IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 24/040313

1. Reportable: **NO**

2. Of interest to other Judges: **NO**

3. Revised

Date: 3 June 2025

Signature:

In the matter between:

First Rand Bank Limited Applicant

Reg No.: 1929/00122506

And

Jaques Cilliers First Respondent

Id No: 7[...]

Jannie Johanna Cilliers Second Respondent

Id No.: 7[...]

JUDGMENT

Ncongwane AJ:

Summary: Relief for monetary judgment and leave to perfect security. Grounds for price reservation established – Rule 46A (8)(e) complied. Benefit of

Excussion in suretyship when renounced – cannot be raised as defence.

Introduction

[1] This is an application for a monetary judgment against the respondents in their capacity as sureties for, and co-principal debtors with, JC Trading CC *("JC Trading")* for its debts owed to the applicant. The matter came before me on the 27th of May 2025 and I reserved the judgment.

[2] Before me, Mr De Oliveira appeared on behalf of the applicant. Respondents, who have been acting in person, from the inception of the litigation in this matter, filed the notice to oppose[1] and later an opposing affidavit[2] but have neither filed heads of argument nor appeared at the hearing despite being duly served with the notice of set down on the 24th of January 2025. On the 26th January 2025, the first respondent acknowledged receipt of the notice on behalf of both respondents.[3]

[3] In the opposing affidavit, condonation is sought for the late filing of the opposing affidavit. Applicant does not strenuously oppose condonation. Despite that the respondents' application for condonation not being satisfactory, in the exercise of my discretion, I condoned the late filing of the answering affidavit in the interest of justice. All affidavits filed are considered in the evaluation process of this matter.

[4] The respondents' indebtedness to the applicant arises out of several loan agreements and a written facility agreement concluded between the applicant and JC Trading, for which the respondents are liable as sureties and co-principal debtors. As further security for the debts of JC Trading and the respondents, the respondents agreed to provide three mortgage bonds over the respondents' immovable property situated in Brits, in favour of the applicant.

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1 Respondent's notice of intention to oppose dated 27 August 2024, caseline item 006-4 to 006-6.

2 Opposing affidavit (5th November 2024) Caseline 003-1 to 003-38.

3 Caseline – acknowledgement of receipt , (27 January 2025) 007-25 to 007-27.

[5] It is common cause that JC Trading was voluntarily liquidated on the 19th December 2023. The commencement of the liquidation of JC Trading constituted a breach of the agreement entered into with the applicant. This spurred the applicant into a recovery action as it turned to the respondents for payment of JC Trading debts owed to the applicant.

[6] In the answering affidavit, the respondents admit that JC Trading defaulted on its various obligations to the applicant and that they executed deeds of suretyship in favour of the applicant for the debts of JC Trading.

Background facts

[7] The applicant and JC Trading concluded three written loan agreements, on the 13th December 2013, *(the first and the second loan agreements)* and on the 27th July 2019, *(the third loan agreement).* The material terms of the loan agreements were, *inter alia,* that the applicant loaned and advanced to JC Trading a sum of R1 100 000.00 (One million one hundred thousand rands) and the loaned amount was repayable over ten (10) years[4], in respect of the first loan agreement, loaned and advanced a sum of R 900 000.00 (Nine hundred thousand rands) repayable over sixty (60) months[5], in respect of the second loan. A third loan agreement, in terms of which the applicant loaned and advanced to JC Trading a further sum of R1 000 000.00 (One million rands), was repayable over sixty (60) months.[6]

[8] Two unlimited deeds of suretyship were obtained and executed by the first and the second respondents on the 13th December 2013.[7]

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4 FA paras 13.1 and 16 at 001-12-13, Loan Agreement 31 December 2023 at 001-47.
5 Id at paras 13.1 and 19, Loan Agreement 31 December 2023 at 001-78.
6 Id at paras 13.2 and 22, Loan Agreement 27 July 2019 at 001-109.
7 As security for JC Trading's indebtedness to the applicant. One was executed by the first respondent on the 31st December 2013 and the other was executed by the 2nd respondent on the 23rd June 2022.

[9] Three mortgage bonds were registered over the respondents' immovable property for the combined capital of R 3 053 000.00 (Three million and fifty three thousand rands)[8].

[10] JC Trading breached the agreement in various respects including failing to repay one or more instalments on time, exceeded the facility limit and resolved that JC Trading be voluntarily liquidated.[9]

[11] On the 3rd August 2023, the applicant delivered a letter of demand to JC Trading requesting that it remedy its breaches to the loan agreements by paying arrears and rectifying the excess.[10] JC Trading failed to remedy its breaches despite the demand.

[12] On or about the 6th November 2023, the applicant elected to accelerate the demand on JC Trading's indebtedness to the applicant under the agreements and it did so by sending a further letter of demand.[11]In addition thereto, a similar letter of demand was also delivered to the first respondent.[12]

[13] It is noted that these formal demands resulted to the parties engaging each other in an endeavour to consider settlement proposals and counter proposals but nothing came out of that limited engagements. As at the 23rd of January 2024, JC Trading and by implication the respondents were indebted to the applicant in the aggregate sum of R 2 100 000.00 (Two million one hundred thousand rands)[13].

Applicant's case

[14] Applicant contends that when concluding the loan agreements, the applicant insisted on the suretyship to which the respondents agreed to provide and

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8 Id at para 52, mortgage bonds 11 March 2014, 15 June 2019, and 8 November 2021 at 001-222, 001-226 and 001-250 respectively.
9 Id at paras 29-32.
10 Id at para 33, letter of demand 3rd of August 2023 at 001 - 179
11 Id at para 34, letter of demand 6th November 2023 at 001 – 0183,
12 Id at para 35, letter of demand 6 November 2023 at 001 – 192.
13 Id at para 41, Certificate of Balance 23rd January 2024 at 001-217-220

bonded their immovable property situated at Brits for a combined capital sum of R 3 053 000.00 (Three million and fifty three thousand rands).

[15] Pursuant to the breaches of the agreements, applicant issued a formal demand to JC Trading calling it to remedy its breach. JC Trading failed to remedy its breach. The applicant contends that it has complied with Rule 46A with regards to the legal requirements applicable for the case, pursued relief in getting an order, declaring the immovable property of the respondents specially executable. I will revert to this aspect later on in this judgment.

The respondents' case

[16] As pointed out above, respondents opposed the application and raised the following grounds:

[16.1] Firstly, the respondents contend that the applicant's failure to join JC Trading erstwhile employees and their families to the application, all of whom according to the respondents reside on the immovable property amounts to a material non-joinder.[14]

[16.2] Secondly, the respondents dispute the evidential value of the valuation relied on by the applicant on the basis that the valuer did not access the property, therefore the value is guesstimated and that he is allegedly not impartial.[15]

[16.3] Thirdly, the respondents contend that the applicant can and should prove a claim in an insolvent estate of JC Trading, or as the first respondent puts it, the applicant should not, *"… enforce a claim directly against ["the respondents"] without first exhausting the remedies available against the principal debtor.*[16]

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14 AA para 2 at 003-3-4.
15 Id para 3
16 Id para 4.9.

[16.4] Lastly, the respondents contend that the applicant failed to comply with Rule 46A in that, *inter alia*, it has not indicated what immovable properties owned by the respondents with which their debts can be settled, or what alternative means, if any, are available for their indebtedness to be settled without having to execute against the immovable property.[17]

Evaluation

[17] In so far as the ground for non-joinder is concerned, it is trite that the test is whether or not a party has a *"direct and substantial interest"* in the subject matter of the proceedings, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.[18]

[17.1] A mere financial interest is an indirect interest and may not require joinder of a person having such interest. The mere fact that the party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The rule is that any party is a necessary party and should be joined if such party has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party.

[18] JC Trading's erstwhile employees have no interest in the subject matter of these proceedings, let alone a direct and substantial interest in the subject matter. In *casu*, the applicant does not seek an order that JC Trading's erstwhile employees be evicted from the immovable property belonging to the respondents. (I make this statement without making any comment as to whether indeed JC Trading's employees reside on the property). There is no allegation made that the erstwhile JC Trading's employees have a contractual or other form of relationship with the respondents or the applicant. In the result, the non-joinder plea stands to be dismissed.

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17 Id at para 5.

18 See: generally DE van Loggerenberg Erasmus: *Superior Court Practice (Jutastat E Publication) at RS 24*, 2024, D1 Rule 10-2-3 and authorities referred to.

[19] The applicant asserts that valuation for the immovable property was procured and this assertion was challenged by the respondents when raising a contention that the valuation is unreliable because the valuer had no access to the property and only valuated the outside of the property. On the other hand, the applicant contends that it is disingenuous of the respondents to make the assertion that the valuation is unreliable when it was the respondents themselves who denied the valuer access to the property. It is further submitted that having being denied access to the property by the respondent, the valuer's valuation was concluded based on the previous inspection of the property conducted by a certain Mr Havenga on the 3rd of July 2019. At that stage, an appointment was made by Mr Havenga with the first respondent to conduct an inspection, and he was granted access to the property by the first respondent to facilitate the inspection.[19]

[20] On the 5th of November 2024, it was brought to the attention of the deponent in the founding and replying affidavits that Mr Havenga has passed away, hence the failure to file a confirmatory affidavit by him to the founding affidavit[20]. The applicant further contends that the valuer has approximately 25 years of experience in valuing properties. The assertion made in respect of the earlier valuation report made by Mr Havenga, even though not confirmed by a confirmatory affidavit is not disputed and as such I find no reason not to admit that as evidence before me.

[21] The respondents have not procured their own valuation of the property to gainsay the findings that are made in the applicant's valuer. The independence of the valuer is not disputed on its individual merits. The applicant made an assertion that the valuer is not employed by itself, and any bald allegations made by the respondents are unsubstantiated. I am not persuaded that there are any merits in the respondents' attempt to dispute the evidential value of the valuation relied upon by the applicant. In the results, I find a proper case to have been made out by the applicant in this regard.

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19 FA, paras 26 – 27.
20 Affidavit 12 November 2024 at 004-91.

[22] A further contention by the respondents is that the applicant should first exhaust any remedies it may have against JC Trading (in liquidation) prior to, or as a precondition to claiming the indebtedness from the respondents. This proposition is unsustainable when regard is had to the legal principles applicable in agreements of surety where parties like the respondents, conclude a surety agreement binding themselves as surety and the co-principal debtors with the main debtor. In the present matter, the respondents renounced the benefit of *inter alia, excussion*, the full force, meaning and effect of which is that the respondents declared themselves to be fully acquainted.[21] It is trite that the *benefit of excussion* is to the effect that, until the principal debtor has been excused, there is no liquid claim against the surety and set off cannot operate.[22]It is common cause that the effect of renouncing this benefit is precisely that the applicant need not look to a principal debtor prior to, or as a precondition to looking to a surety for payment. That is also the effect of biding oneself as a co-principal debtor[23], which both respondents did.

[23] In **Kilroe-Daley Barclays National Bank Ltd**[24], the court quoted with approval what was said in **Union Government vs Van der Merwe**,[25] regarding the consequences of signing a surety in *solidum* and co-principal debtor and said:

> *"The present case is, however, stronger for the surety has signed as surety and co-principal debtor. We must give some meaning to the words 'co-principal debtor'. That the addition of these words operate as a renunciation of the benefits of the surety is clear, but they have a still greater force. The addition of these words show that the surety intends that his obligation shall be co-equal in extent with that of the principal debtor: or intends that his obligation shall be co-equal in extent with that of the principal debtor, or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor."*

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21 Clause 31 or at 001 – 170 and 001-174
22 See: For example **Asco Carbon Dioxide Ltd vs Lahner 2005 (3) SA 213 at 216H-I**.
23 **Neon and Cold Cathode Illuminations (Pty) Ltd vs Ephron 1978 (1) SA 463 (A) at 472 B-C.**
24 **[1984] (2) ALL SA 551A (1984 (4) SA 609 (A).**
25 **1921 PPD 318 at 321**.

[24] In **Absa Bank vs Lowting and Others**[26], the court held that the renunciation of the *'benefit of excussion'* has the effect of permitting the creditor to proceed directly against the surety before excusing the principal debtor. The court further held that it should be noted that a surety who binds himself or herself as a co-principal debtor is taken to have tacitly placed himself or herself in the same position as that of the principal debtor. I have also taken note of the fact that the applicant points out, without it being denied by the respondents, that it is likely that there will only be limited recovery to be made by applicant in the insolvent estate of JC Trading in any event. In the liquidator's report, it is estimated that the JC Trading's unsecured creditors amount to approximately R155 000.00.[27]This of course, is incorrect having regard to the extent JC Trading's liabilities owed to the applicant, so it is contented by the applicant. The liquidator's estimate is shortfall of approximately R 412 000.00 which is before the administration expenses having been taken into account, and also without knowing JC Trading's liability to SARS, *('who will be a preferent creditor'),* is said to have been under-estimated and inaccurate.

[25] Accordingly, I agree that the applicant is within its rights to look for the respondents for payment of JC Trading's debts without even proving a claim in JC Trading insolvent estate, if it thinks there is no prospect of any meaningful recovery from JC Trading's liquidation. In light of the above, the respondents' defence that the applicant should first search and execute on the assets of JC Trading before turning to the respondents for a recourse, when they renounced the *'benefit of excussion'* is legally untenable and stands to fail.

[26] With regard to the respondents' contention that the applicant has not complied with Rule 46A in that it has not adequately indicated what alternative means are there, if any, by which the respondents' debts to the applicant can be settled. The applicant contends that in applications of this nature, it has neither or very limited knowledge of the respondents financial affairs other than that which can be accessed on publicly available databases, such as those in respect of the

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26 (39029/2011) [213] ZAGP PHC265 (19 August 2013)

27 FA at 48 -49, liquidator's report 20th March 2024 at 004-31.

ownership of immovable property and applicant referred me to the Supreme Court of Appeal decision where SCA held that, in opposed proceedings, there is an onus on the debtor, at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is the primary residence, whether there are other means to discharge the debt and whether there is disproportionality between execution and other possible means to exact payment of the judgment.[28]

[27] It is contended by the applicant that the respondents have not discharged this onus. I agree. It is one thing to criticise a creditor for not adequately indicating what alternative means are there, if any, by which debts to the creditor can be settled, but it is an affront to do this and then for the debtor not to indicate whether there are any such alternative means, and in which case why they have not been explored by the debtor himself or herself for purposes of settling his or her debts.

[28] I must emphasise the fact that it has been held by the courts that it is incumbent upon the debtors to place all the relevant information concerning their property so as to put the court in a position to make an evaluation of the information in reaching a just and equitable decision, fulfilling the requirements of Section 26 (1) of the Constitution as well as the requirements for Rule 46A of the Uniform Rules.

[29] In further analysis of whether Rule 46A has been completely complied with by the applicant, it is necessary that at this stage I deal with the issue of the reserve price with regard to the immovable property of the respondents.

Reserve price

[30] The issue of the reserve price requires this court, as part of its duty to prevent unjust and inequitable outcome, to ensure that the *property owners' rights* in terms of Section 26 (1) of the Constitution are not eroded. The consideration is

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28 **NPGS Protection and Security Services CC and Another vs First Rand Bank 2020 (1) SA 494 SCA at (55).**

centred on preserving the right in terms of Section 26 as it becomes implicated whenever the homeowner's property is sold in execution and the inequities that may be caused, if the property is sold well below its market value.

[31] The determination of the reserve price is an issue which is provided for in Rule 46A of the Uniform Rules of court. The sale of the respondents' property, their primary residence, for a low amount will be to the detriment of the respondents. They will not only lose their place of residence, but will remain indebted to the applicant for a substantial amount. In the founding affidavit, the applicant avers that no reserve price should be set by the court due to reasons that when bidders have knowledge of the reserve price, they are reluctant to bid at an amount higher than the reserve price. Further, the effect of the reserve price would hinder the obtaining of a highest possible price for the property at the auction, resulting to the property being sold for less.

[32] This is a typical argument that has been found by the courts to be without any foundation. Even if there is merit in this contention, the full bench in the South Gauteng Provincial Division held that there is no reason that the applicant cannot approach the court for a variation of an existing order making it more likely to find a buyer, should the perceived difficulties arise.[29]

[33] In the heads of argument, applicant asserts that in the event the court being inclined to set a reserve price in respect of the immovable property as contemplated in Rule 46A (8)(e) it is submitted that the reserve price be in the amount of R2 030 700.00 million.

[34] In the founding affidavit, applicant deposed to the fact that the market value of the immovable property is R 4,25 million.[30] The applicant, as it is required by the Constitution and Rule 46A and as referred to above, filed a valuation report

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29 **Absa Bank Limited vs Dokkie Kenneth Mokebe and Others case 2021/00612**, **Absa Bank Limited vs RL Kobe case 2017/28091, Absa Bank Limted vs Bokwane 2018 – 1459, Standard Bank vs Colo Brink and Others 2017/355/79, Judgment delivered on the 12th of September 2018**.

30 FA para 68-69, caseline 001-31, Rule 46A (5)(a)

attached to the founding affidavit and updated the valuation report in its replying affidavit reflecting the market value of R2 070 000.00 million.

[34.1] The municipal value of the immovable property is R 1 552 000.00.[31]

[34.2] An indication that there was an amount of R 5 413.00 that was owing to the local municipality as at the time of deposing to the affidavit.

[35] Given this information, I am able to establish a reserve price to the sum of R2 070 000.00 (Two million seventy thousand rands).

[36] I am satisfied that the determined reserve price will, in all likelihood, assist in the possible extinguish of the respondents' debt or leave them with a balance in their favour, and place them in a position that stems from a just and equitable process and from the proper application of the legal position.

[37] I find no reason to depart from the general practice of setting the reserve price for the property of the sale in execution as empowered by Rule 46A (8)(e) of the Rules of court. During the hearing my attention was drawn to the copies of the current certificates of balance for the respondents' debts.

[38] It is common cause that the National Credit Act does not apply to loan agreements and the facility agreement between the parties and to buttress any contention on non-compliance with the NCA, Section 4(1)(a) or (b), read with Section 7(1)(a) and Section 9 (4) respectively and Section 4 (2)(c) of the National Credit Act 34 of 2005 make clear provisions that the NCA does not apply to Loan Agreements or Deed of Suretyship. In my view, the point with regard to the applicability of the provisions of NCA is accordingly not sustainable when regard is had to the provisions of Section 4(1) and Section 7(1) read with Section 9(4) of the NCA.

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31 FA para 70-71, caseline 001-31, Rule 46A(5)(b)

[39] In the premise, the applicant has made out a proper case for the relief sought and a draft order was prepared and availed to court at the hearing of the matter, I therefore, make an order in favour of the applicant in the following terms:

Order

[40] The late filing of the respondents' answering affidavit is condoned.

[41] Payment of the sum of R 121,142.00 together with interest thereon at the prime rate plus 1% per annum compounded monthly and calculated from 2 January 2024 until date of payment.

[42] Payment of the sum of R 1,101,408.64 together with interest thereon at the prime rate plus 1% per annum compounded monthly and calculated from 1 January 2024.

[43] Payment of the sum of R 298,297.32 together with interest thereon at the prime rate plus 1.5% per annum compounded monthly and calculated from 1 January 2024 until date of payment.

[44] Payment of the sum of R 1,089,319.09 together with interest thereon at the prime rate plus 2.5% per annum compounded monthly and calculated from 1 January 2024.

[45] The immovable property of the Respondents, more fully described as Remaining Extent of Portion 173 (a Portion of Portion 54) of the Farm Roodekopjes 417, Registration Division J.Q., North West Province, measuring in extent 6,8615 hectares, held by Deed of Transfer No.: T154720/2006 ("the Property"), is declared specially executable.

[46] The Respondents' property may be sold with a reserve price in the sum of R2 070 000.00 million.

[47] Leave is granted to the applicant to approach the court, on the same papers, duly supplemented, if necessary, for a reduction of the reserve price in the event that an offer is received at a sale in execution that is less than the reserve price.

[48] Payment of costs on an attorney and client scale.

NCONGWANE AJ
Acting Judge of the High Court
Gauteng Division Pretoria

Representation:

For the applicant: Adv M. De Oliveira
Instructed by: Cox Yeats Attorneys

For the respondent: No Appearance

Heard: 27 May 2025
Delivered: 3rd June 2025

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to Caselines. The date and time for the hand down is deemed to be 10h00 on the 3rd June 2025.