

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



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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|-----|------------------------------------|
| (1) | REPORTABLE: [Y/N] |
| (2) | OF INTEREST TO OTHER JUDGES: [Y/N] |
| (3) | REVISED: [Y/N] |
| (4) | Signature: _____ Date: _____ |

CASE NUMBER: 87458/2019

In the matter between:

SB GUARANTEE COMPANY (RF) PROPRIETARY LIMITED

Applicant/Plaintiff

(REGISTRATION NUMBER: 2006/021576/07)

and

EWLOUD

FREDERICK

BOTES

Respondent/Defendant

(IDENTITY NUMBER: [...])

JUDGMENT

ASL VAN WYK AJ

[1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of Court. The relief sought by the Plaintiff is as follows:

- 1.1 Payment in the amount of R 1 606 163.34 (One Million Six Hundred and Six Thousand One Hundred and Sixty-Three Rans and Thirty-Four Cents).

- 1.2 Interest on the sum of R 1 606 163.34 (One Million Six Hundred and Six Thousand One Hundred and Sixty-Three Rans and Thirty-Four Cents) calculated at the rate of 10.45% per annum from 8 November 2019 to date of payment, both dates inclusive.

- 1.3 An order declaring the immovable property known as, **Erf [...] H[...], in the Municipality and District of George, Province of Western Cape, measuring 4,2686 (Four comma Two Six Eight) Hectares held by deed of Transfer Number T72727/2016 - subject to the conditions contained therein-**, specially executable in terms of Uniform Rule 46A(8)(d), which immovable property is to be sold in execution by the Sheriff with a reserve price.
- 1.4 That the immovable property known as **Erf [...] H[...], in the Municipality and District of George, Province of Western Cape, measuring 4,2686 (Four comma Two Six Eight) Hectares held by deed of Transfer Number T72727/2016 - subject to the conditions contained therein,** be declared specially executable in terms of Uniform Rule 46A(8)(d) read with Uniform Rule 46(A)(8)(e) and that reserve price be and is hereby set by this Court at R 1 498 200-00.

1.5 That the Registrar is authorised to issue a writ of execution against the immovable property known as **Erf [...] H[...], in the Municipality and District of George, Province of Western Cape, measuring 4,2686 (Four comma Two Six Eight) Hectares held by deed of Transfer Number T72727/2016 - subject to the conditions contained therein,** in terms of Uniform Rule 46(A)(1)(a)(ii) read with Uniform Rule 46A(2)(c).

1.6 Costs of suit on an attorney and client scale.

[2] The Plaintiff pursues a securitized claim, relying on the provisions of a written Indemnity Agreement read with the provisions of a Mortgage Bond granted in its favour by the Defendant which agreements forms part of a suite of agreements between the Plaintiff, Defendant and The Standard Bank of South Africa Limited (**“Standard Bank/Credit Provider”**).

[3] The summary judgment is resisted by the Defendant on the following basis:

3.1 The *first defence* raised by the Defendant, which is in the form of a special plea, consist of three defences, each in the *alternative*, in which the Defendant contends that this action had to be instituted in the Magistrates Court following an express term contained in the mortgage bond; *alternatively* considering the *contra proferentum* rule, the Plaintiff is

obliged to commence legal proceedings in the Magistrates Court because such institution of proceedings in the Magistrates Court is favourable to the Defendant. Further *in the alternative* such agreement to commence legal proceedings in the Magistrates Court, constitutes an irreversible election which binds the Plaintiff. Further *in the alternative* should this Court find that the Plaintiff is allowed to commence proceedings in this Court, the Plaintiff is precluded from instituting the proceedings in this Division of the High Court because the Defendant is not resident or employed within this Court's jurisdiction. Further *in the alternative* if this Court rejects the special plea(s) and its alternative special plea(s), the Defendant avers that Plaintiff is precluded by Section 130(3)(a) of the National Credit Act, from determining this matter and Plaintiff failed to comply with the requisite procedures contained in Section 129 thereof.

3.2 The *second defence* raised by the Defendant is that Defendant did not breach the terms of the Home Loan Agreement.

3.3 The *third defence* raised by the Defendant is that although Defendant admits concluding the loan agreement, agreed to its terms and admits that he caused the mortgage bond to be registered over the immovable property, there were further material terms to the loan agreement – contained in paragraph(s) 7.3.1 to 7.3.5 of Defendants plea.

3.4 In amplification of the third defence raised by the Defendant, the Defendant avers that because of “*recapitalisation*”, any arrears due to non-payment would be incorporated in the main debt and “*spread*” over the loan period making the arrears “*disappear*” by adjusting the monthly instalment.

3.5 The fourth defence raised by the Defendant, is that neither the Loan Agreement nor the Indemnity Agreement refers to reinstatement in terms of Section 129(3) of the NCA and therefore he cannot re-instate the Indemnity Agreement.

3.6 The fifth defence raised by the Defendant, is that the Plaintiff is not allowed to attach an updated certificate of balance to its affidavit in support of Summary Judgment.

3.7 The sixth defence raised by the Defendant, is that the Plaintiff ought to have brought a separate Rule 46A Application.

3.8 The seventh defence raised by the Defendant (joining in with the Defendants third defence) is that The Standard Bank of South Africa

Limited did not send out all the notices informing the Defendant of the change of interest rate.

3.9 The *eighth defence* raised by the Defendant is that the Indemnity Agreement constitutes a credit agreement, and as such, the Plaintiff must be registered as a credit provider. It is the Defendant's contention that the Indemnity Agreement furthermore constitutes an unlawful credit agreement.

3.10 Further, the Defendant opposes the granting of an order for special executability of the immovable property forming the subject matter of the application on the following *verbatim* basis:

3.10.1 *"Even if the Honourable Court were to decide that the Applicant would be entitled to judgment, I (referring to the Respondent- my emphasis) submit that granting it (referring to the Applicant- my emphasis) the right to sell my property would be unjustifiable and disproportionate as there is a less invasive way that is available for recovery of its debt."*

3.10.2 *"It was only after I understood the robust nature of the Home Loan agreement did, I know that my inability to repay the enormous, alleged arrears was not the only way for me to repay the Applicant and/or the Lender. In this regard, I submit if I am to repay the monthly instalment as is currently updated and revised then I will eventually satisfy my obligation; such eventually will be in the originally envisaged term."*

3.10.3 *"Such speedy remedy I submit would amount to a violation of my Basic Human Rights, including my property rights, my rights of access to adequate housing and my right to dignity."*

[4] During argument, Mr Webbstock appearing on behalf of the Defendant - abandoned the second-, third-, and six defence(s) referred to in paragraph 3 *supra*. I was consequently not tasked to consider the aforesaid defences and neither did I. I must add that legally there is no basis for the Defendant to suggest that the Plaintiff ought to have instituted a separate Uniform Rule 46A application in these circumstances.

Factual Background

[5] On 1 March 2015, the Plaintiff and Standard Bank concluded a Common Terms Guarantee Agreement (“**Guarantee Agreement**”) in terms of which the Plaintiff would from time to time guarantee the obligations of Standard Bank’s debtors under individual Home Loan Agreements. It was recorded therein, *inter alia*, that:

5.1 Standard Bank had and would in future enter into individual Home Loan Agreements with various debtors in terms of which Standard Bank would advance funds to the relevant debtors against security of immovable property.

5.2 It was a condition of each Home Loan Agreement that the Plaintiff would guarantee the obligations of the relevant debtor to Standard Bank under the relevant Home Loan Agreement and that the debtor would Indemnify the Plaintiff against any payment obligation it incurred under the Guarantee and would register a Mortgage Bond in favour of the Plaintiff over the relevant immovable property as security for the repayment of the indebtedness of the debtor under the Indemnity.

[6] The relevant terms of the Guarantee Agreement included, *inter alia*, the following:

6.1.1 In consideration for each debtor granting the required Indemnity and registering a Mortgage Bond, and with effect from the date of registration of the Mortgage Bond, the Plaintiff guaranteed, subject to

the terms and conditions of the Guarantee Agreement, the due and punctual payment of all sums then and subsequently due by each debtor to Standard Bank under his or her respective Home Loan Agreement.

6.1.2 On signature of a Home Loan Agreement, an Indemnity and a Power of Attorney authorising the registration of a Mortgage Bond, the Plaintiff would sign and deliver a Guarantee to Standard Bank.

6.1.3 If Standard Bank notified the Plaintiff in writing to make any payments to it as set out in clause 13 thereof, the Plaintiff would and should proceed promptly against the debtor in any competent Court and call up and foreclose on the Mortgage Bond or enforce such other remedies as may be available to it.

[7] On 17 October 2016 the Defendant and Standard Bank (the Credit Provider) concluded a Home Loan Agreement in terms of which Standard Bank agreed to lend and advance the sum of R 1 440 000.00 to the Defendant (**“Home Loan Agreement”**).

[8] As security for the Home Loan, Standard Bank required, *inter alia*:

- 8.1 a Guarantee by the Plaintiff to Standard Bank in terms of which the Plaintiff undertook to pay to Standard Bank the amount owing in terms of the Home Loan Agreement in the event of a default by the Defendant thereunder.
- 8.2 an indemnity by the Defendant in terms of which the Defendant indemnified the Plaintiff against any claim made by Standard Bank in terms of the aforesaid Guarantee; and
- 8.3 a Mortgage Bond registered in favour of the Plaintiff for the capital sum of R 1 440 000.00.

[9] The relevant terms of the Home Loan Agreement included, *inter alia*, the following:

- 9.1 An event of default would occur under the Home Loan Agreement if, *inter alia*, the Defendant failed to pay any amount owing to Standard Bank thereunder on due date and/or where there was a material deterioration in the debtor's (Defendant's) financial position and/or the Defendant otherwise breached the Home Loan Agreement or any agreement between Standard Bank and the Defendant and failed to remedy such breach within the time period provided in Standard Bank's written notice to the debtor (Defendant) do so.

9.2 In the event of default, Standard Bank could, at its election and without prejudice to any other remedy which it had in terms of the Home Loan Agreement (including cancellation), recover from the Defendant payment of amounts owing under the Home Loan Agreement.

[10] Pursuant to the Home Loan Agreement, as read with the Guarantee Agreement:

10.1 the Plaintiff signed and delivered a Guarantee to Standard Bank in terms of which it guaranteed the due and punctual payment of all sums which were then, or which would subsequently become, due and payable by the Defendant to Standard Bank pursuant to the Home Loan Agreement.

10.2 the Defendant provided a written Indemnity to the Plaintiff in terms whereof the Defendant acknowledged and agreed that if Standard Bank lodged or made a claim against the Plaintiff on the Guarantee, The Defendant would immediately be liable to the Plaintiff in terms of the Indemnity for the amount in which the Plaintiff was liable under the Guarantee; and

10.3 a first continuing covering Mortgage Bond for the sum of **R 1 440 000-00** was registered over the Defendant's immovable property known as **Erf [...] H[...]**, in the **Municipality and District of George, Province of Western Cape, measuring 4,2686 (Four comma Two Six Eight) Hectares held by deed of Transfer Number T72727/2016** in favour of the Plaintiff. The principal debt as regards to the aforesaid and incurred by the Defendant was recorded as **R 1 445 985-00**. The Defendant hypothecated the immovable property as security for his stated liability to the Plaintiff, including 'every indebtedness or obligation of whatsoever cause and nature, whether then in existence or which may have come into existence in the future', including costs on the attorney and client scale.

10.4 In terms of clause 6 the Mortgage Bond, *"A certificate signed by any director or administrator of the Mortgagee, whose appointment need not be proved, will on its mere production be sufficient proof of any amount due and/or owing by the Mortgagor to the Mortgagee and secured by or in terms of this bond, unless the contrary is proven."*

10.5 In terms of clause 9 of the Mortgage Bond, if the Defendant failed to observe or perform any provisions in the Mortgage Bond, or failed to pay any sum which may be legally claimable by the Plaintiff, or failed to perform any other obligation on due date or at all, then all amounts secured by the Mortgage Bond would, at the Plaintiff's option, becomes

immediately due and payable in full upon demand, and the Plaintiff could then institute proceedings for the recovery thereof and for an order declaring the immovable property specially executable.

10.6 The Defendant utilised the funds advanced to Defendant by the Credit Provider, Standard Bank, to purchase the immovable property referred to herein *supra*.

10.7 the Defendant defaulted in Defendant's obligations under the Home Loan Agreement, Standard Bank (the Credit Provider), on 8 October 2019, despatched a breach notice in terms of Section 129(1) of the NCA, in which it demanded payment of the arrears (then R 118 047.46) within a period specified therein. When the arrears remained unpaid at the expiry of the specified period, Standard Bank called on the Plaintiff to make payment under the Guarantee and to institute legal proceedings against the Defendant for the recovery of the full amount due by the Defendant and to take steps, *inter alia*, to foreclose under the Mortgage Bond.

[11] The Defendant defaulted on the Loan Agreement as he failed to maintain the monthly instalment payments as agreed. On 8 November 2019 the arrear amount was **R 147 426-96** (One Hundred and Forty-Seven Thousand Four Hundred and Twenty-Six Rand and Ninety-Six cents) and the full

outstanding balance owed by the Defendant to the Plaintiff an amount of **R 1 606 163.34** (One Million Six Hundred and Six Thousand One Hundred and Sixty-Three Rans and Thirty-Four Cents).

The Defendant's defence(s) within the legal framework

[12] The Defendant's first defence:

12.1 The Defendant's first defence raised consists of three main arguments, each being in the *alternative* and each concerning a jurisdictional challenge. I will deal with all three arguments (alternatives) simultaneously herein *infra*.

12.2 As regards to the Mortgage Bond Agreement, clause 13.1 of the Mortgage Bond Agreement reads as follows:

"The Mortgagor agrees that if the Magistrate's Court has concurrent jurisdiction with the High Court over any dispute in terms of this Bond, then the Mortgagor consents to the Magistrate's Court having jurisdiction. If, however, the Magistrate's Court does not have concurrent jurisdiction with the High Court and the High Court has exclusive jurisdiction, then the Mortgagor consents to the jurisdiction

of the High Court for purposes of any dispute arising out of this bond.”

- 12.3 The Indemnity Agreement, **Annexure “POC3”** to the Plaintiff’s Particulars of Claim, specifically clause 5.3.2 thereof, reads as follows:

“The Borrower agrees that the Guarantor may bring legal proceedings against it in any Magistrate’s Court that has jurisdiction. The Borrower agrees to the jurisdiction of the Magistrate’s Court even if the amount the Bank claims from the Borrower exceeds the jurisdiction of the Magistrate’s Court. This does not prevent the Guarantor from bringing legal proceedings in a High Court that has jurisdiction.”

- 12.4 *Further*, clause 5.5.4 of the Indemnity Agreement clearly states that, if there is any conflict between the provisions of the Indemnity Agreement and the Mortgage Bond, the provisions of the Indemnity Agreement will prevail.

- 12.5 Clause 5.3 of the Indemnity agreement, in all respects (including its existence, validity, interpretation, implementation, termination and enforcement) is governed by the Laws of the Republic of South Africa.

12.6 *In Amcoal Collieries Ltd v Truter 1990 (1) SA 1 (A) at 5H-6D*, Nicholas AJA stated that:

'It is a matter of frequent occurrence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: Pretoria Hypotheek Maatschappij v Groenewald 1915 TPD 170.

12.7 In the matter of *Mayne v Main 2001 (2) SA 1239 (SCA)*, it was held that the time to determine jurisdiction is at the commencement of the action. An action commences when the Summons has been issued and duly served.

12.8 In the matter of *Firststrand Bank Limited v Baadjies (2024/13) [2013] ZAWCHC 116*, the Court dealing with the approach regarding jurisdiction in terms of the provisions of Section 19(1)(a) of the Supreme Court Act (now being section 21 of the Superior Courts Act, Act 10 of 2013 (as amended) stated the following:

“[6] *In approaching the question of jurisdiction in the context of the present case, the starting point must be found in the provisions of*

s 19(1)(a) of the Supreme Court Act, which confers jurisdiction, inter alia, ' . . . over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction and all other matters of which it may according to law take cognizance . . . ' (emphasis added). It is trite that a cause based on contract 'arises' where (a) the contract was entered into; or (b) the contract is or was to be performed, wholly or in part; or (c) the particular breach of contract upon which the plaintiff relies, was committed. The plaintiff has a choice of instituting action in any of these places."

12.9 In the matter of ***Makhanya v University of Zululand 2010 (1) 62 (SCA)***, the SCA at paragraph 52 stated that:

' . . .the term "jurisdiction", as it has been used in this case, and in the related cases that I have mentioned, describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim.'

12.10 The concurrency of jurisdiction in circumstances in which a claim is justiciable in a Magistrates' Court and has been brought in a High Court has been recognised for over a century. (See: ***Koch v Realty Corporation of South Africa 1918 TPD 356***).

12.11 Section 21(1) of the Superior Courts Act 10 of 2013 provides that:

'A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance. . . .'

12.12 The Supreme Court of Appeal in the matter of ***The Standard Bank of SA Ltd and Others v Thobejane and Others (38/2019 & 47/2019) and The Standard Bank of SA Ltd v Gqirana N O and Another (999/2019) [2021] ZASCA 92 (25 June 2021)***, the Court considering the issues where a High Court may properly refuse to hear a matter over which it has jurisdiction where another Court has concurrent jurisdiction in either of two circumstances; when a High Court and a Magistrates' Court both have jurisdiction in respect of the same proceedings and, when the main seat of a Division of a High Court and a local seat both have jurisdiction in respect of the same proceedings read in conjunction with Section 21 of the Superior Courts Act and the NCA, *inter alia* held that, once a Court has jurisdiction to entertain a matter, it cannot refuse to do so unless the action amounts to an abuse of process of the Court. Furthermore, the NCA (Section 3 and 90) does not oust the jurisdiction of the High Court in NCA matters and it is settled law that a High Court has

concurrent jurisdiction with any Magistrates Court in its area of jurisdiction.

12.13 In approaching the question of jurisdiction in the context of the present matter before me, the starting point must be found in the provisions of Section 21(1) of the Superior Courts Act, which confers jurisdiction, *inter alia*, ‘ . . . over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction and all other matters of which it may according to law take cognizance . . . ’.

12.14 It is trite that a cause based on contract ‘arises’ where (a) the contract was entered into; or (b) the contract is or was to be performed, wholly or in part; or (c) the specific breach of contract upon which the Plaintiff relies, was committed. In those circumstances I am of the view that the Plaintiff has a choice of instituting action in any of these places.

12.15 In the context of the present matter before me, I am of the view that in interpreting “*all causes arising*”, regard must be had to the *ratio jurisdictionis* recognized by our Common Law, namely performance, or part performance, of the agreements.

12.16 Consequently, in *this application before me*:

12.16.1 In terms of the Home Loan Agreement, the Defendant selected his chosen *domicilium* as **580 SKUKUZA STREET, FAERIE GLEN,**

EXT 34 which is within the Court's jurisdiction.

12.16.2 In terms of the application for finance with Standard Bank, the Defendant specifically selected his present (at the time of application for finance) residential address as **580 SKUKUZA STREET, FAERIE GLEN, EXT 34** which is within this Court's jurisdiction.

12.16.3 In terms of clause 5.1 of the Indemnity Agreement, the Defendant selected his domicilium citandi et executandi/ physical address as **580 SKUKUZA STREET, FAERIE GLEN, EXT 34** which is within this Court's jurisdiction.

12.16.4 The Home Loan Agreement entered between Standard Bank and the Defendant was entered into at George and Pretoria respectively.

12.16.5 The Indemnity Agreement was entered into between the Plaintiff and the Defendant at George and Pretoria respectively.

12.16.6 The Power of Attorney to pass the Mortgage Bond was also executed and provided in Pretoria within this Court's jurisdiction.

12.16.7 Payment in terms of the Defendant's obligations in terms of the

Home Loan Agreement was to be made into an account held by Standard Bank, receiving payment within the jurisdiction of the Court.

12.16.8 The bank account held by the Defendant at the Standard Bank branch from which payment was to be made and selected in the Application for Credit, is held at the Castle Walk Centurion, which is furthermore situated within this Court's jurisdiction; and

12.16.9 The breach of payment in terms of the Home Loan Agreement *inter alia* also falls within this Court's jurisdiction.

12.17 I am of the view that a *conjunctio causarum* clearly exists and that this Division has jurisdiction to hear this application. Further, the Plaintiff as *dominus litis* in these proceedings consequently became entitled as a matter of choice, to institute the proceedings in this Court.

12.18 As regards to the Defendant's vigorous argument before me, that there is non-compliance by the Plaintiff with the procedures required by Section 129 of the National Credit Act, in that, as per Defendant's interpretation of Section 129(1), the Plaintiff who commences legal proceedings *must* be the credit provider that provides the consumer with the notice pursuant to Section 129(1)(a). I am of the view that the Defendant's interpretation as aforesaid are misguided and wrong because:

- 12.18.1 On a common ground basis, the Defendant entered into a Home Loan Agreement with Standard Bank (the Credit Provider), the funds were advanced to the Defendant by Standard Bank with which he purchased the mortgaged immovable property.
- 12.18.2 The Indemnity Agreement is neither a credit agreement as such nor has the Plaintiff advanced any credit and/or funds to the Defendant.
- 12.18.3 It is common cause between all parties that Standard Bank is the creditor who advanced the funds to the Defendant in terms of the Home Loan Agreement.
- 12.18.4 It is common cause that Standard Bank (the Credit Provider) dispatched the relevant Section 129(1) notice to the Defendant's chosen *domicilium* addresses as well as per Sheriff and the Defendant admitted receiving same. The Defendant has not utilised any of the procedures contained in such notice, afforded to him.
- 12.18.5 I am of the view that Standard Bank (the Creditor Provider) has duly complied with the prerequisites of Section 129(1) read with Section 130 of the NCA, by dispatching the relevant Section 129(1) notice to the Defendant's chosen *domicilium* addresses as well as per Sheriff, prior to the commencement of legal proceedings to enforce the

credit agreement.

12.19 I am of the view that the Defendant's Special Plea(s) are meritless and was raised more in hope than expectation.

12.20 The approach adopted by the Defendant failed to account for the current legal position concerning jurisdictional matters of this nature detailed in **The Standard Bank of SA Ltd and Others v Thobejane and Others (38/2019 & 47/2019) and The Standard Bank of SA Ltd v Gqirana N O and Another (999/2019) [2021] ZASCA 92 (25 June 2021)** and confirmed by the Constitutional Court in the matter of **South African Human Rights Commission v Standard Bank of South Africa Ltd and Others [2022] ZACC 43.**

12.21 In consequence the Defendant's first defence is not *bona fide* or a triable issue and is hereby dismissed.

[13] The Defendant's Fourth Defence:

13.1 The fourth defence raised by the Defendant, is that neither the Loan Agreement nor Indemnity Agreement refers to reinstatement in terms of Section 129(3) of the NCA and he cannot reinstate the Indemnity Agreement or the Credit Agreement (Home Loan Agreement).

13.2 The National Credit Act and the procedures contained therein finds application to the Loan Agreement.

13.3 The Indemnity Agreement as well as the Guarantee and Common Terms Agreement are in all respects (including its existence, validity, interpretation, implementation, termination, and enforcement) governed by the Laws of the Republic of South Africa, which includes the National Credit Act and by implication reinstatement of a credit agreement, which in this regard, will be the Loan Agreement, and

13.4 Upon perusal of the Plaintiff's particulars of claim, specifically paragraph 43 thereof, the Defendants attention is specifically drawn to Section 129(3) and 129(4) of the National Credit Act for reinstatement of the credit agreement.

13.5 The Defendant did not plead or prove that he paid up all the arrears due, owing, and payable – and that the Loan Agreement/ credit agreement has reinstated.

13.6 It is trite that the Defendant can reinstate the credit agreement any time before cancellation of such agreement and/or transfer of the

immovable property. This remedy remains available to the Defendant if he extinguishes all the arrears as regards to the credit agreement.

13.7 In consequence the Defendant's Fourth defence is not *bona fide*, or a triable issue or a defence at all and is hereby dismissed.

[14] The Defendant's Fifth Defence:

14.1 The fifth defence raised by the Defendant, is that the Applicant is not allowed to attach an updated Certificate of Balance to its affidavit.

14.2 The Supreme Court of Appeal judgement in the matter of **Rossouw v First Rand Bank Ltd 2010 (6) SA 439 (SCA)** at paragraph 47 thereof stated the following:

“ The certificate of balance, also handed up to the court a quo, stands, however, on a different footing. The court a quo refused to have regard to the certificate. That approach was not correct. The certificate did not, as the court a quo considered, amount to new evidence which would be inadmissible under rule 32(4). To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on the facts already before the court which the court would otherwise have to perform itself. Such calculations are better performed by a qualified person in the employ of a financial institution.

And to the extent that such a certificate may reflect additional payments by the defendant after the issue of summons, or payments not taken into account when summons was issued, this constitutes an admission against interest by the Bank and the Bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether a quo or on appeal) perform a useful function and are not hit by the provisions of rule 32(4).”

14.3 Insofar as the Defendant suggests that a certificate of balance, which constitutes *prima facie* proof of indebtedness to the Plaintiff is outdated, contrary to public policy and the National Credit Act, I find no merit in this argument, whatsoever. It is common cause that Plaintiff’s reliance on a certificate of balance originates from a contractual term agreed between the parties. On this point, the following is important:

14.3.1 In **Beadica 231 CC and others v Trustees for the Time Being of the Oregon Trust and Others 2020 (9) BCLR 1098 (CC)**

In paragraph 83 thereof: *“The first is the principle that public policy demands that contracts freely and consciously entered into must be honoured. This Court has emphasised that the principle of pacta sunt servanda gives effect to the central constitutional values of freedom and dignity. It has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken.*

Pacta sunt servanda is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values.”

In paragraph 84 thereof: *“Moreover, contractual relations are the bedrock of economic activity, and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.”*

In paragraph 85 thereof: *“The fulfilment of many rights promises made by our Constitution depends on sound and economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda.”*

14.4 There can be no dispute that this defence raised by the Defendant is settled in our law. In consequence the Defendant's Fifth defence is not bona fide, or a triable issue or a defence at all and is hereby dismissed.

[15] The Defendant's Seventh Defence:

15.1 This defence raised by the Defendant suggests that Standard Bank has not dispatched all the notices informing him of the change of interest rate.

15.2 The Defendant admitted that Standard Bank advanced the loan amount to the Defendant.

15.3 I dealt with the certificate of balance which constitutes *prima facie* proof of the indebtedness herein *supra*. The Defendant is consequently tasked to allege and proof in what way he purportedly made payment(s) more than the claimed amount, if any. In fact, the Defendant's legal representative during argument abandoned the defence that Defendant is not in breach of the terms of the agreement.

15.4 Further, the Defendant did not provide any proof, at any stage prior to issuing of summons that it demanded compliance from the Plaintiff

and/or Standard Bank as regards to change(s) in interest rate(s) from time to time. It is not denied by the Defendant that he received regular interval statements as envisaged in the agreement between the parties.

15.5 There is no evidence before me that the Defendant invoked the breach clause contained in the agreement between the parties, either concerning letter(s) of interest rates changes or regular interval statements. The Defendant provided no proof that he made contact or attempted to contact the Applicant and/or Standard Bank concerning a higher monthly instalment at any stage.

15.6 Notwithstanding what I have said herein *supra*, the Defendant admits that he received a notice of change in interest rate which occurred on 21 July 2022 and that he paid the adjusted instalment of R 17 479.45 on 11 August 2022. I find it disconcerting that the Defendant did absolutely nothing since 2019, when legal proceedings commenced or any period thereafter, to follow up and/or request and/or enquire from Standard Bank as regards to the alleged non-receipt of any or all previous interest rate change letter(s) or enquired about the status of his account in arrears.

15.7 The Defendant presented no evidence that he applied for a fixed interest rate option agreement as envisaged in clause 16.5 of the Home Loan Agreement, at any stage, and neither did Defendant's legal representative advance such an argument before me.

15.8 Considering the objective facts, I find it improbable and unconvincing that the Defendant did not receive the change in interest rate letter(s) *alternatively* that the receipt thereof, if his version was hypothetically accepted – which remains seriously unconvincing- would have influenced or diminished the outstanding balance at it stands before me. I am not persuaded.

15.9 In consequence the Defendant's Seventh defence is not *bona fide* or a triable issue or a defence at all and is hereby dismissed.

[16] The Defendant's *Eight Defence*

16.1 This defence by the Defendant contends that the Indemnity Agreement is a credit agreement and, as such, the Plaintiff must be registered as a credit provider.

16.2 Further, in the *alternative* that if I find that the Indemnity Agreement is not a credit agreement, and that the Plaintiff is not required to be registered as a credit provider, I must consider whether the Indemnity Agreement is invalid because according to the Defendant, it deprives him of his rights in terms of the National Credit Act.

16.3 It is a common cause fact that the Defendant entered into a Loan Agreement with Standard Bank (the Credit Provider) subsequent to which funds were advanced to the Defendant by Standard Bank with which he purchased the immovable property.

16.4 The *vinculum juris* between the Plaintiff and Defendant flows from the Indemnity agreement. I am of the view that the Indemnity Agreement is neither a credit agreement nor has the Plaintiff advanced any credit and/or funds to the Defendant. The amounts in question were advanced by Standard Bank to the Defendant in terms of the Home Loan Agreement.

16.5 I am in agreement with Mr Marais, Counsel for the Plaintiff that the judgments in the matters of ***Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 3 SA 384 (T)*** and ***Shaw & another v Mackintosh & Another (267/17) [2018] ZASCA 53 (29 March 2018)*** are applicable and relevant to the principle that the Plaintiff need not comply with the

provisions of the National Credit Act insofar as registration as credit provider is concerned, under these circumstances.

16.6 In consequence the Defendant's Eight defence is not *bona fide*, or a triable issue or a defence at all and is hereby dismissed.

[17] The principles governing summary judgment are trite and need not be restated. Suffice to refer to the well-known judgment in **Maharaj v Barclays National Bank Limited 1976 (1) SA 418 A** at **426A-C** where the court held as follows regarding the discretion of the court:

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the Plaintiff in his summons, or combined summons, are dispute or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All the court enquires into is: (a) whether the defendant has ‘fully’ disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be.”

[18] As regards to what is meant by the words 'fully' disclose, the Court in **Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)** at 228D-E explained as follows:

*" I respectfully agree, subject to one addition, with the suggestion by Miller J., in **Shepstone v Shepstone, 1974 (2) SA 462 (N)** at page 466- 467, that the word fully should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the Defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague, or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides"*

[19] Considering the trite principles governing summary judgment proceedings and the defences raised by the Defendant, I am not convinced that the defences raised by the Defendant constitutes *bona fide* and triable defences.

[20] I now turn to deal with the factors whether the immovable property described herein *supra* should be declared specially executable.

[21] I considered the payment information- and -history in terms of the Loan Agreement, and all factors whether the immovable property should be declared specially executable *inter alia* as follows:

21.1 The Defendant was, as of **8 November 2019**, approximately **10.04** months in arrears.

21.2 The arrear amount owed by the Defendant, as of **8 November 2019**, was in the amount of **R 147 426-96**.

21.3 There was no evidence presented by the Defendant or his legal representative that the arrear amount which escalated to **R538 525.68** as of **23 July 2022**, became reduced.

21.4 On the conspectus of the facts, I am satisfied that the immovable property was not acquired with the assistance of a state subsidy.

21.5 In his answering affidavit to these proceedings, the Defendant submits that he primarily resides at the immovable property.

21.6 I am satisfied that the amount owed by the Defendant is substantial and the immovable property is the only tangible security which the Plaintiff holds in this regard.

21.7 I am not convinced, in the absence of any proof submitted by the Defendant to the contrary, that there are less invasive way(s) or avenues available to the Plaintiff to recover its substantial debt or that the mechanisms contained in Uniform Rule 46 (1)(a)(i) would suffice under these circumstances. I consequently disagree that granting executability of immovable property would be unjust and disproportionate.

21.8 Further, the immovable property is zoned as a residential property.

21.9 I accept the unchallenged expert evidence that the market value of the immovable property is **R 2 000 000-00**, and the forced sale value thereof is **R 1 500 000-00**.

21.10 A report by Omega Tracers and the George Municipality shows that the municipal value of the immovable property is **R 1 026 000-00**.

21.11 As regards to my judicial exercise and discretion in setting a reserve price, I accept the amount of **R 1 498 189-20** (forced sale values less outstanding Rates and Taxes of **R 1 810-80**) as reasonable, equitable, just and fair under these circumstances.

21.12 Considering the matter of *Beadica supra*, and all the facts of this matter, I am not persuaded that an order of this nature- declaring the Defendant's immovable property specially executable under these circumstances will be a violation of his basic human rights, his property rights, his right to adequate housing or his right to dignity.

[22] As regards to the question of costs, considering the holistically unsustainable defences raised by the Defendant and the delay caused therewith in this matter, I am inclined to award costs on the scale as between attorney and client against the Defendant.

[23] I therefore make the following order:

1. The application for summary judgment is hereby granted against the defendant.

2. The Defendant is ordered to pay to the Plaintiff an amount of **R 1 606 163-34** (One Million Six Hundred and Six Thousand One Hundred and Sixty-Three Rans and Thirty-Four Cents).

3. The Defendant is ordered to pay to the Plaintiff interest on the amount of **R 1 606 163.34** (One Million Six Hundred and Six Thousand One Hundred and Sixty-Three Rans and Thirty-Four Cents) calculated at the rate of 10.45% per annum from 8 November 2019 to date of payment, both dates inclusive.

4. That the the immovable property known as, **Erf [...] H[...]**, in the **Municipality and District of George, Province of Western Cape, measuring 4,2686 (Four comma Two Six Eight) Hectares held by deed of Transfer Number T72727/2016 - subject to the conditions contained therein-**, is hereby declared pecially executable in terms of Uniform Rule 46A(8)(d), which immovable property is to be sold in execution by the Sheriff with a reserve price set in *prayer 5* below.

5. That the immovable property known as **Erf [...] H[...]**, in the **Municipality and District of George, Province of Western Cape**, measuring **4,2686 (Four comma Two Six Eight) Hectares** held by **deed of Transfer Number T72727/2016** - subject to the **conditions contained therein**, is hereby declared specially executable in terms of Uniform Rule 46A(8)(d) read with Uniform Rule 46(A)(8)(e) and that reserve price is hereby set by this Court at **R 1 498 189-20** .

6. That the Registrar is hereby authorised to issue a writ of execution against the immovable property known as **Erf [...] H[...]**, in the **Municipality and District of George, Province of Western Cape**, measuring **4,2686 (Four comma Two Six Eight) Hectares** held by **deed of Transfer Number T72727/2016** - subject to the **conditions contained therein**, in terms of Uniform Rule 46(A)(1)(a) (ii) read with Uniform Rule 46A(2)(c).

7. That the Defendant's attention is drawn to Sections 129(3) & 4 of the National Credit Act No. 34 of 2005 that the Defendant may pay to the Plaintiff/ Credit Grantor all overdue/arrear amounts together with the Plaintiff's permitted default charges, taxed, or agreed costs of enforcing the agreement prior to the sale of the immovable property and so revive the credit agreement.

8. The arrear amounts and enforcement costs together with the default charges may be obtained from the Plaintiff or its attorneys of record. The Defendant is advised that the arrear amount (together with default charges and enforcement costs) is not the full amount outstanding, but the amount owing by the Defendant to the Plaintiff, without reference to the accelerated amount.

9. Costs of suit on an attorney and client scale.

ASL VAN WYK

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

For the Plaintiff/Applicant: ADV H MARAIS

Instructed by: Vezi & De Beer Incorporated Attorneys

For the Respondent: MR M WEBBSTOCK

Instructed by: Matthew Webbstock Attorney

Date of Judgment: 15 February 2024

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