



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

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

**Date:**

**Signature:**

**Case No. 24058/2021**

**In the matter between:**

**NEDBANK LIMITED**

Plaintiff

and

**VIKA INVESTMENTS TRUST**

1<sup>st</sup> Defendant

**VILAKAZI, KEKE SYDWELL N.O**

2<sup>nd</sup> Defendant

**VILAKAZI, SAMUEL MOTSAMAI N.O.**

3<sup>rd</sup> Defendant

**VILAKAZI, VUSI N.O**

4<sup>th</sup> Defendant

**VILAKAZI, KEKE SYDWELL**

5<sup>th</sup> Defendant

**VILAKAZI, SAMUEL**

6<sup>th</sup> Defendant

**VILAKAZI, VUSI**

7<sup>th</sup> Defendant

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**JUDGMENT**

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**MAHOMED, AJ**

## **INTRODUCTION**

1. This is an application, for summary judgment and for an order declaring property executable. On 31 May 2007, the applicant advanced a loan to the first defendant, a trust. The trust purchased property which it mortgaged as security for the loan. The 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, and 6<sup>th</sup> defendants are cited as trustees and defendants 4 and 7 are cited in their capacity as sureties and co-principal debtors for the trust. The trust breached the agreement when it failed to repay the loan and is in arrears for 34 months at the date of hearing this application. In August 2018, the parties entered into a Debt Restructure Agreement when the repayment terms were reviewed and changed, however the first defendant has defaulted on this new arrangement.

## **THE DEFENCE**

2. The defendants filed a plea<sup>1</sup> however only the 5<sup>th</sup> respondent filed an affidavit resisting summary judgment<sup>2</sup> and no confirmatory affidavits were filed on behalf of the 6<sup>th</sup> and 7<sup>th</sup> defendants as sureties. The trust with whom the loan agreement was concluded (“the principal agreement”) has not opposed the application for summary judgment.

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<sup>1</sup> Caselines 004 -1

<sup>2</sup> Caselines 006-1

3. Advocate Oschman appeared for the applicant and submitted that given that the Trust, the principal debtor, has not opposed the application, the applicant/plaintiff is entitled to judgment. The defendants do not raise a genuine defence in the plea and the 5<sup>th</sup> respondent does not raise a genuine defence or a triable issue in his opposing affidavit. Counsel submitted that the defence is raised simply to further delay the finalisation of the matter.

4. Paragraph 2.2 of the plea provides:

*“Compliance with the National Credit Act with Fifth, Sixth and Seventh Defendant’s as sureties were a requirement.”*

5. Paragraph 3.2 to 3.4 of the plea provides:

*“3.2 the aforesaid property is a primary resident (sic) of the fifth sixth and seventh defendant. If the property is declared executable the Defendants family will be rendered homeless thus violating their constitutional rights to shelter and dignity.*

*3.2 “it would be unjustifiable to order execution on the immovable property as the advantage to the plaintiff would be (sic) far outweigh the hardship caused to the defendants.*

*3.4 they(sic) are two minor children residing in the aforesaid property and attending school in the same area, The defendants have been paying since the lockdown regulations were uplifted”*

6. Counsel argued that the opposing affidavit presents a case for only the surety, not the principal debtor.
  
7. The plea does not set out which sections of the National Credit Act, 34 of 2005 (“the Act”) was not complied with. It was further submitted that the Act does not apply,<sup>3</sup> as the Trust is defined in the Act as a juristic entity and does not enjoy rights as a consumer, as set out in the particulars of claim. Therefore, the defendants as surety, do not enjoy any protections in their capacity as sureties, the loan agreement was concluded with the 1<sup>st</sup> defendant, the trust, the sureties exist through the trust, which is the principal debtor. They do not exist in terms of any separate agreement with the plaintiff, they are bound only, to pay the principal debt when the principal debtor fails to pay.
  
8. Counsel referred to section 4(2) (c ) of the Act read with section 8(5) and submitted that the Act does not apply to the credit guarantee, as was concluded. It was further argued that the fifth defendant failed to provide sufficient reasons why the property should not be declared executable. The opposing affidavit simply states that the property is a primary residence and there are minor children living on the property who attend a school in the area. There is not enough information before the court to exercise any judicial oversight, as was argued on behalf of the 5<sup>th</sup> respondent.

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<sup>3</sup> Caselines 001-23 para 22

9. Ms Oschman submitted that declaring property executable is not an eviction. The Constitution<sup>4</sup>, provides for evictions only by an order of court and the relief sought does not include an eviction of the respondents. The fifth respondent can choose to conclude a lease agreement with any new purchaser of the property. It was argued that the order for execution is necessary as it is the only means by which the plaintiff can recover its monies. Counsel argued there are no triable issues raised and the opposition is filed purely to delay the and plaintiff's claim, the trust has not even been able to pay the renegotiated repayment plan.
10. Mr Nxumalo for the respondent, submitted that the Act is applicable since the sureties are also "co-principal debtors" and as such they are entitled to the protections and defences available to consumers, in the Act.
11. It was submitted that this court has only to "identify" if the Act "*might*" find application and if there is even a possibility, this court is obliged to refer the matter to a trial court which will have more time to consider all the facts. Mr Nxumalo submitted that the respondents need not at this stage refer to the sections of the Act that might apply.
12. It was further submitted that as "co-principal debtors" the sureties would be entitled to raise the defence of "reckless credit" in terms of the Act. Mr

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<sup>4</sup> Section 26(3) Constitution Act 108 of 1996

Nxumalo referred the court to section 3 of the Act and argued that the court cannot overlook the purpose of the Act, and called on the court to exercise oversight regarding the position of the sureties in casu.

13. Mr Nxumalo submitted that an order to declare property executable would have the effect of an eviction and impinges on the 5<sup>th</sup> respondent's Constitutional rights to housing and dignity as the property is the primary residence of the 5<sup>th</sup> to 7<sup>th</sup> respondents and that there are minor children living on the property, who attend a school in the area. Mr Nxumalo relying on the judgment in *Bestbier*, *infra*, that the primary focus must be that the home is a primary residence, irrespective of the entity which owns it. He contended that a trial court would be best suited to hear the necessary evidence to preserve and protect the constitutional rights of the respondents and their family.
  
14. In reply, Ms Oschman argued that the principal debtor is a trust which has three trustees and is defined as a juristic person, to whom the Act does not apply. The surety and co-principal debtor does not exist separately from the principal debtor, their obligations flow or arise from the principal debt and the principal debtor. The 5<sup>th</sup> respondent failed to raise any triable issue regarding the money claim, a mere reference to the Act relying on a 'chance' that the Act might apply is not the defence contemplated in the rule.

15. Sections 4(1)(a) and 4(1) (b) of the Act, does not apply to a consumer who is a juristic entity, such as a trust. It was argued that even if the Act applied, there is still no version from the first defendant the principal debtor to the plaintiff's claim. The plaintiff seeks judgment against all defendants jointly and severally the one paying the other absolved. It was therefore submitted that the Defendant has not discharged the onus in terms of R32 and the order of executability is appropriate, the applicant does not seek to evict the respondents.
16. A reserve price as calculated is R625 000, after consideration of the rates and taxes outstanding to the municipality.

## **JUDGMENT**

### Rule 32

17. Rule 32 is regarded as stringent or extraordinary remedy in that the court is called upon to grant a judgment without the defendant having been afforded an opportunity to ventilate its defence. However, the amendments to the rule<sup>5</sup>, requires of a plaintiff, after a plea is filed, to verify its cause of action, the amount claimed, the point of law or the facts upon which that the plaintiff's claim is based, and to provide the court with a brief explanation as to why the defence as pleaded raises no triable issue.

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<sup>5</sup> GN R842 published in GG 42497 of 31 May 2019

18. The application would succeed only if a court were satisfied that the requirements have been fulfilled and that there is no defence on the merits, and that the defence is raised merely for the purposes of delay.
19. In *Guardrisk v Life Limited FML Life (Pty) Ltd*, the court confirmed that the deponent to the affidavit supporting summary judgment must be in position to say whether the defence advanced in the plea is genuine and sustainable on the facts known to them. A plea which is a bare denial will not assist a defendant, the defendant must raise an issue for trial.
20. In casu only the 5<sup>th</sup> defendant, has filed an opposition to the application for summary judgment. The first defendant, the principal debtor, whom the applicant looks to, has not filed an opposition to the relief sought. In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* <sup>6</sup> the court confirmed that the requirement of an explanation by the plaintiff enjoins the defendant to deal with the applicant's explanation in the opposing affidavit.
21. There is no version before this court, of the principal debtor with whom the plaintiff/applicant concluded the loan agreement.
22. The defence as set out in paragraphs 4 and 5 above does not comply with Rule 18 (4) and 22(2). The rules require a defendant to set out clearly and concisely the material facts relied upon for the defence.

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<sup>6</sup> 2020 (6) SA 634 (WCC) at para 41



Neither the plea nor the opposing affidavit addresses the claim regarding the principal debt. A mere allegation that payments were made after the lockdown, will not suffice. It is trite that one who alleges must prove. There are no details of payments made or a genuine, bona fide defence to the breach of the loan agreement, before this court.

23. I agree with Ms Oschman, there is no version by the first defendant, the principal debtor, to the plaintiff's claim and therefore the plaintiff is entitled to judgment for R654 358.78 as set out in the certificate of balance.<sup>7</sup>

24. Mr Nxumalo's submissions that the defendants, as sureties and coprincipal debtors enjoy the protections in the Act is misplaced. In *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron*<sup>8</sup>, the Appeal Court confirmed that, the use of the word co principal debtor did not transform the contract of suretyship into some other type of contract. It was stated that the only consequence that flows from a surety also undertaking the liability as co- principal debtor, is that he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion, division and cession of actions.<sup>9</sup> I agree with counsel for the applicant that the sureties are linked only to the principal debtor and serve as security for when the debtor fails to pay the debt. The Act does not

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<sup>7</sup> Caselines 015-7

<sup>8</sup> 1978 1 SA 463 A

<sup>9</sup> Lotz, DJ, Nagel, CJ, *Specific Contracts in Court* 2<sup>nd</sup> ed p91

provide for sureties as consumers who may claim protections afforded in the Act.

25. Section 4(2) (c) read with section 8(5) of the Act, provides for a surety as a credit guarantee which applies only in relation to the credit facility or transaction. The surety agreement flows from the principal debt, it cannot exist without it. The Act does not apply to a juristic person.

26. In the definition section, the Act provides:

*“ juristic person includes a partnership....., or a trust if-*

*There are three or more individual trustees, or*

*... “*

27. Section 4(1) (a)(i) provides that the Act does not apply to a juristic person. The respondents as sureties, cannot claim protections or rely on defences provided in the Act.

28. Having regard to the definition of a juristic entity and the provisions of the Act , the respondent’s reliance on the defence of “reckless credit” has no merit and accordingly no triable issue is raised, as a defence to the claim.

Executability

29. The plaintiff seeks an order to declare the property executable. Mr Nxumalo correctly argued that eviction is drastic, it violates the constitutionally protected rights of adequate housing<sup>10</sup> and dignity.
30. In *Bestbier v Nedbank*<sup>11</sup>, the SCA, confirmed that even if the immovable property is owned by a juristic entity, the ethos of the Rule cannot be overlooked. The primary purpose of the Rule is to give effect to the right to access to adequate housing as provided for in s26(1) of the Constitution.
31. The evidence is that the property is the primary residence of the 5<sup>th</sup> to 7<sup>th</sup> respondents, the beneficiaries of the trust. It is noteworthy that no confirmatory affidavits are annexed to the papers on behalf of the 6<sup>th</sup> and 7<sup>th</sup> respondents. It is alleged that minor children, who attend a school in the area reside on the property however no further details of the children, their school or other occupants are included in the pleadings. The children are alleged to be attending a school in the area, however no confirmation from a school is annexed to the pleadings. There is no indication as to financial circumstances of those who occupy the property and no evidence that they sought any alternative housing. I noted

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<sup>10</sup> S26 Act 108 of 1996

<sup>11</sup> 2023 (4) SA 25 (SCA)

counsel's submissions that the respondents can seek to lease the property from the persons who purchase the property at the sale.

32. In exercising oversight, a court is to engage in a balancing process and to determine the impact and fairness of the order to evict persons. It is to ensure the preservation of rights afforded in the Constitution.
33. Due to the paucity of evidence, I refer to in paragraph 31 above, I am unable to engage in a balancing process to determine if the order sought is fair. Therefore, the application to declare property executable is postponed sine die.
34. The issue of costs is at a court's discretion. The respondent's failure or refusal to disclose all necessary and relevant facts delays the finalisation of this matter, however it is prudent to reserve costs at this stage.

Accordingly, I make the following order:

1. Judgment in the amount of R654 348.78. limited to R518 400 in respect of the fifth, sixth and seventh defendants, jointly and severally, the one paying the other to be absolved is granted.
2. Interest on the amount at the rate of 5.35% per annum is payable from 1 December 2020 to date of payment.

3. The issue of execution against immovable property is postponed sine die.
4. Costs are reserved.

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**MAHOMED AJ**  
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be \_\_\_\_\_.

Date of Hearing: 1 November 2023

Date of Judgment:

**Appearances**

For Applicant: Advocate Oschman

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