REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes/ No

4/6/2021
DATE

SIGNATURE

Case No.: 24418/2019

In the matter between:

NEDBANK LIMITED Plaintiff

and

PETTITT, NICOLE PIA First Defendant

PETTITT, JEREMY ROSS Second Defendant

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.

Gilbert AJ:

1. The plaintiff seeks summary judgment against the defendants based upon a home loan which is secured by a mortgage bond registered over the defendants' immovable property situated in Bryanston Ext 8, Sandton. The loan agreement was initially concluded on 4 November 2020 pursuant to which the plaintiff advanced the defendants an amount of R2 030 700.00 repayable over 240 months.

2. From at least November 2013 the defendants experienced difficulties in meeting their obligations under the loan agreement and which over the years resulted in a series of written "*Distressed Restructure Agreements*" which *inter alia* restructured the period over which the loan was to be repaid. The most recent distressed restructure agreement was concluded in November 2018 and provides for repayment of what was then the loan amount of R1 908 489.97 by way of 324 months.

3. Notwithstanding the restructuring of the home loan under this distressed restructure agreement, the defendants were unable to meet their commitments.

4. On 11 July 2019 the plaintiff issued a combined summons money judgment on the home loan together with an order declaring their primary residence specially executable.

5. The defendants defended the action and on 21 February 2020 the plaintiff applied for summary judgment.

6. Uniform Rule 32 providing for summary judgment was substantially amended with effect from 1 July 2019. As the summons in this matter was issued after that date, rule 32 as amended applies. Affidavits were exchanged between the parties as envisaged in amended rule 32 and the summary judgment application was ultimately enrolled for hearing on an opposed basis and came before me.

7. The application for summary judgment contains a prayer that the court in terms of rule 46A(8) and (9) after considering all the relevant factors in relation to the sale in execution of the immovable property set a reserve price. The plaintiff's affidavit supporting summary judgment provides in paragraph 18:

> "*It is apparent from the particulars of claim that the plaintiff has accommodated the defendants on numerous occasions, particularly by restructuring their home loan debt. The plaintiff has assisted the defendants as far as it possibly could. If a consumer can no longer afford to live in a particular home, it is, with respect, the duty of the consumer to take the responsibility to rearrange his or her lifestyle in accordance with his or her affordability. The defendants' case is no different. The Court will see from the papers that the defendants owe R115 596.44 in rates and taxes as at to the City of Johannesburg 02 December 2020 (see "SJ2" hereto). This is a substantial sum. According to the plaintiff the market value of the property is R2 600 000.00. The defendants are clearly living in a luxurious home. It is also a large erf. There is no reason why the defendants could not have disposed of the property in the open market to prevent execution now sought by the plaintiff. The court should also take into account that the property is situated in Sandton, an upmarket area, which reinforces the fact that the defendants are, with respect,*

holding on to a lifestyle they can no longer afford. The Constitution does not warrant or promote luxurious housing, but simply a right to fulfilment of one's basic housing needs."

8. The plaintiff in its heads of argument dated 20 July 2020 appreciated that "*Rule 46A requires the Court to consider additional relevant facts for purposes of determining the reserve price, if any, at which the property may be sold. These facts are set out in a separate affidavit*"

9. Attached to the plaintiff's practice note dated 20 October 2020 is an exchange of correspondence between the respective attorneys in which the plaintiff's attorneys confirm that "*we have recently received the updated rates and taxes figure and will accordingly serve the Rule 46 affidavit (for executability purposes) shortly*."

10. Although specific reference was made by the plaintiff to the rule 46A affidavit, it did not file the affidavit. Neither did the plaintiff file the affidavit required in terms of Chapter 10.17 of the Practice Manual of this Division relating to foreclosure proceedings.

11. Some of the facts that would have to be considered by a court when deciding whether to order a property specially executable and whether to set a reserve price and what that reserve price should be can be gleaned from the combined summons and the affidavit in support of summary judgment, such as in paragraph 18 set out above. But much of the required information is not before the court.

12. Summary judgment proceedings are no different in requiring substantive compliance with rule 46A as well as Chapter 10.17, subject to allowances being made procedurally to accommodate such compliance in the context of foreclosure proceedings.

13. In *ABSA Bank Limited v Sawyer* [2018] ZAGPJHC 662 (14 December 2018) the plaintiff sought summary judgment in terms of rule 32 as it was before its amendment. As rule 32 had not yet been amended, the only affidavit that the plaintiff was permitted to file in the summary judgment proceedings was the verifying affidavit required in terms of the then rule 32(2) and in which the plaintiff was limited to swearing positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in its opinion there was no *bona fide* defence to the action and that notice of intention to defend had been delivered by the defendant solely for the purposes of delay.

14. This posed the procedural challenge as to how the plaintiff was to go about complying with rule 46A and chapter 10.17 of the Practice Manual as it was not permitted in summary judgment proceedings to adduce any further evidence. Nonetheless compliance was required notwithstanding that the proceedings were for summary judgment. Chapter 10.17 takes particular cognisance of foreclosure proceedings in the context of default judgment in terms of rule 31(5) but it does not follow that the chapter is applicable only to default judgment proceedings

15. Van Eeden AJ in *Sawyer* in paragraph 7 found a solution as follows:

> "*When the application for summary judgment was enrolled the plaintiff's attorney had to comply with chapter 10.17 of this division's Practice Manual. The heading of this chapter reads 'Foreclosure (and execution when property is, or appears to be, the defendant's primary home)'. The rule states that chapter 10.17 is applicable to all applications for foreclosure. The directive must be read in conjunction with the amended rule 46A which came into operation on 22 December 2017. In every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit is required. The affidavit shall be attached to the Notice of Set Down. Where action proceedings have been instituted and the provisions of rule 31(5) are appliable, the registrar shall refer the application for the money judgment and the declaration that the property is executable, to open court. The affidavit shall contain details of attempts made by the plaintiff to contact the defendant in order to negotiate terms of settlement to prevent foreclosure. The plaintiff must also, in the affidavit, provide the information referred to in rule 46A(5) and (9)(b).*"

16. In *Sawyer*, the plaintiff did file an affidavit in terms of chapter 10.17 setting out the required information but did not bring a separate rule 46A application. The defendant delivered a supplementary affidavit in terms of rule 46A(6)(a)(ii) making submissions which were relevant to the making of an appropriate foreclosure order. The court understandably permitted the filing of such a supplementary affidavit by the defendant, reasoning that a defendant in opposed summary judgment proceedings should not only put facts before the court pertaining to the money judgment but is also to deal with the desirability of declaring the property executable. This was especially so as the defendant had not had an opportunity in her affidavit resisting summary judgment to deal with the plaintiff's averments on this issue in its

chapter 10.17 affidavit as that affidavit had only been filed after the defendant's resisting affidavit.

17. The defendant in *Sawyer* argued that the procedure that had been adopted by the plaintiff could not be countenanced and that what was required was a separate application in terms of rule 46A and that an affidavit filed in terms of chapter 10.17 was insufficient for the court to grant the order of executability. The defendant further submitted that in any event the chapter 10.17 affidavit was not properly before the court in the context of rule 32 proceedings. This is because rule 32, as then formulated, did not permit the filing of such further affidavits by a plaintiff.

18. Van Eeden AJ rejected the argument:

> *"14. … A plaintiff pleading its cause of action in a combined summons is compelled to plead both circumstances entitling it to the money judgment and circumstances entitling it to an order of executability. Although the order of executability is ancillary to the money judgment, the latter relief forms an integral part of the cause of action. It follows that when summary judgment is applied for and the cause of action is verified, the deponent verifies both the money judgment and the order of executability. The chapter 10.17 affidavit is a separate affidavit not falling foul of rule 32, which supports the relief sought in respect of executability. A court is eventually faced with a hybrid procedure requiring adherence to rule 32, rule 46A and the Practice Manual.*
>
> *15. I do not read rule 46A as excluding a plaintiff's right to apply for summary judgment, nor that the plaintiff must institute a further*

application under rule 46A in order to follow Form 2A. In my view the summary judgement application and affidavit filed in compliance with chapter 10.17 constitute substantial compliance by the plaintiff of its obligations contained in rule 46A. Together they allow the court to discharge its duties imposed by rule 46A and to strike a balance between the competing interests of the plaintiff and defendant in a matter where the executability of a primary residence is at stake. In this matter the defendant also availed herself of the opportunity to place a supplementary affidavit before court after receipt of the chapter 10.17 affidavit. In my view nothing would be achieved by insisting that the plaintiff should follow the motion procedure prescribed by rule 46A. All the information required by rule 46A is already before court.

16. *In the premises I find that the plaintiff was fully entitled to apply for both orders in summary judgment proceedings in terms of rule 32. The summary judgment application, read with the affidavit filed in terms of chapter 10.17, constitute substantial compliance with the provisions of rule 46A. Rule 46A does not exclude action proceedings for an order declaring a primary residential property executable, but the requirements of rule 46A must still be complied with before the primary residence of the defendant can be declared executable.*"

19. The court in *Sawyer* found that in light of the averments that had been made in the combined summons which were subsequently verified in the verifying affidavit in the summary judgment proceedings coupled with the separate chapter 10.17 affidavit that had been filed, there was no need for a separate application in terms of rule 46A.

20. The court accepted that when the defendant fails to place facts before the court in relation to execution, it was nevertheless bound to determine the matter without the benefit of the defendant's input. Notably the court found that all the information required in terms of rule 46A had been placed before it by the plaintiff and so it was in a position to consider whether upon a consideration of all relevant factors a foreclosure order should be granted and to determine an appropriate reserve price.

21. *Sawye*r was subsequently applied by Strydom AJ in *Changing Tides 17 (Pty) Limited NO v Rademeyer and others* [2019] ZAGPPHC 165 (13 May 2019). In that matter both a chapter 10.17 affidavit as well as a separate rule 46A application had been filed by the plaintiff, which contained all the required information relevant to the factors to be taken into account before declaring the residential property specially executable. Both the rule 46A and the summary judgment application were enrolled for simultaneous hearing.

22. The court, in rejecting that the defendant's argument that the rule 46A application could not be heard simultaneously with the summary judgment application, found in paragraph 20 that "*in short, in a summary judgment application a court is not only entitled but also obliged to consider the rule 46A application and an accompanying affidavit to determine whether the order in the summary judgment application should include an order to declare the immovable property executable*". This was especially so, the court reasoned, as the full court of this Division in *ABSA Bank Ltd v Mokebe and related cases* 2018 (6) SA 3492 (GJ) had found that the money judgment and issue of executability should be dealt with simultaneously.

23. Both *Sawyer* and *Rademeyer* were applied by Brauckmann AJ in the Local Seat of the Mpumalanga Division, Middelburg in *ABSA Bank Limited v Makola* [2019] ZAMPMHC26 (3 December 2019). In that matter too a separate rule 46A application had been launched by the plaintiff which the court found could be heard simultaneously with the summary judgment application.

24. The writers in *Van Niekerk Summary Judgments – A Practical Guide* (LexisNexis, service issue 20, March 2021) in paragraph 3.7.3 citing *NPGS Protection & Security Services CC and another v FirstRand Bank Limited* 2020 (1) SA 494 (SCA)[1] opine that :

> "*Regarding the question of judicial oversight in the grant of an execution order against immovable property which is the debtor's primary residence, one should distinguish between applications for default judgment and applications for summary judgment. In an application for default judgment the court should be possessed of adequate information in order to grant the remedy of execution. In an application for summary judgment, however, provided that the plaintiff has complied with the requirements of rule 46A, there is an onus on the defendant to provide the court with information about whether a property is her or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionality between execution and other possible means to exact payment of the judgment debt. If this is not addressed in the affidavit resisting summary judgment, mere submissions by the defendant's counsel*

[1] See in particular paragraph 55.

> *cannot avoid the grant of summary judgment in respect of the prayer for an order declaring the property executable.*" (My emphasis).

25. What is clear from these decisions is that in summary judgment proceedings it nevertheless remains necessary to comply substantively with rule 46A and chapter 10.17 and that procedurally this was achievable in the context of rule 32 as it then was, as the plaintiff did successfully in all three of those cases.

26. Rule 32 as amended now requires a plaintiff since 1 July 2019 to file a more substantive affidavit in support of summary judgment. Uniform Rule 32(2)(b) as amended provides that:

> "*The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.*"

27. This more expansive affidavit may give more scope for a plaintiff to comply with rule 46A and chapter 10.17 than was previously the case with the considerably more circumscribed verifying affidavit that the plaintiff was required to filed under rule 32 in its previous form. But I need not determine that this is so because in the present instance the plaintiff's supporting affidavit does not in any event go far enough in placing before the court the information required in terms of rule 46A and chapter 10.17.

28. The upshot is that in the present instance the plaintiff has not substantively complied with the obligatory requirements of rule 46A and chapter 10.17. The plaintiff has filed neither a separate rule 46A application (although it

specifically stated that it had or would do so) nor a chapter 10.17 affidavit. This can be contrasted to *Sawyer* and *Rademeyer* where all the relevant facts had been placed before the court.

29. I therefore do not find myself in a position where I am able to make an order authorising execution against the defendants' immovable property which is their primary residence as I do not have before me the relevant factors that I am enjoined to consider.[2]

30. Shortly before the matter was to be heard before me, the plaintiff emailed to my registrar a supplementary practice note in which the plaintiff stated that the parties had agreed that an order be granted against the defendants and that the defendants' immovable property be declared executable but that the operation of the execution against the immovable property be suspended for a period of six months until 30 November 2021, presumably to enable the defendants to settle all sums due as provided for in section 129(3) of the National Credit Act and so enable the agreement to be reinstated. This supplementary practice note also sets out that what remains for determination is the reserve price and the scale of costs. Simultaneously with the practice note a copy of the latest municipal invoice from the City of Johannesburg reflecting the latest municipal value and the current arrear rates and taxes was emailed to my registrar.

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[2] See, for example, *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) para 16 and 17, referring to *Jaftha v Schoeman and others; Van Rooyen v Stoltz and others* 2005 (2) SA 140 (CC) para 67; and as since expressly so stated in Uniform Rule 46A(1)(b).

31. When the matter was called, there was appearance only for the plaintiff. I was informed that because of the agreement reached and although the matter had been enrolled as an opposed basis, there would be no appearance on behalf of the defendants. I requested my registrar to contact the defendants' legal representatives seeking that there be an appearance on their behalf. Unfortunately, this was unsuccessful.

32. Notwithstanding what I was told was the settlement agreement that had been reached with the defendants, the position remained that I required information in terms of rule 46A and chapter 10.17 which was not before me to enable me to apply myself to whether an order of execution should be granted, and if so, whether a reserve price should be set and what amount. The submissions that were made on behalf of the plaintiff were that in light of the settlement agreement that had been concluded, a court should not be over-technical and that, as I understood the submissions, compliance with the provisions of rule 46A and chapter 10.17 fell away, or at least could be considerably relaxed. Further, the plaintiff submitted that there was relevant material before the court, such as in the affidavit in support of summary judgment, albeit that it was outdated, to enable the court to declare the property executable.

33. I have several difficulties in accepting these submissions in the present instance.

34. The first is that there was no evidence before the court that the defendants had agreed to what had been set out in the plaintiff's supplementary practice

note. As stated, there was no appearance on behalf of the defendants. Nor was there anything on record emanating from the defendants or their attorneys confirming the settlement. Given the seriousness of ordering execution against a debtor's home, I was reluctant to accept without more that the defendants were agreeable to their property being sold in execution and in the paucity of the ordinarily relevant factors.

35. The second difficulty is that a debtor's acceding to an execution order does not necessarily absolve the court from its responsibility to make the necessary enquiry whether it is appropriate having considered all the relevant factors that execution should be ordered against the debtor's home.

36. As observed by Makgoka JA in his minority judgment in *NPGS Protection*:[3]

> *"[28] The object of judicial oversight was emphasised in* Mkhize v Umvoti Municipality and Others 2012 (1) SA 1 (SCA) *([2011] ZASCA 184) para 26 as being to determine whether rights in terms of s 26(1) of the Constitution are implicated. This court went on to explain:*
>
> > *'In the main a number of cases grappling with Jaftha sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight? We are unable to understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are*

[3] Above.

implicated. To not undertake such an enquiry would in fact render the procedure unconstitutional.'

37. This is not to find that in all instances a court must go behind the debtors' agreement that his or her home be sold in execution as the debtors may be best placed to decide what is in their interests and it may amount to an infringement of their constitutional right to dignity in the context of contractual autonomy to second-guess them.[4] But in the present instance, in the absence of an appearance on behalf of the defendants to confirm the last minute settlement agreement or any evidence of the circumstances giving rise to this last minute settlement agreement, I am not in a position to ascertain to what extent the defendants were appreciative of the settlement to which they have apparently agreed.

38. As also held in the minority judgment in paragraph 44 in *NPGS Protection*, *"[a] court must always be reluctant to deprive a judgment debtor of the right and protection of s 26(3), except in the clearest case that the judgment debtor has waived that right."*[5] The emphasis by the majority decision in *NGPS Protection* on the onus being on the debtor who is legally represented to place certain information before the court relating to execution against his or her property is distinguishable as in that matter the debtor remained legally represented in court throughout, including on appeal, and still did not place any evidence before the court. In contrast, in the present matter, there was

[4] See, for example *Brisley v Drotsky* 2002 (4) SA 1 (SCA), para 94 referring to *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 475B-F.
[5]

no appearance on behalf of the defendants before me and so more circumspection is required.

39. On a practical level, the defendants have not agreed to a reserve price, and which was specifically stated in the plaintiff's supplementary practice note as being an outstanding issue to be determined by the court.

40. Rule 46A(5) expressly provides that every application made in terms of the rule:

> "*shall be supported by the following documents, where applicable, evidencing:*
>
> *(a) the market value of the immovable property;*
>
> *(b) the local authority valuation of the immovable property;*
>
> *(c) the amounts owing on mortgage bonds registered over the immovable property;*
>
> *(d) the amounts owing to the local authority as rates and other charges;*
>
> *(e) the amounts owing to a body corporate as levies; and*
>
> *(f) any other factor which may be necessary to enable the court to give effect to subrule 8.*"

41. Rules 46A(8) and (9) deal *inter alia* with the setting of a reserve price. In particular, rule 46A(9)(b) provides that:

> "*In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court shall take into account –*

(i) the market value of the immovable property;

(ii) the amounts owing as rates or levies;

(iii) the amounts owing on registered mortgage bonds;

(iv) any equity which may be realised between a reserve price and the market value of the property;

(v) reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule 5(a) to (e), whether or not equity may be found in the immovable property, as referred to subparagraph (iv);

(vi) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;

(vii) the likelihood of the reserve price not being realised and the livelihood of the immovable property not being sold;

(viii) any prejudice which any party may suffer if the reserve price is not achieved; and

(ix) any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor."

42. Such information as is to be found in the papers before is on a piecemeal basis and was largely outdated.

43. For example, as appears above, the plaintiff alleges in paragraph 18 of its affidavit in support of summary judgment that:

43.1. the defendants are indebted to the City of Johannesburg as at 2 December 2020 in an amount of R115 596.44. But the document that is attached to the affidavit in support of the averment is a municipal invoice from the municipality that is much older, of November 2019. Although the plaintiff sought to address that difficulty by simultaneously emailing a more recent municipal invoice dated May 2021with its supplementary practice note shortly before the matter was to be heard, this evidence needs to be properly and timeously placed before court and not by way of an attachment to a practice note by the plaintiff alone just before the application is to be heard;

43.2. the plaintiff states that *"according to the plaintiff the market value of the property is R2.6 million".* This is the *ipse dixit* of the plaintiff. No attempt is made to place any valuation before the court as to the market value of the property, whether on a willing seller-willing buyer basis or on a fire-sale basis.

44. In the absence of the necessary evidence to decide upon an appropriate reserve price, I am unable do so.

45. The plaintiff sought that should the court not be inclined to grant the order declaring the property specially executable, that the court at least grant the money judgment, particularly as the defendants had agreed thereto. The full court of this Division in *ABSA Bank Limited v Mokebe*[6] after closely

[6] Above.

examining whether it was appropriate to separate the granting of the money judgment from the execution order, held in paragraph 29 that:

> "*There is, therefore, a duty on banks to bring their entire case, including the money judgment, based on a mortgage bond in one proceeding simultaneously. Should the matter require postponement for whatever reason, the entire matter falls to be postponed and piecemeal adjudication is not competent.*"

46. The plaintiff further sought that should I not be inclined to grant any of the orders sought that the application for summary judgment be postponed. Presumably the reason for the postponement would be to enable the plaintiff to get its house in order insofar as it is able to do so, in relation to compliance with the foreclosure requirements in rule 46A and chapter 10.17.

47. I directed plaintiff's counsel's attention to paragraph 3 of chapter 10.17 of the Practice Manual, which provides that *"where arrears are low, and/or the period of non-payment is a few weeks / months, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of 6 months and that notice of set down should again be served"* and that *"[a]t the adjourned date, an affidavit should be filed setting out what efforts the plaintiff had made to effect settlement and/or prevent foreclosure."* Plaintiff's counsel submitted that as best as can be ascertained from the papers, the defendants were some four months in arrears. It also appears from the settlement apparently concluded on the steps of the courtroom that the plaintiff in any event was prepared not to execute upon the execution order, if it obtained such an order, for a period of six months

and until 30 November 2021, presumably to afford the defendants an opportunity to settle the arrears. In the circumstances, I raised with the plaintiff's counsel whether it would be appropriate that an order be made that the matter not be re-enrolled for six months.

48. Plaintiff's counsel submitted as the plaintiff was prepared to delay execution on the basis that it obtained an execution order, should such an execution order not be granted then it would be unfair to the plaintiff to hold it to the six-month grace period to which it may otherwise have been prepared to agree.

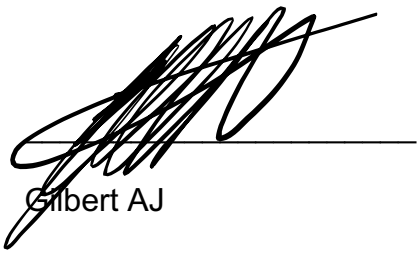
49. Given what would appear to now be the supine approach adopted by the defendants in relation to the fate of their property by not appearing in court, I am disinclined to direct that the plaintiff be precluded from re-enrolling its application for summary judgment for a specified period. In any event, pragmatically, it may be that by the time the application for summary judgment can be re-enrolled and heard, a period of six months in any event would have lapsed and the defendants would have been afforded an opportunity to demonstrate that they can settle the arrears.

50. Ultimately, the application for summary judgment is not ripe for hearing as there has not been substantive compliance with rule 46A and chapter 10.17 and accordingly it is appropriate that the matter be removed from the roll and that there be no order as to costs.

51. The following order is made:

    51.1. The application for summary judgment is removed from the roll.

51.2. No order of costs is made in relation to the enrolment of and the hearing of the opposed application for the week of 31 May 2021.



Gilbert AJ

Date of hearing:	1 June 2021
Date of judgment:	4 June 2021
Counsel for the plaintiff:	Ms I Oschman
Instructed by:	Bezuidenhout Van Zyl & Associates Inc
Counsel for the defendants:	No appearance
Instructed by:	Shaban Clarke Coetzee Attorneys