legal costs that were neither agreed nor taxed. The defendant contends that, absent these amounts, he may not be in arrears at all. The plaintiff's own papers show materially different figures at different dates, for example:

49.1. R2,064,917.17 in the particulars of claim;

49.2. R2,334,536.64 in the Rule 46A founding affidavit; and

49.3. R2,177,923.39 as claimed.

50. A certificate of balance is *prima facie* proof, however it cannot make a genuinely contested account speedily ascertainable. The liquidity requirement is jurisdictional, and as such does not depend on whether the defendant pleaded the point perfectly.

The third reason is Kumalo J's judgment

51. The third reason is Kumalo J's judgment in the 2019 action. Kumalo J held that the HOC premium and costs dispute "*cannot be dealt with adequately in summary judgment proceedings and requires proper ventilation in another forum like a trial.*" The plaintiff then withdrew that action and re-issued on the same papers. The same issue remains, and the Court's earlier finding remains relevant. The dispute is still triable.

ORDER

52. In the premises, the following order is made:

1. The application for summary judgment is refused.
2. The defendant is granted leave to defend the action.
3. The application in terms of Rule 46A is postponed sine die.
4. The costs of the application for summary judgment shall be costs in the cause.
5. The costs of the application in terms of Rule 46A are reserved.

SOPHIA MARITZ

Acting Judge of the High Court

Gauteng Division, Pretoria

APPEARANCES

For the applicant/plaintiff: Adv P I Oosthuizen

Instructed by: Velile Tinto & Associates Inc (ref S7824)

For the respondent/defendant: Adv K Meyer

Date of judgment: 03 September 2026

Electronically delivered