Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40476/2021

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

[redacted]

13/05/2024

Date **ML TWALA**

ABSA BANK LIMITED **APPLICANT**

And

AGRO TRACTOR HOUSE IMPORT AND EXPORT CC
(Registration Number: 2004/021584/23) **FIRST RESPONDENT**

IVERSEN: VILLY HANSEN
(PASSPORT NO: [redacted]) **SECOND RESPONDENT**

MORULE: TSHEGOFATSO MOKGOLO
(ID NO: [redacted]) **THIRD RESPONDENT**

MORULE: VIRGINIA
(ID NO: [redacted]) **FOURTH RESPONDENT**

JUDGMENT

TWALA J

Introduction

[1] There are two applications before this Court. In the first application the applicant seeks an order that summary judgment be entered against the first to fourth respondents, jointly and severally, the one paying and the other to be absolved in the following terms:

1.1 Claim A

1. Payment in the sum of R4 558 896.57
2. Interest on the aforesaid sum at the rate of 15% (prime currently 7% plus 8%) linked to prime, per annum, calculated and capitalised monthly from 3 June 2021 to date of payment, both days included;
3. An order whereby the following property owned by the fourth respondent/defendant is declared executable:

   Erf 2017 Northcliff Extension 15 Township

   Registration Division IQ

   Province of Gauteng measuring 1487 (one thousand four hundred and eighty- seven square metres)

   Held by deed of transfer number T19051/1994 ("the property")
4. The plaintiff is hereby authorised to issue a writ of attachment calling upon the sheriff of the court to attach the property per 3 above and to sell the property in execution;
5. Costs of suit on the scale as between attorney and client.

As against the fourth and first defendants/respondents jointly and severally the one paying the other to be absolved for:

Claim B

1. Payment of the amount of R1 263 469.66;
2. Interest on the aforesaid sum at the rate of 5.10% (prime currently 7% less 1.9%) linked to prime, per annum, calculated and capitalised monthly from 9 June 2021 to date of final payment, both days inclusive;
3. An order whereby the following property belonging to the fourth defendant/respondent be declared executable:
   Erf 2017 Northcliff Extension 15 Township
   Registration Division IQ
   Province of Gauteng measuring 1487 (one thousand four hundred and eighty- seven square metres)
   Held by deed of transfer number T19051/1994 ("the property")
4. The plaintiff be and is authorised to issue a writ of attachment calling upon the sheriff of the above Honourable court to attach the property per 3 above and to sell it in execution.
5. Costs of suit on the scale as between attorney and client.

As against the fourth and first defendants/respondents jointly and severally the one paying the other to be absolved for:

Claim C

1. Payment in the sum of R554 294.35;
2. Interest on the aforesaid amount at the rate of 6.9% (prime currently 7% less 0,10%) linked per annum calculated and capitalised monthly from 9 June 2021 to date of payment both days included;
3. An order whereby the following property of the fourth defendant be declared executable:

Erf 2017 Northcliff Extension 15 Township
Registration Division IQ
Province of Gauteng measuring 1487 (one thousand four hundred and eighty- seven square metres)
Held by deed of transfer number T19051/1994 ("the property")

4. The plaintiff is hereby authorised to issue a writ of attachment calling upon the sheriff of the court to attach the property per 3 above and to sell the property in execution;
5. Costs of suit on the scale between attorney and client;

[2] The second application is in terms of Rule 46A of the Uniform Rules of Court whereby the applicant seeks an order to declare the immovable property of the first respondent in this application, who is the fourth respondent in first application, specially executable, being property:

Erf 2017 Northcliff Extension 15 Township
Registration Division IQ
Province of Gauteng measuring 1487 (one thousand four hundred and eighty- seven square metres)
Held by deed of transfer number T19051/1994 ("the property").

[3] Furthermore, the applicant seeks an order that it be authorized to issue a writ of attachment calling upon the sheriff of the Court to attach the property as mentioned above and to sell it in execution with the reserve price for the auction set at the sum of R2 920 000. The applicant asks the Court to award it with the costs of suit on the scale as between attorney and client.

Factual Background

[4] For the sake of convenience, I propose to deal with both applications in this judgment since they relate to the same parties and the property to be declared executable was provided as security for the indebtedness of the fourth respondent in

the first application. Further, I propose to refer to the parties herein as applicant and respondents and where necessary I shall refer to the respondents by their respective numbers. Furthermore, it is worth noting that the second respondent did not participate in these proceedings.

[5] The genesis of this case arises in that on 24 August 2021 the applicant issued summons against the respondents based on an agreement for an overdraft facility entered into by and between the applicant and the first respondent. The overdraft facility agreement consisted of Commercial Terms, Standard Terms and Business Client Agreement which together constitute the overdraft facility agreement between the parties. The overdraft facility which was agreed upon by the parties and was made available to the first respondent is the sum of R2 550 000 as at date of signature of the agreement on the 31st of March 2018.

[6] It is undisputed that the applicant performed in terms of overdraft facility agreement. As one of the terms of the agreement, the first respondent provided the applicant with the existing Security in the form of unlimited Suretyships by the second and fourth respondents which were signed in Rosebank on 5 July 2006. The suretyship agreement bound the second and fourth respondents as sureties and co-principal debtors jointly and severally together with the first respondent in favour of the applicant for the repayment on demand of any sum or sums of money which the first respondent owes or may thereafter owe to the applicant from whatsoever cause arising.

[7] On 5 April 2017 and as required by the Commercial Terms of the overdraft facility agreement, the first respondent provided the applicant with a new security in the form of an unlimited suretyship agreement by the third respondent. The third respondent bound itself as surety and co-principal debtor jointly and severally together with the first respondent in favour of the applicant to repay the full amount the first respondent owes or may owe the applicant in terms of an agreement with the applicant for an initial sum of up to R2 550 000, and which the first respondent

owes or may later owe the applicant from whatsoever reason and the due fulfilment of all associated obligations to the applicant in respect of such indebtedness.

[8] On 1 August 2007, the fourth respondent registered a first mortgage bond on its property as mentioned above, held by deed of transfer number T19051/1994 in the capital sum of R1 300 000 plus an additional amount of R260 000 in respect of costs and similar causes. Again, on 14 September 2010 the fourth respondent registered a second mortgage bond over the property for the capital sum of R550 000 plus an additional amount of R110 000 in respect of costs and similar causes. Furthermore, on 10 October 2012 the fourth respondent registered a third mortgage bond over the property for the capital sum of R1 100 000 plus an additional amount of R220 000 in respect of costs and similar causes.

[9] It was agreed between the parties that the three mortgage bonds served as security for the indebtedness of the fourth respondent as surety and co-principal debtor with the first respondent in respect of all amounts owing to the applicant under the overdraft facility agreement. It is undisputed that the first respondent has breached the terms of the agreement by not making regular payments of the agreed instalments. As at the 2nd of June 2021 an amount of R4 558 896.57 remained due and payable by the first respondent and by the second, third and fourth respondents, as sureties, to the applicant.

[10] In respect of claim B, on 17 September 2012 the applicant and the fourth respondent entered into a mortgage loan agreement in terms whereof the applicant lent and advanced monies to the fourth respondent in the sum of R1 158 711.88 as a home loan in respect of the property. A covering bond was registered over the property in favour of the applicant in the sum of R1 100 000 plus an additional amount of R220 000 in respect of costs and similar expenses. The first respondent signed a suretyship agreement on 17 September 2012 binding itself as surety and co-principal debtor jointly and severally in favour of the applicant for the repayment on demand

of any sum of money, limited to an amount of R2 880 000 which the fourth respondent owes or may thereafter owe to the applicant.

[11] It is not in dispute that the fourth respondent has breached the terms of the agreement by not making regular payments of the instalments as agreed upon. As at the 8th of June 2021 an amount of R1 263 469.66 remained due and owing to the applicant by the fourth respondent and the first respondent as surety.

[12] In respect of claim C, the fourth respondent and the applicant concluded another mortgage loan agreement whereby the applicant advanced the fourth respondent with a home loan in respect of the property in the sum of R484 846.00. It was a term of the loan agreement that the first respondent should sign a limited surety which it signed on the 17 September 2012 binding itself as surety and co-principal debtor jointly and severally in favour of the applicant for the repayment on demand of any sum of money, limited to an amount of R2 880 000.

[13] It is common cause between the parties that the fourth respondent has breached the terms of the agreement in that it did not make regular payments of the agreed instalments. As at the 8th of June 2021, the fourth respondent and the first respondent as sureties, were and remained indebted to applicant in the sum of R554 294.35.

Preliminaries

[14] It is noteworthy that the present attorneys of record of the respondents filed a notice of withdrawal as attorneys of record on 26 July 2023. However, counsel for the respondents submitted that, although the attorneys did not file a notice of reinstatement as attorneys of record, their mandate was reinstated by the respondents. The court then directed that the respondents' attorneys file the notice of reinstatement as attorneys of record for the respondents.

The Parties Submissions

[15] The respondents raise some points in limine and say that this Court does not have jurisdiction over matter since it was a term of the agreements between the parties that in case of a dispute arising out of these agreements, it will be referred to the Magistrate Court for determination. Furthermore, so say the respondents, the applicant has failed to attach the correct facility agreement since the one attached has some pages which were not signed by the respondents and or the parties. It was contended further that the letters of demand were not sent to the domicilium address of the first and fourth respondents and that no statements of account were attached to the letters of demand.

[16] The respondents argue that the applicant has attached the certificate of balance which it alleges to constitute prima facie proof of the indebtedness but does not afford the respondents an opportunity to understand the complexities of the calculation of interest and whether the respondents are charged correctly in the circumstances. They say that the defences raised in their plea should be adjudicated upon as the alleged agreements and other documentary evidence attached to the summons is incomplete, unsigned and evince some irregularity.

[17] In relation to the application to declare the property of the fourth respondent specially executable, the fourth respondent says that she is a single mother with dependent children and a breadwinner of the family. She has been running her business successfully until the country was hit by the global covid-19 pandemic and if the order is granted to declare her property executable, she and her children will be rendered homeless. She will be grossly prejudiced should the order be granted. Further, the applicant has failed to comply with the National Credit Act, 35 of 2005 *("the NCA")* as no proper and due notice was given to her.

[18] The applicant says that this court has the necessary jurisdiction since all the parties are resident within the court's jurisdiction. Further, this court enjoys concurrent

jurisdiction with the magistrate court and therefore the issue of jurisdiction is a red hearing. It was submitted by the applicant that the issue that some of the pages of the agreement for the overdraft facility are not signed should be discarded since those pages form part of the agreement and the respondents have failed to state with any certainty what it is that they do not agree with in those pages.

[19] The applicant contended further that the section 129 notice in terms of the NCA was sent to the mortgaged property of the fourth respondent as the domicilium citandi et executandi; and with regard to the first respondent the letter of demand was sent to its postal address as the NCA does not find application with regard to the first respondent. There is no bona fide defence established by the respondents and the plea was filed for the purpose of delaying the finalisation of this case. Furthermore, so it was contended, it was an agreed term of the agreement that the certificate of balance is prima facie proof of the amount outstanding on the accounts if it is signed by any of the managers of the applicant.

Discussion

[20] It has been decided in a plethora of cases that the purpose of the summary judgment procedure is to afford an innocent plaintiff who has an unanswerable case against an elusive defendant a much quicker remedy than that of waiting for the conclusion of an action at the trial. It is furthermore trite that for the defendant to successfully resist a claim for summary judgment it has to satisfy the Court by affidavit that it has a bona fide defence to the claim of the plaintiff.

[21] The essential question in this case is whether the respondents in their affidavit resisting summary judgment disclose a bona fide defence that is good in law, and whether they state therein the nature and grounds of their defence and disclose the material facts upon which their defences are based in accordance with the

peremptory provisions of Rule 32(3) of the Uniform Rules of Court which provides as follows:

> "Rule 32 (3) Upon the hearing of an application for summary judgment the defendant may-
>
> (a) ……..
>
> (b) Satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[22] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[1], the Court stated the following:

> "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. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425 G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by the defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of the defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor."

[23] The respondents' special plea that this court has no jurisdiction upon them, and this matter is disingenuous since the respondents are resident within the jurisdiction of the court. Further, the respondents attempt to rely on the terms of the agreements that they subject themselves to the jurisdiction of the magistrate court should a

[1] 2009 (5) SA 1 (SCA).

dispute arise in relation to the agreement is of no moment. It is without merit since this court has concurrent jurisdiction with the magistrate court in whose area of jurisdiction the respondents are domiciled or resident. It is my respectful view therefore that the special plea of jurisdiction falls to be dismissed.

[24] The second special plea is with regard to the agreement upon which the claim of the applicant is based, that it must be attached to the particulars of claim. There is no merit in the contention that the attached agreement is incorrect or has some irregularities since it is not signed in every page. What is telling in this case is that there is no dispute that both parties performed in terms of the agreement – the applicant provided the overdraft facility and the first respondent had access and utilised the facility. Moreover, the respondents do not make issue with regard to the terms and conditions contained in the unsigned pages of the agreement. The respondents admit the agreements and its terms and therefore there is no issue on this point - thus it falls to be dismissed.

[25] There is no merit in the respondents' argument that the notices were not delivered at their respective domicilium addresses. The letter of demand for the first respondent was sent by registered post to its postal address whereas the section 129 notice in terms of the NCA was also sent and delivered at the domicilium address of the fourth respondent who is, in terms of the NCA entitled to service of the section 129 notice before institution of the proceedings. There is no law providing for the letter of demand to be sent to an entity such as the first respondent and it does not fall within the parameters of the NCA. Further, there is no merit in the contention that the applicant failed to send a demand to the sureties for the summons itself constitute demand.

[26] The respondents argue that the certificate of balance attached by the applicant is not sufficient for providing the Applicant's quantum on a prima facie level and that it does not afford them an opportunity to understand whether they are charged correctly. I am not persuaded by this argument. The respondents have not put

forward evidence to disprove the balance reflected on the certificate of balance. Instead, they argue that the clause in the suretyship agreement that provides that the certificate signed by any manager shall be sufficient proof does not allude to the correctness of the amount due.

[27] The respondents have failed to establish a bona fide defence in compliance with the provisions of rule 32(3) in the affidavit resting summary judgment. The respondents attempted to rely on technical defences as shown above and failed to demonstrate a bona fide defence which would stand scrutiny at the trial of the matter. In the affidavit the respondents pleaded a bare denial and referred this court to its plea to the summons. However, the rule requires the respondents to establish a defence in the affidavit which is bona fide to answer the claim of the applicant and they failed dismally in this regard. The ineluctable conclusion is therefore that the applicant has established an unassailable case against the respondents and is entitled to the order it seeks in terms of the notice of motion.

[28] Before dealing with the application for declaring the property of the fourth respondent executable and authorising the sheriff of the court to attach and sell same in execution, it is apposite to restate the provisions of Rule 46 A which provide as follows:

> "46A Execution against residential immovable property
>
> (1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.
>
> (2) (a) A court considering an application under this rule must –
>
> (i) Establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
>
> (ii) Consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.
>
> (b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having

> considered all relevant factors, considers that execution against such property is warranted".

[29] The main thrust of Rule 46A is that, when a court adjudicates an application for an execution order against a debtor's property which is his or her primary residence, the court must consider whether the debtor can satisfy the debt in any alternative way so as to avoid a sale of the debtor's home. Put differently, the court should only order a sale in execution of the debtor's home if, after considering all the relevant factors, such execution is warranted or just and equitable. For the court to exercise proper oversight in terms of this rule, the applicant must place such information before the court as to demonstrate that there are no other alternative means to secure and settle the indebtedness of the respondent except the execution of its immovable property.

[30] What is striking in the fourth respondent's affidavit resisting summary judgment in this Rule 46A application, is that it is a carbon copy of the affidavit in the first application except that it additionally mentions that she is a single mother who lives on the property with her children and that she is a breadwinner. The fourth respondent does not take the court into confidence and disclose her personal circumstances to enable the court to determine if she would be able to afford a less expensive property even for a rental. She does not state the number and ages of her children. She completely failed to disclose her finances to the court and how she can attempt to settle her indebtedness to the applicant.

[31] It is telling that the fourth respondent exposed her property, which she alleges is her primary residence, with such heavy loans and mortgages which were not secured for the purposes of buying this property but for the furtherance of her business interests. The applicant has laid out such money for it had the property as security for the indebtedness of the fourth respondent. It is a hollow plea in my view that now she alleges that she would be rendered homeless if she is evicted from the property. Moreover, the applicant is only seeking a declaration of the property to be executable

and to authorise of the sheriff of this court to attach same but has not reached the stage yet when the property would be sold in execution. I am therefore of the view that, with the evidence before me it is just and equitable for the property of the fourth respondent as referred to above to be declared specially executable.

[32] As a result, the following order is made:

1. judgment is granted in favour of the applicant against the defendants/respondents, jointly and severally, the one paying the others to be absolved for:
    1.1 Payment in the sum of R4 558 896.57
    1.2 Interest on the sum of R4 558 896.57 at the rate of 15% (prime currently 7% plus 8%) inked, per annum, calculated at capitalised monthly form 3 June 2021 to date of payment, both days included.
2. As against the fourth and first defendants/respondents jointly and severally the one paying the other to be absolved for:
    2.1 Payment of the amount of R1 263 469.66.
    2.2 Interest on the aforesaid sum at the rate of 5.10% (prime currently 7% less 1.9%) linked to prime, per annum, calculated and capitalised monthly from 9 June 2021 to date of final payment, both days included.
3. As against the fourth and first defendants/respondent jointly and severally the one paying the other to be absolved for:
    3.1 Payment in the sum of R554 294.35
    3.2 Interest on the aforesaid amount at the rate of 6.9% (prime currently 7% less 0,10%) linked per annum calculated and capitalised monthly from 9 June 2021 to date of payment both days included.
4. The immovable property known as Erf 2017 Northcliff Extension 15 Township, Registration Division IQ, The Province of Gauteng, measuring 1487 square metres and held by Deed of Transfer Number: T19051/1994 *("the property")* is declared specially executable.

5. The applicant is authorized to issue a writ of attachment calling upon the sheriff of the above Honourable Court to attach the property.
6. The sheriff of the above Honourable Court is authorized to sell the property by auction arranged in terms of the provisions of Rule 46.
7. The reserve price for the sale of the property by the sheriff of the above Honourable Court on auction is set in the amount of R2 920 000.00.
8. Costs of suit on the attorney and client scale

TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

For the Applicant:	**Advocate N Alli**
Instructed by:	**Jay Mothobi Incorporated** **Tel: 011 268 3500** esme@jay.co.za
For the Respondents:	**Advocate Nkabinde**
Instructed by:	**G Chabalala Inc** **Tel: 012 667 1319** **gasta@cinc.co.za**
Date of Hearing:	**15th of April 2024**
Date of Judgment:	**13 May 2024**

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 13 May 2024.