

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT

GAUTENG DIVISION,



OF SOUTH AFRICA

JOHANNESBURG

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

Date: **29th November 2023** Signature:

APPEAL CASE NO: A5073/2022

COURT A QUO CASE NO: 44394/2020

DATE: 29TH NOVEMBER 2023

In the matter between:

TUHF LIMITED

Appellant

and

**68 WOLMARANS STREET
JOHANNESBURG (PTY) LIMITED**

First Respondent

10 FIFE AVENUE BEREA (PTY) LIMITED

Second Respondent

FARBER, MARK MORRIS

Third Respondent

Neutral Citation: *TUHF v 68 Wolmarans Street Johannesburg and Others*
(A5073/2022) [2023] ZAGPJHC --- (29 November 2023)

Coram: Vally, Adams et Dlamini JJ

Heard: 06 September 2023

Delivered: 29 November 2023 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 29 November 2023.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Senyatsi J sitting as Court of first instance):

- (1) The appellant's appeal against the order of the court *a quo* is upheld, with costs.
- (2) The order of the court *a quo* is set aside and in its place is substituted the following: -
 - '(1) Judgment is granted in favour of the applicant against the first, the second and the third respondents, jointly and severally, the one paying the other to be absolved, for: -
 - '(a) 68 Wolmarans Street Johannesburg (Pty) Ltd, 10 Fife Avenue Berea (Pty) Ltd and Mark Morris Farber ("the Respondents"), jointly and severally, the one paying the others to be absolved, shall pay to the applicant the sum of R4 897 004.22, together with interest thereon at the rate of 2.50% above the commercial banks' prime rate plus 1% per year, calculated daily and compounded monthly in arrears from 1 February 2020 to date of final payment, both dates included;
 - (b) The applicant is, with immediate effect, authorised to take cession of any and all rental amounts payable by every tenant occupying the immovable property known as Wolbane Mansions ("the Wolbane Mansions tenants") to 68 Wolmarans Street Johannesburg (Pty) Ltd ('the First Respondent'), alternatively to the respondents, further alternatively, to their duly authorised agent or agents ("the cession");
 - (c) The respondents are ordered and directed to sign all documents necessary to facilitate and to give effect to the cession in (b) above, failing which the Sheriff is hereby authorised to sign all documents necessary to give effect to the cession;
 - (d) The respondents shall furnish the applicant, within fifteen days from date of this order, with the names and contact information of the Wolbane Mansions tenants together with: -
 - (i). Copies of any written lease agreements concluded between the first respondent, alternatively the respondents, further alternatively, their duly authorised agent, and the Wolbane Mansions tenants;

- (ii). Particularity in respect of the terms of any implied and/or oral terms of any lease agreement concluded with the Wolbane Mansions tenants; and
 - (iii). Particularity and copies of any existing property management mandates for the management of and rental collection at the Wolbane Mansions;
- (e) The applicant is granted leave to take whatever steps necessary for purposes of collecting rental amounts from the Wolbane Mansions tenants;
- (f) The immovable property, being Erf 2154 Johannesburg Township, Registration Division IR, Gauteng Province, measuring 467 (Four Hundred and Sixty-Seven) Square Metres, Held By Deed of Transfer Number T7596/2014 (“the immovable property”) be and is hereby declared executable, and the applicant is authorised to issue Writs of Attachment calling upon the Sheriff of the Court to attach the immovable property and to sell the immovable property in execution;
- (g) The respondents be and is hereby ordered to pay a penalty fee equal to 5% (Five Percent) plus VAT of the monthly outstanding instalment amount in arrears and unpaid by the first respondent within 2 (Two) days of an Instalment Payment Date as from 10 February 2020, to date of payment in full of (a) above, both dates included;
- (h) the first, the second and the third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants’ costs of the application on the scale as between attorney and client, such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).’
- (3) The first, the second and the third respondents, jointly and severally, the one paying the other to be absolved, shall pay the appellant’s costs of the appeal, including the costs of the application for leave to appeal to the court *a quo*, all such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).

JUDGMENT

Dlamini J (Vally *et* Adams JJ concurring):

[1] This appeal came before us as a result of leave being granted by the court *a quo* to this court. The appellant who was cited as the applicant in the court below is appealing against the whole judgment and order made by Senyatsi J, delivered on 17 September 2021, sitting as the court of first instance in the Gauteng, Division, Johannesburg.

Background Facts

[2] The facts underlying this appeal are largely common cause.

[3] The appellant (TUHF), on or about 23 August 2013, entered into a loan agreement with the first respondent (68 Wolmarans Street) to assist the first respondent with the purchase and refurbishment of an immovable property. The total estimated costs of the loan facility were an amount of R12 223 191. Under the loan agreement and the security for the facility, a mortgage bond was registered over Wolbane Mansions in terms of which 68 Wolmarans Street ceded, assigned, and transferred to TUHF all of its rights, title and interest in and to any rent that would arise in respect of Wolbane Mansions. The second and the third respondents also concluded written unlimited suretyship agreements in favour of TUHF.

[4] There was a fallout between the parties and as a result TUHF launched the first application against the respondents under case number 2020/7844, seeking an order claiming the repayment of the monies lent and advanced in terms of the loan agreement ('the first application'). In that application, the respondents raised a point in their defence that the second respondent's suretyship agreement was void but they (the respondents) did not provide the applicant with alternative security, as they would have been required to do in terms of the loan agreement.

[5] It also appeared that the respondents were in default with their monthly rentals in that they had failed to pay the full monthly installments for months of May and June 2020. This failure, according to the appellant, gave rise to another event of default in terms of the loan agreement.

[6] It is the above alleged two events of default that arose after the launch of the first application that gave rise to TUHF launching the second application which is the subject of this appeal.

[7] Several issues came up for determination by the court *a quo*. In sum, these were the following: the special plea of *lis pendens* raised by the respondents. Whether there was a breach of the suretyship agreement by the respondents. Whether there was any short payment of the monthly rent by the respondents. Whether the immovable property was executable in terms of rule 46A, and, lastly whether the launch of the second application by the TUHF amounted to an abuse of the court process.

[8] Upon hearing the matter, the court *a quo* upheld the respondents' special plea of *lis pendens*. The court *a quo* also upheld the respondents' defence that there was a signed amendment of the loan agreement as contemplated in the non-variation clause. Finally, the court below upheld the respondent's claim that TUHF's second application amounted to an abuse of the court process. It must be pointed out that the court *a quo* did not deal with the rest of the issues that were raised during the trial in light of his findings relating to the preliminary points raised by the respondents, which, according to the court *a quo*, were dispositive of the matter.

[9] Feeling aggrieved by this decision, TUHF filed an application for leave to appeal, which application was granted by the court *a quo*, who granted leave to appeal to the Full Court of this court.

Grounds of Appeal

[10] In its grounds of appeal, the appellant alleged the following: -

- 10.1 That the learned judge erred by finding that the appellant alleges that the short payment for May and June was central to the number of events of default the applicant relied upon, and which gave rise to the launch of the application, and thereby the learned Judge erred by failing to deal with the respondents' intention to repudiate the security they had provided and their failure to provide the applicant with alternative security.
- 10.2 That the learned Judge erred in finding that the respondents have succeeded in proving that the cause of action in the second application is the same as the cause of action in the first application and that the respondents' special plea of *lis pendens* should succeed.
- 10.3 That the learned Judge erred in finding that a dispute of fact had arisen and that the disputed fact on whether there has been a variation to the loan agreement is not of such a serious nature.
- 10.4 The learned Judge erred in finding that just because the email correspondence dated 11 May 2020 was 'clearly from Mr. Makwela', that constituted compliance with the requirements of the loan agreement to effect a valid variation of its terms
- 10.5 The learned Judge erred in finding that the applicant's determination to obtain the relief it seeks amounts to an abuse of the court process.

[11] Below I deal with these grounds of appeal.,

Lis Alibi Pendens

[12] At the hearing of the trial, the respondents raised the special plea of *lis pendens*, alleging that the cause of action in the second application is the same as the cause of action in the first application.

[13] The legal principles relating to *lis pendens alibi* are trite and have been pronounced upon in a number of our court's decision. A party raising *lis pendens* must allege and prove the following: -

- 13.1 that there is pending litigation.
- 13.2 between the same parties.
- 13.3 based on the same cause of action; and
- 13.4 in respect of the same subject matter

[14] In upholding the respondent's plea of *lis pendens*, Senyatsi J held at [34] that "As in the first application TUHF seeks judgment against the second respondent based on the same Deed of Suretyship which was argued in the first application. This in my respectful view, meets the second requirement pertaining to the same cause of action for the special plea of *lis pendens* to succeed. I hold the view that the respondents have succeeded in proving that indeed this is the same cause of action".

[15] Before us, TUHF contends that the court *a quo* should have dismissed the special plea of *lis pendens* because the dispute or even the nature of the events of default in the first application was not the same as those in the second application. And that the events of the security breach only arose after the launch of the first application. Finally, there was no litigation pending between the same parties at the time of handing down the order in the second application.

[16] The case made out by the respondents is that the central issue in both the first application and the second application before the court *a quo* were the same, which is the breach by the first respondent of the loan agreement and the mortgage bond and the obligation of the first respondent in terms of the loan agreement and the second and third respondent as sureties to make payment monthly repayments to the TUHF.

[17] In adjudicating the *lis pendens* point, a court has a discretion to hear the matter. In *Gerotek Test Facilities v New Generation Ammunition*¹, following the principle laid down in *Geldenhuis v Kotze*², it was held that a Court should not only consider what would be the correct procedure at the time of hearing the matter, but it must delve into all the facts to determine whether equity dictates

¹ [2005] JOL 15779 (T)

² 1964 (2) SA 167 (O)

that the matter should be heard. See also *Nestle (SA) (PTY) Ltd v Mars Incorporated*.³

[18] It is useful to restate the provisions of the loan agreement in particular clause 18 headed 'Events of Default'. Relevant to us are the following: -

'18.1 Each of the following events of breach shall constitute an Event of Default under the Loan Facility

18.1.1 the Borrower fails to pay any amount(s) due by it in terms of this Agreement on the due date for payment thereof or breaches any other provision of this Agreement and fails to remedy any such breach within any applicable cure period.

18.1.7 the Borrower or any Surety breaches or repudiates or evidences an intention to repudiate any of the provisions of this agreement or the Security to which it is a party and does not remedy any such breach within any applicable notice or cure period calling upon it to do so.

... ..

18.1.10 any Security or any part thereof shall for any reason cease to be in full force and effect under the applicable law or any part thereof otherwise ceases to constitute valid security in respect of the relevant asset(s) or revenue, and the Borrower fails to restore or procure the restoration of such security or fails to provide additional security to the satisfaction of the Lender within 10 (ten) Business Days of being required to do so or such longer period as the Lender may agree.'

[19] The principle of interpretation of contracts in our law is well established and has been pronounced upon in a number of our court's decisions. In *FirstRand Bank Ltd v KJ Foods*,⁴ the Supreme Court of Appeal held that in interpreting terms of contract or legislation as the case may be; the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵ and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*⁶ find application. Furthermore, as was said in *Endumeni*, '*a sensible meaning is to be preferred to that that leads to insensible or unbusinesslike results*'.

[20] What is common cause in this case is the fact that the action is between the same parties. I disagree with the court *a quo*'s finding that the rest of the requirements of *lis pendens* have been met. This is so because the words used

³ [2001] 4 ALL SA 542 (SCA)

⁴ (734/2015) [2015] ZASCA 50(26 April 2017)

⁵ (920/2010) [2012] ZASCA 13(15 March 2012)

⁶ (20229/2014) [2015] ZASCA 111(3 September 20150)

in the above clauses are plain, clear and unambiguous. Clause 18 postulates that there might exist a situation where there will be several events of default that might occur during the existence of the agreement and in the event of the occurrence of each event of such default (there are a number listed in the loan agreement, I quoted only three above), which are relevant to this case, then in that situation, the loan agreement expressly grant TUHF the right sue. In other words, the fact that the appellant had issued the first application is no bar, precluding TUHF from launching a separate application if a new event of breach arises.

[21] Furthermore, the events of default in the first application have no bearing and are completely unrelated to the events of default in the second application. In the first application, TUHF sought an order claiming the repayments of the monies lent and advanced to the respondents. In the second application, the appellant's application is based on two claims. TUHF's first claim is founded on the basis that the respondent's evidence of an intention to breach the loan agreement by the respondents alleging that the second respondent's suretyship was void and the respondents' failure to remedy this breach by restoring the security to TUHF (the security breach). The second claim is the short payment, which is the failure by the respondents to pay the full monthly installments due for May and June 2020, in terms of the loan agreement. The cause of action is therefore the money judgment (the short payment).

[22] In general, contracting parties possess enough freedom in choosing how they structure their agreements, and it is not the function of the court to protect consenting parties from bad bargains. The established principle of our law of contract is that legal certainty and the notion of *pacta sunt servanda* must always be honored and enforced by our courts.

[23] It is therefore evident that the facts and questions that had to be answered in the first application are different from the issues that had to be determined by the court in the second application, i.e. the security breach and the rental short payment.

[24] In *National Union of Metal Workers of SA & Others v Bumatech Calcium Aluminates*⁷, the Court held that the factual matrix in the two matters should be the same. The facts alleged in this case are substantially different from the facts in the first application. As is the case in the second application, different questions had to be answered in the different proceedings. In light of the above, the court *a quo* misdirected itself by upholding the respondent's special plea of *lis pendens*.

The Suretyship Agreement

[25] The issue for determination in this regard was whether the claim by the respondents that the second respondent's suretyship agreement was void, was an event of default or breach of the loan agreement that entitled TUHF to launch the second application. It should be noted that the court *a quo* did not pronounce on this issue and it thus stands to be determined in this appeal.

[26] The case made out by the appellant is that the claim by the respondents that the second respondent's suretyship agreement is void in terms of sections 45(6) and 46 of the Companies Act 2008, is evidence of an intention to repudiate the provisions of the loan agreement. TUHF says that despite its efforts in requesting the respondents to correct the aforesaid breach and restore the security or at the least to provide alternative security, the respondents have failed to correct the aforesaid breach. As a result, TUHF insists that it had no option but to launch the second application.

[27] The crux of the respondents' submission is that they could only repudiate the second respondent's suretyship if the respondents' assertion that the suretyship is void, is incorrect. Finally, the respondents argue that the assertion that the surety is void in terms of the Companies Act it did not constitute an event of breach in terms of clause 18.1.7 of the loan agreement.

[28] It is apposite at this stage to look at the relevant provisions of the loan agreement dealing with this aspect, under the heading 'Events of Default'. Clause 18 reads, in the relevant, as follows: -

⁷ (2016) 37 ILJ 2862(LC)

'18.1.7 the Borrower or any Surety breaches or repudiates or evidences an intention to repudiate any of the provisions of this Agreement or Security to which it is a party and does not remedy such breach within the applicable notice or cure period calling upon it to do so.

... ..

18.1.10 any security or any part thereof shall for any reason cease to be in full force and effect under any applicable law or any part thereof otherwise ceases to constitute valid security in respect of the relevant asset(s) or revenue, and the Borrower fails to procure the restoration of such Security or fails to provide additional security to the satisfaction of the lender within 10 (ten) business days of being required to do so or such longer period as the Lender may agree.'

[29] In my view, a sensible and businesslike interpretation (see *First Rand Bank*⁸) of the Security clause is that the duty to provide valid security rests on the respondents. There is no obligation on the appellant to investigate whether the security provided by the respondents is valid or not. The duty and the onus rest on the respondents to ensure that whatever security they provided to TUHF is valid. If, for whatever reason the respondents are alleging that the security they provided is invalid or void, then in that event, the Security clause requires the second respondent to provide additional or alternative valid security as the case may be. TUHF attempted by letter through their attorneys dated 20 September 2020 calling upon the respondents to correct the aforesaid breach and provide the appellant with additional valid security. From the evidence presented before us, the respondents have failed and refused to provide alternative valid security. Therefore, absent the restoration of such security by the respondents, (as they have done), this is tantamount to a breach of the Security clause, and it follows therefore that TUHF was in terms of clause 18.1.7 entitled to launch the second application.

Short Payment

[30] It was a common cause between the parties that there was short payment of the rental by the respondents for the months of May to June 2020. In light of the respondents' rental short payment as aforesaid, TUHF demanded

⁸ supra

in a letter addressed to the respondents that the first respondents pay the arrear amount within ten days of receipt of that letter.

[31] Following this letter of demand, the parties engaged in negotiations to resolve the impasse. Numerous emails were exchanged between them, and it appears that there was no successful solution to this conflict, hence the launch of the second application by TUHF. The issue that arose during the trial was whether after the respondents failed to make the monthly payments there was a variation of the loan agreement between the parties that entitled the respondents to make short payments during the aforesaid months. If so, whether the email of 11 May 2020, constitutes a variation agreement and whether Mr Nano Makwela 'signed' the email.

[32] In deciding this question, the court *a quo* held as follows at [46]:

'TUHF contends that the email by Mr Makwela in terms of which he purports to agree to the reduced payment does not comply with the loan agreement requirement on variation clause and should therefore be ignored. Because he did not attach his signature. This contention is without merit; it loses sight of the fact that the email (email) is clearly from Mr Makwela. This is a proven fact on the papers. The bare denial does not assist TUHF in this regard.'

[33] The court *a quo* continued at [50] and held: -

'Having regard to the contents of the quoted email exchanges between the parties and the dispute of fact raised by the respondents based on the said emails, I am not persuaded that the dispute of fact is so far-fetched that it must be rejected on the papers. I hold the view that the first respondent was justified in making reduced payments in accordance with what was proposed and with the rental collected for each property. It follows, in my respectful view, that the disputed fact on whether there has been variation to the agreement is not of such of serious nature and, I find no reason to reject the version advanced by the first respondent. This matter can therefore be disposed of on papers.'

[34] TUHF contends that the 11 May 2020 email by Mr. Makwela in terms of which it is alleged he purports to agree to the reduced payment does not comply with the non-variation clause of the loan agreement requirement and should therefore be ignored because Makwela did not attach his signature. The appellant insists that there was no valid variation of the agreement that was entered into between the parties. Even if there was a variation agreement

(which it denies), so TUHF contends, that agreement was not signed by Mr Makwela and is therefore not binding on the parties.

[35] The respondents remain adamant that there was no 'Event of Default' by way of short payment. They also contend that, even if there was a short payment, there was a subsequent variation of the loan agreement between the parties, wherein the parties reached an agreement to the effect that the first respondent could pay a certain percentage of the monthly installments due in terms of the loan agreement.

[36] Alternatively, the respondents argue that there was a *pactum de non petendo*, the effect of which was that TUHF would not take steps to enforce the loan agreement for so long as the first respondent paid 48.16% of the monthly installments due in terms of the loan agreement.

[37] It is appropriate to revisit the non-variation clause of the loan agreement, as it is relevant in deciding this issue before us. Clause 29 provides as follows: - 'No addition to or variation, consensual cancellation or novation of this agreement and no waiver of any rights arising from this Agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by all the parties.'

[38] On a sensible and businesslike interpretation, the 11 May 2020 email does not meet the requirements of clause 29 of the non-variation clause and it does not constitute a variation agreement. In my view, Senyatsi J erred in finding that the aforesaid email constitutes a variation agreement both factually and in law. This is because the aforementioned email does nothing more than capture the discussion between the parties encompassing their attempt to resolve the dispute. At best it indicates that Mr. Makwela of the appellant was still awaiting the respondent's bank statement to enable TUHF to determine whether it was amenable to a settlement and agree on the repayable amount and period. It is therefore evident that the negotiations were inconclusive in that the Bank statements were never sent to TUHF by the respondents which statements would have assisted the appellant in determining the revised monthly repayments and period. I conclude therefore that the email of 11 May 2020 does not constitute a variation agreement.

[39] In dealing with the issue of the signatures, Senyatsi J, quoting from the emails, held as follows at [40]: -

'On the 11 May 2020, Mr Makwela then responded as follows by way of email

"Dear Mark.

Agreed, but as per our last communication on the subject matter please send us bank statements. This in a nutshell is what the parties engaged on.

Kind Regards

Nano Makwela"

This in a nutshell is what the parties engaged on.'

[40] Even if the respondents insist that the 11 May 2020 email constitutes a variation agreement (which it does not), the aforesaid email was not signed by Mr Makwela. It was thus not compliant with section 13 of the ECTA act and in line with the decision of the court in *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another*⁹. I say this because the 11 May 2020 email was not signed by Mr Makwela. This email ends with the salutation '*Kind Regards*'. There is no signature thereafter. By itself, it does not, in my view, establish that the agreement was varied. The court *a quo* erred in finding otherwise.

[41] It should follow therefore that there are no material disputes of fact in this case. The respondent's contention that the 11 May 2020 email constitutes a variation agreement and their contention of the existence of the *pactum* is far-fetched and is not *bona fide*. These allegations are raised by the respondents to avoid their obligations to TUHF in terms of the loan agreement and are therefore dismissed.

Abuse of the Court Process

[42] The nub of the issue in this regard was whether the launch of the second application by TUHF amounted to an abuse of the court process.

[43] In upholding the respondent's defence that the second application amounts to abuse of the court process, Senyatsi J said the following at [56]: -

'In the instant case, when TUHF initiated this application, it was already busy in another directly related application based on the same loan agreement, mortgage bond and deed of suretyship. To hide the true colors (the true extent) of the abuse, TUHF made new averments regarding the

⁹ 2015 (2) SA 118 (SCA)

defenses that were raised in the first application and used those and the alleged short payments as additional new grounds of breach. This was despite the fact that the other application had not been determined and in the face of a glaring dispute of fact on the averred variation of payments for May and June 2020 as part of the COVID-19 relief. I cannot infer any motivation for launching such legal attack other than it is the abuse of the court process. This unfairly exposed the respondents to multiple actions that are all related and the same.'

[44] The case made out by the appellant is that the court ought to have first determined the parties' respective rights and obligations, which in turn was a matter of interpreting the loan agreement and assessing on the facts whether the respondents were in breach of their obligations, or not. That if there was a breach of these obligations, TUHF insists that it was then entitled to exercise the remedies provided for in the loan agreement. Those remedies according to TUHF entitled it to launch the second application.

[45] In sum, the respondents are adamant that the appellant's second application was an abuse of the court process. They insist that the appellant should have not instituted the second application but rather should have supplemented the grounds upon which it sought relief in the first application.

[46] In this appeal, I have already made a finding and dismissed the respondents' plea of *lis pendens*. My finding is that the respondents' conduct in disputing the validity of the third respondent's suretyship amounted to a separate breach of the loan agreement which entitled TUHF to launch the second application. Evidently, the breach of the monthly repayments by the respondents is clearly a separate event of default. Our view is that it is the loan agreement's express provision that gave the appellant the right to launch the second application and to seek the relief that TUHF sought. It must therefore follow that the Senyatsi J erred in finding that TUHF's second application amounted to an abuse of the court process.

Rule 46A

[47] The issue that required to be decided by the court was whether TUHF is entitled to an order to declare the immovable property, being Erf 2154 Johannesburg Township, Registration Division IR (the immovable property), specially executable in terms Rule 46A of the Uniform Rules of court. However,

Senyatsi J did not make any ruling on this aspect as a result this court had to decide in this regard.

[48] TUHF insists that it is entitled to the order on the basis that the property is a large multi-unit residential property comprising 51 residential units which are owned by 68 Wolmarans Street. According to the appellant, as a legal entity 68 Wolmarans Street is not capable of having a primary residence nor is the case being made by the respondents that the third respondent, its director, or shareholder uses 68 Wolmarans Street as their primary residence.

[49] The core of the respondent's submission is that the fact that the immovable property is owned by the first respondent, being (a juristic entity), and is used for residential purposes, this therefore does not follow that Rule 46A is not applicable. Even though the respondents concede that the immovable property is only occupied by the first respondent's tenants, they insist that the TUHF ought to have given notice of the proceedings to the occupants, that is the persons who would be affected by the execution. Accordingly, argues the respondents, the appellant is not entitled to execute against the first respondent's immovable property. Finally, TUHF's relevant factors being the evaluation of the immovable property were not stated in the appellant's affidavit in terms of Rule 46A (5).

[50] The principles relating to the provisions of Rule 46A are trite and have been dealt with in numerous decisions of our courts. In my view, the first respondent is a legal entity, it is not an individual and a natural person, therefore the provisions of rule 46 A are not applicable to it. See *Investec Bank Ltd v Fraser N.O and Others*¹⁰.

[51] Significantly, at the hearing of this appeal, the parties advised us that in a separate case under case number A5015/2022, involving the same parties, a Full Court of this division made a ruling and declared that the immovable property specifically executable and the Full Court authorized TUHF to attach and sell the immovable property in execution. Having regard to all the facts and pleadings in this case, we agree with the full court's decision. This therefore

¹⁰ 2020 (6) 211 (GJ);

means that until the full court's decision is set aside, this court is bound by this decision.

[52] In all the circumstances, I am satisfied that the appellant has discharged the *onus* that rested on its shoulders and the appeal ought to succeed. There is no reason why the costs should not follow the result.

Order

[53] In the result, the following order is made: -

- (1) The appellant's appeal against the order of the court *a quo* is upheld, with costs.
- (2) The order of the court *a quo* is set aside and in its place is substituted the following: -
 - '(1) Judgment is granted in favour of the applicant against the first, the second and the third respondents, jointly and severally, the one paying the other to be absolved, for: -
 - '(a) 68 Wolmarans Street Johannesburg (Pty) Ltd, 10 Fife Avenue Berea (Pty) Ltd and Mark Morris Farber ("the Respondents"), jointly and severally, the one paying the others to be absolved, shall pay to the applicant the sum of R4 897 004.22, together with interest thereon at the rate of 2.50% above the commercial banks' prime rate plus 1% per year, calculated daily and compounded monthly in arrears from 1 February 2020 to date of final payment, both dates included;
 - (b) The applicant is, with immediate effect, authorised to take cession of any and all rental amounts payable by every tenant occupying the immovable property known as Wolbane Mansions ("the Wolbane Mansions tenants") to 68 Wolmarans Street Johannesburg (Pty) Ltd ('the First Respondent'), alternatively to the respondents, further alternatively, to their duly authorised agent or agents ("the cession");
 - (c) The respondents are ordered and directed to sign all documents necessary to facilitate and to give effect to the cession in (b) above, failing which the Sheriff is hereby authorised to sign all documents necessary to give effect to the cession;
 - (d) The respondents shall furnish the applicant, within fifteen days from date of this order, with the names and contact information of the Wolbane Mansions tenants together with: -

- (iv). Copies of any written lease agreements concluded between the first respondent, alternatively the respondents, further alternatively, their duly authorised agent, and the Wolbane Mansions tenants;
 - (v). Particularity in respect of the terms of any implied and/or oral terms of any lease agreement concluded with the Wolbane Mansions tenants; and
 - (vi). Particularity and copies of any existing property management mandates for the management of and rental collection at the Wolbane Mansions; [CHECK NUMBERING]
- (e) The applicant is granted leave to take whatever steps necessary for purposes of collecting rental amounts from the Wolbane Mansions tenants;
 - (f) The immovable property, being Erf 2154 Johannesburg Township, Registration Division IR, Gauteng Province, measuring 467 (Four Hundred and Sixty-Seven) Square Metres, Held by Deed of Transfer Number T7596/2014 (“the immovable property”) be and is hereby declared executable, and the applicant is authorised to issue Writs of Attachment calling upon the Sheriff of the Court to attach the immovable property and to sell the immovable property in execution;
 - (g) The respondents be and is hereby ordered to pay a penalty fee equal to 5% (Five Percent) plus VAT of the monthly outstanding instalment amount in arrears and unpaid by the first respondent within 2 (Two) days of an Instalment Payment Date as from 10 February 2020, to date of payment in full of (a) above, both dates included;
 - (h) the first, the second and the third respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants’ costs of the application on the scale as between attorney and client, such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).’
- (3) The first, the second and the third respondents, jointly and severally, the one paying the other to be absolved, shall pay the appellant’s costs of the appeal, including the costs of the application for leave to appeal to the court *a quo*, all such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).

J DLAMINI
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON: 6th September 2023

JUDGMENT DATE: 29th November 2023 – judgment handed down electronically

FOR THE APPELLANT: Adv Adrian Botha SC, together with Adv Eloïze Eksteen

INSTRUCTED BY: Schindlers Attorneys, Melrose Arch, Johannesburg

FOR THE FIRST, SECOND AND THIRD RESPONDENTS: Adv Louis Hollander

INSTRUCTED BY: Swartz Weil Van der Merwe Green Attorneys, Melrose Estate, Johannesburg