REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 2344/2013

Date Heard: 29.07.2015;
7-10.11.2016

Date Delivered: 31 January 2017

In the matter between:

**ABSA BANK LIMITED** Plaintiff

and

**ADELLE YVETTE POTGIETER** Defendant

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**JUDGMENT**

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**EKSTEEN J:**

[1] The plaintiff instituted action against the defendant for the payment of the balance outstanding on a loan, together with interest thereon. The loan was secured by the registration of a mortgage bond over an immovable property being portion 16 (a portion of portion 2) of the farm Brak River, number [...], in the Nelson Mandela Metropolitan Municipality, division of Uitenhage, Province of the Eastern Cape (the property). The plaintiff accordingly seeks a further order declaring the property to be specially executable.

[2] The action was opposed. Although the defendant was represented throughout by an attorney in Durban, who drafted all pleadings and advised the

defendant throughout the duration of the trial the defendant appeared in person. In doing so she acquitted herself admirably. In her pleading she denied the existence of any loan at all and contested the copy of the loan agreement annexed to the declaration alleging that it was not a true copy of the original. She denied her indebtedness to the plaintiff and denied compliance with the provisions of the National Credit Act, 34 of 2005 (the NCA). In addition to these blanket denials the defendant pleaded that, in the event that the plaintiff proves a loan and its material terms as alleged, then the granting of such credit was reckless in that at all material times the plaintiff knew or ought to have known that the ability of the defendant to make payment was dependent upon charitable donations and/or grants which by their nature are sporadic and fluctuate. Finally, the defendant pleaded that the declaration of executability of the property would infringe her rights under section 26 of the Constitution.

*The plaintiff's claim*

[3] Notwithstanding the blanket denials contained in the pleading the plaintiff did not contest any of the material evidence in respect of the plaintiff's case.

[4] As alluded to earlier a photocopy of the loan agreement signed by the defendant and a duly authorised representative of the plaintiff was annexed to the plaintiff's declaration. Mr Lotz, an attorney and conveyancer practising as a director in the firm McWilliams & Elliot Incorporated in Port Elizabeth testified that he was duly authorised by the plaintiff to sign the loan agreement on their behalf and that the signature which appears on the annexure to the declaration is his. He testified that the defendant signed the agreement in his presence. This evidence was not

challenged and the defendant later acknowledged that she had indeed signed the loan agreement and she did not contest the authenticity of the document. In the trial it was not in dispute that the amount of R490 000 was indeed advanced to her for the purpose of acquiring property.

[5] Simultaneously with the signature of the loan agreement, Mr Lotz testified that a further document being the standard mortgage conditions applicable to all mortgage bonds registered in favour of Absa Bank was duly presented to the defendant and that she signed the document in his presence. A house owner's insurance policy was similarly signed on the same occasion together with a document headed "Confirmation of National Credit Act compliance in respect of rights, risks and obligations and costs". I shall revert to this document later herein. Finally, Mr Lotz testified that the defendant signed a power of attorney authorising him to register the said bond over the property. Each of these documents were handed in in evidence.

[6] Mr Fourie, a risk mitigation manager in the plaintiff's Kempston Road office in Port Elizabeth testified that he calculated the outstanding balance on the loan account as at 28 July 2015 in the amount of R770 057. The certificate of balance and the calculation underlying the certificate were not challenged.

[7] Ms Pienaar, a legal secretary in the firm McWilliams & Elliot Incorporated testified that on 29 July 2013 she had communicated via email with the defendant and requested the defendant to confirm that they may correspond with her via her

email address for purposes of notifications which need to be sent in terms of the NCA. The defendant responded indicating that she would prefer to receive letters by mail at P O Box [...], Moselville as her email signal was intermittent, however, she confirmed that Mc Williams & Elliot Incorporated may also write to her at her email address. On 30 July 2013 Ms Pienaar forwarded a notice in terms of section 129 of the NCA to the defendant at her email address. She obtained a computer generated confirmation of the delivery of the email. The letter was subsequently also forwarded to the defendant via registered post. On 8 August 2013 the defendant responded acknowledging receipt of both the email and the registered letter and indicating that she had received the registered letter on 7 August 2013. She expressed her intention to apply for debt review. This she duly did on 13 August 2013. The plaintiff, however, contended that by virtue of her failure to have applied prior to receipt of the section 129(1) notice the debt to the plaintiff should be excluded from the debt review process. The evidence of Ms Pienaar was not challenged in any manner and the plaintiff acknowledged later, during her evidence, that by virtue of the plaintiff's stance the debt review process was not proceeded with. There was therefore no process pending before a debt counsellor at the time when proceedings in this court were commenced.

[8] In these circumstances, notwithstanding the issues raised in the pleadings, I am satisfied that the plaintiff has established its claim against the defendant.

[9] In its declaration the plaintiff claimed an amount of R588 185,02 together with interest at the rate of 12,95% per annum calculated on daily balances and capitalised monthly on the first day of each month from July 2013 to the date of

payments, both dates inclusive. It transpires from the evidence of Mr Fourie that a fresh calculation was done on 28 July 2015 , the day preceding the commencement of trial. I have alluded to this evidence. Although the calculation by Mr Fourie was not challenged in cross-examination it emerged later, during the evidence of the defendant and after the close of the plaintiff's case, that she contends that her loan was subject to a fixed interest rate of 12%. In this regard the plaintiff pleaded the material terms of the mortgage loan agreement and specifically pleaded that the initial interest rate in respect of the loan was 12,2% per annum, such interest rate now being 12,95%. As set out earlier the plaintiff denied the existence of the loan and challenged the authenticity of the copy annexed to the particulars of claim on the basis that it did not represent a true copy of the original. Having denied the existence of the loan she did not raise any specific dispute relating to the interest rate. She has since conceded both these issues. The pre-agreement quotation delivered in terms of section 92(2) of the NCA, which is incorporated in the mortgage loan agreement itself, specifies that interest will be levied at a variable rate commencing at 12,2%.

[10] After the plaintiff had closed its case, the defendant for the first time suggested that the interest rate had been varied. She acknowledged that at the time of the signing of the agreement the interest rate was variable, however, she states that when the economic situation changed she was afraid that the interest rate would shoot through the roof and so she went to the bank and asked them to fix the interest rate for her for a period of ten years and she contends that this was done. Thereafter, however, against her expectation, interest rates dropped considerably and she again approached the plaintiff and requested that her interest rate be

changed back to a variable interest rate. This they declined to do. Although she states that the agreement to change the interest rate to a fixed interest rate was in writing she was unable to produce any correspondence or an agreement evidencing such a change. She does not state when it occurred, who she spoke to or where the alleged agreement was concluded. Her evidence in this regard is accordingly vague and unsubstantiated and relates to an issue which was not raised in the pleadings nor suggested to Mr Fourie when he testified in respect of the calculation. In the circumstances, on a preponderance of probability, I find that the agreement is subject to a variable interest rate currently at 12,95% per annum.

*The defence of reckless credit*

[11] The defendant's amended plea filed on 28 July 2015, the date preceding the commencement of trial, records that in the event that the plaintiff proves her loan the granting of such credit was reckless by virtue thereof that the plaintiff knew or ought to have known that the ability of the defendant to make payments was dependent upon charitable donations and/or grants which by their nature are sporadic and fluctuate. The contention of reckless credit in the amended plea was limited to this single ground. During the course of her evidence at the resumed hearing of the trial and whilst she was under cross-examination the defendant introduced a further special plea on 8 November 2016. Although the document is headed "Special Plea" it contains a number of prayers at its conclusion. In the further special plea the defendant contended that the plaintiff granted credit recklessly in that she was over-indebted from the outset of the loan agreement. In these circumstances she sought an order that I declare the property not executable; set aside the credit agreement

and cancel the remaining debt, alternatively, reduce the interest rate on the loan from the date of the inception thereof to 1%, and refer the defendant for debt review.

[12] Mr **Beyleveld** did not object to the filing of this further plea, however, in view of the content thereof he sought to file a replication on 10 November 2016. The replication denied that the defendant was entitled to the relief sought in the said special plea. The replication further addressed the question of reckless credit as raised in the original pleading and contended that the defendant was not entitled to the relief by virtue of the provisions of section 81(4) of the NCA as the defendant had provided false and misleading information relating to her income at the time that the loan was granted. This amendment was supported by evidence which had previously been fully canvassed in cross-examination of the defendant and her witnesses. I shall refer to this evidence below.

[13] The matter of reckless credit formed the foundation of the defendant’s case.

*Background*

[14] The defendant was previously employed by the South African Police Services (SAPS) between 1994 and 2005. In the course of her duty she developed a post-traumatic stress disorder with underlying depression. Whilst absent from duty on extended sick leave due to the said condition she was further diagnosed with cancer. She has received treatment for this condition intermittently and is currently on passive treatment. In these circumstances she applied to be medically boarded from SAPS, however, they refused to process her application. She was ultimately advised by her psychiatrist from whom she received treatment for her depression

that she was unlikely to recover until such time as she had put SAPS behind her and had cut all ties with the organisation. She accordingly resigned from SAPS in 2005.

[15] At the time that she sought to be medically boarded the defendant was resident in Central, Port Elizabeth. During the period from approximately 2002 to 2003 she had founded two charitable organisations which were registered as non-profit organisations. The first was the Help Our People Excel Foundation (H.O.P.E Foundation) and the other the Restoration of Human Abilities Association (ROHA). These organisations engaged in a number of admirable initiatives aimed at assisting and making a positive contribution to the lives of disadvantaged and handicapped people. This still continues.

[16] In 2007 the defendant resolved to purchase a smallholding, the property, both for personal use and to house some of her charity projects. The purchase price of the property amounted to R895 000 and the defendant was at that time awaiting a pension pay-out from SAPS. She intended too to sell her property in Central which was bonded at the time to the plaintiff but which she anticipated would render a reasonable free residue. The defendant accordingly approached Mortgage SA to ensure that she would qualify for a loan. Mortgage SA advised her that the banks would look at her financial position and require proof of income for a six month period. Bank statements and payslips would constitute such proof of income. The defendant states that she advised Mortgage SA that by virtue of her employment by two non-profit organisations (H.O.P.E Foundation and ROHA) she had a fluctuating income from month to month and the organisations do not produce payslips. She advised too that the non-profit organisations would hire office space from her on the

property at an agreed rental thereby providing additional income. In these circumstances Mortgage SA advised that the banks require a letter from the non-profit organisations to state that the defendant is in fact employed by the non-profit organisations and that she earns a specific amount of money. The letters had also to confirm the existence of the rental agreement.

[17] The defendant accordingly approached Ms Goulding who was at the time the chairperson of the H.O.P.E Foundation and Ms Bell who was a management member of ROHA to issue these letters.

[18] Ms Goulding issued a letter on behalf of the H.O.P.E Foundation on 30 July 2007. The content of the letter reads:

> **"RE: RENTAL AGREEMENT BETWEEN MS A.Y POTGIETER AND THE H.O.P.E FOUNDATION & CONFIRMATION OF EMPLOYMENT AND WAGES**
>
> I refer to your telephonic conversation with our Director, Ms Adelle Potgieter, two weeks ago.
>
> **Rental Agreement**
>
> We wish to confirm that a rental agreement exists between Ms Adelle Potgieter and The H.O.P.E Foundation for the rental of an office situated at Ms Potgieter's residence at [...] R. H., Central, Port Elizabeth. We have inspected the smallholding which Ms Potgieter wishes to purchase and have agreed to continue renting office space from Ms Potgieter at the new premises. We also wish to rent a field from her to present farming training workshops and to supply our soup kitchens with fresh produce.
>
> Currently our rental is Three Thousand Six Hundred Rands, which is used as follows:

R1 600-00 (from March, formerly R800-00 pm) is paid directly to Ms Potgieter's ABSA bond account on a month basis; and
R2 000-00 is paid monthly directly to the municipal account held in Ms Potgieter's name.

This rental amount will be increased depending on the size of the additional space we will rent at the new premises. This agreement is valid for a period of not less than five years.

**Employment & wages**

We also wish to confirm that Ms Potgieter has been employed on a full-time basis as Director since November 2005 at a salary of twelve thousand rands (R12 000-00) per month. (Ms Potgieter founded the Foundation in June 2002 and originally did volunteer & part-time work for the Foundation until her full-time employment as Director last year.) Only a part of the said wages are transferred to Ms Potgieter's bank account monthly, with part paid out in cash and other amounts paid directly to service providers (ie Cell C, medical aid, etc) on behalf of Ms Potgieter.

Please feel free to contact me personally if you have any further enquiries regarding the above.

Yours sincerely

(Mrs) Madeleine Goulding"

[19] Ms Goulding referred also in her evidence to a resolution of the H.O.P.E Foundation which was handed in in evidence. The exhibit was unsigned, however, Ms Goulding confirms that she in fact signed the original at the time. She is unaware of the whereabouts of the original. The resolution reads as follows:

> "The Management Committee of Help Our People Excel Foundation resolves that the Director may be determine his/her remuneration level and package structure, whether as self-employed service provider contracted to HOPE Foundation or staff member, as well as of other staff and service providers, including salary, wages, … . No staff member, whether internal staff or external service provider will be paid unless the funds for the remuneration is raised in cash or in kind."

[20] For this reason Ms Goulding testified that the salary of the defendant was never guaranteed and was always dependent upon whether or not sufficient money was raised. The non-profit organisation was dependent upon donations and grants received from time to time from the National Lottery Distribution Trust Fund (the Lotto). In the event that sufficient funds were raised she states that the defendant's salary was R12 000 per month at the time.

[21] In cross-examination Ms Goulding acknowledged that she was requested to write the letter by the defendant. She knew that the defendant intended to purchase the property and she too was keen for the property to be purchased because the H.O.P.E Foundation intended to operate from the property. She knew that the defendant did not have sufficient money to purchase the property and that she required a bond. In these circumstances she acknowledges that when she wrote the letter she knew that the defendant intended to present the letter to the bank in order to satisfy the bank that the defendant meets the financial requirement to qualify for a bond because they were assessing her ability to repay bond instalments. She acknowledged that that was the purpose of the letter.

[22] She was constrained to acknowledge during cross-examination that on a reading of the letter it unequivocally conveys that the defendant earns a fixed salary from the H.O.P.E Foundation which amounts to R12 000 per month. She denied however that it was her intention to mislead the plaintiff and contends that she did not think at the time of annexing the resolution to which I have referred. She states that she expected the plaintiff to carry out its own investigation to verify the facts.

[23] Ms Bell authored the letter on behalf of ROHA. The letter records:

> "**<u>RE: CONFIRMATION OF EMPLOYMENT: MS A.Y POTGIETER</u>**
>
> This letter serves to confirm that Ms Adelle Y. Potgieter, ID [7...], is employed on a full-time basis (1½ days per week) in the capacity as Acting Ddirector, at an average wage of One Thousand Five Hundred Rands (R1 500-00) per month. Ms Potgieter has been employed in this position since 7 November 2003, but has only been remunerated since January 2005. Ms Potgieter was a founding member of ROHA and Chairman since February 2000.
>
> Please do not hesitate to call me if you require further information regarding the above."

[24] Ms Bell testified that she has a highest educational qualification of Standard 8 and that she suffers from depression. In cross-examination Ms Bell acknowledged that the defendant had requested her to write the letter and advised her what should be contained in the letter. She acknowledged that she knew that the only purpose for the letter was to convince the plaintiff to grant a bond. Ms Bell, however contends that the information contained in the letter was factually correct.

[25] Ms Bell wrote a further letter to Mortgage SA on the same day which reads as follows:

> "I herewith wish to confirm that I am a boarder with Miss Adelle Potgieter of [...] R. H., Central, Port Elizabeth since September 2003. Currently I pay boarding fees of R700-00 per month in cash for room and board. I supplement my contribution to the household by doing household chores like cooking and laundry.
>
> I intend moving with Miss Potgieter to the smallholding and live there indefinitely.
>
> Please feel free to contact me if you have any further enquiries in this regard."

[26] During her evidence, however, she referred to two resolutions taken by ROHA, the first in November 2003 reads in identical terms to the resolution allegedly taken by the H.O.P.E Foundation in June 2007 which I have set out earlier. The second resolution is dated 23 July 2007, just one week prior to the loan application. The resolution provides:

> "The salary scale and Lotto application is approved without amendments. Members agreed that wages are only payable if funds are raised for that purpose and that payments need not be made on a monthly basis, but may be made on a per job/task/project basis."

[27] She explained that both ROHA and the H.O.P.E Foundation applied from time to time to the Lotto for funding. Lotto did not, however, call for project applications every year. When applications were invited ROHA and the H.O.P.E Foundation submitted applications. They did not receive funding every year and not every application submitted by them was successful. In these circumstances there was not

always money available to pay salaries. At the time of the hearing they had not received Lotto funding for approximately three years.

[28] After a lengthy adjournment and at the resumed hearing of the matter the defendant produced documentation to which she referred as management accounts for ROHA and the H.O.P.E Foundation. These are in the form of a computer printout and were prepared by the defendant and Ms Bell on 2 November 2016, just a week prior to the recommencement of the hearing. No source documents are provided in support of the figures set out therein, however, Ms Bell explained that the documents were only prepared on 2 November 2016 as she is no long resident in Port Elizabeth and had only returned to Port Elizabeth on 2 November 2016. She still had information in her emails which she had not discarded and she was able therefrom to present these management accounts in respect of the financial years 1 March 2007 to 28 February 2009 in respect of the H.O.P.E Foundation and ROHA. The management accounts are not supportive of the information set out in the respective letters by Ms Goulding and Ms Bell. In respect of the H.O.P.E Foundation it reflects wages to the defendant in the amount of R500 in June 2007, R700 in July 2007, R12 000 in August 2007, R6 500 in September 2007 and R7 000 in October 2007. In June 2007 the management account reflects further payments of R353,49 in respect of insurance which may or may not be to the benefit of the defendant personally, R260 in respect of medical aid for the defendant and R1 600 in respect of municipal services. In July 2007 a similar amount was paid in respect of insurance and R270 in respect of medical aid for the defendant. R1 831,25 was paid in respect of municipal services. On the figures presented in the management accounts, to the extent that they may be reliable, it is apparent that the representation made in the

letter by Ms Goulding is not supported by the evidence presented by the defendant. In fact the evidence suggests that at no time preceding 30 July 2007 has the defendant earned the amounts set out in the letter of Ms Goulding which was provided by defendant as proof of income.

[29] On 30 July 2007, the same day upon which the other letters to which I have referred were written the defendant addressed a letter to Mortgage SA for presentation to the banks. Her letter reflects the following:

> "**<u>APPLICATION FOR BOND FOR SMALLHOLDING</u>**
>
> I refer to our conversation two weeks ago.
>
> I have made an offer to purchase a small holding in the Rocklands area and need your assistance in obtaining a bond.
>
> Herewith included is the following:
>
> - my accepted offer to purchase;
> - proof of income from my employers (ROHA and the H.O.P.E Foundation);
> - proof of income from a boarder;
> - proof of income from trading partner (Africa React UK).
> - your Home Loan Expenditure and Liability Form and accounts details.
>
> Although I owe R103,000-00 on the bond of my current address, I am awaiting a payout of my Police pension, which should cover this amount. I am expecting the payout to arrive in the next three to four months.
>
> I am seeking a bond of roughly R345,000-00 plus cost. Please see what the maximum is that I would qualify for, as to speed up the process I may have to lower the selling price of my current property. I should be able to put down R500,000-00 on the new property.

> In addition, I plan to rent out stabling and to open an apiary and will be able to generate an income from the property within six months of occupation.
>
> Thanking you in anticipation.
>
> Yours truly
> (Ms) Adelle Y Potgieter
>
> PS: My sister also boards with me at a fee of R700-00 per month for room and board and an extra R200-00 towards bread and milk for the household."

[30] The proof of income from ROHA and the H.O.P.E Foundation submitted were the letters by Ms Goulding and Bell respectively. The proof of income from a boarder was the letter from MS Bell which I have set out earlier herein. In addition she submitted a letter signed by one Benningfield of Africa React (UK). This letter too was dated 30 July 2007. It records:

> "Africa React (UK) wishes to confirm that we have purchased an average of R7 000-00 worth of beadwork per month from Miss Adelle Yvette Potgieter, RSA ID [7...], from January 2007. These funds have been paid to her by moneygram or direct transfer into an ABSA account held in my name and on which she has signing power.
>
> I have been buying beadwork from Miss Potgieter for four years now. I hereby confirm that our business arrangement will continue indefinitely as I have set up a shop in the United Kingdom to sell the goods I purchase from Miss Potgieter."

[31] The defendant testified that due to the economic downturn in the United States of America and Europe Mr Benningfield never placed another order after 30 July 2007. Moreover, the financial position of ROHA and the H.O.P.E Foundation deteriorated rapidly and they were unable to pay the salaries set out in the letters which the defendant had anticipated would in fact occur.

[32] The plaintiff received the bond application together with the proof of income submitted. They carried out a credit assessment as envisaged in section 80(1) and 81(2) of the NCA and advised the defendant on 24 August 2007 that a bond in the amount of R395 000 was approved. On 6 September 2007, however, the defendant addressed a letter to Mortgage SA in which she expressed the wish to increase the bond amount to R600 000 as it appeared that the pension pay-out from the SAPS may be further delayed and she wished to effect certain repairs and maintenance or minor alterations to the property. The request was conveyed to the plaintiff and the plaintiff accordingly carried out a new credit assessment in respect of the request to borrow R600 000. The plaintiff concluded that the defendant had inadequate income to qualify for such a loan but offered to extend to her a bond in the amount of R490 000.

[33] Ms de Klerk testified on behalf of the plaintiff in respect of the pre-credit assessment. She explained that the NCA came into force in June 2007, just one month prior to the bond application. Pre-credit assessments are required by the NCA and the plaintiff would take into account the income and expenditure of an applicant and then assess what surplus is available to determine whether or not the applicant can afford to repay the bond. In circumstances where the applicant puts

down a significant deposit on the purchase price the bank would consider the risk to it to be mitigated by virtue of the free residue available in the value of the property.

[34] Ms de Klerk explained the various computer printed documents presented in evidence in respect of the pre-credit assessment. The income which the defendant represented to the plaintiff and supported by the letters to which I have referred earlier amounts to R25 500 made up as follows:

| | |
|---|---|
| "Salary ROHA | R 1 500 |
| Salary H.O.P.E Foundation | R12 000 |
| Rental from H.O.P.E Foundation | R 3 600 |
| Sales to Africa React (UK) | R 7 000 |
| Rental from Ms Bell | R 700 |
| Rental from Defendant's sister | R 700 |
| TOTAL | R25 500" |

[35] Ms de Klerk explained that it appeared from the pre-credit assessment that the plaintiff disregarded the sales of R7 000 per month and the rental amounts received from Ms Bell and the defendant's sister and conducted the assessment conservatively on an acceptance of an income of R17 100. Having regard only to this income the plaintiff concluded that the defendant could only afford to service a bond of R490 000.

[36] In cross-examination Ms de Klerk acknowledged that the plaintiff has an obligation to carry out a pre-credit assessment and that they bear the onus to verify the information provided to them. She acknowledged that the plaintiff would have had regard to bank statements, however, it is common cause that the plaintiff is

currently not in possession of any bank statements which were utilised for purposes of the assessment. Ms de Klerk was unable to explain the whereabouts of such bank statements. Ms de Klerk, however, asserted that the plaintiff did verify that the salaries were paid to the defendant. In this regard both the letters submitted by Ms Bell and Ms Goulding as retrieved from the plaintiff's records contain a handwritten inscription which reads:

> "2/8
> Confirmed"

[37] The author of this note was not identified in evidence nor called to testify. Ms Goulding, Ms Bell and the defendant deny that any representative of the plaintiff contacted any of them to obtain further information in respect of the said letters or to confirm the correctness thereof. The bank statements which the defendant contends were delivered to the plaintiff have, as set out earlier, not been traced and it appears from the purported management accounts of the two non-profit organisations that the representations made in the letter of Ms Goulding bears little correlation to the true income of the defendant.

*Application of section 80 and 81 of the NCA*

[38] Reckless credit is regulated by section 80 and 81 of the NCA. The material portion of section 80 provides:

"(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased,…-

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted."

[39] When such an assessment is made as to whether a credit agreement is reckless or not the criteria set out in subsection (1) should be applied as they existed at the time the agreement was made. (See section 80(2).)

[40] The prevention of reckless credit is provided for in section 81 of the NCA. The material portion of section 81, for purposes of the present matter, provides:

"(1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

(a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) …

(3) …

(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if-

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment."

[41] The evidence of Ms de Klerk as set out earlier clearly establishes that the plaintiff did indeed conduct a pre-credit assessment as required by section 80(1)(a). Section 82(2)(b) of the NCA provided at the time that the National Credit Regulator may publish guidelines proposing evaluative mechanisms, models and procedures to be used in conducting an assessment in terms of section 81. This the National Credit Regulator failed to do until 2013. Section 82(1), as it read at the time, afforded the credit provider the right in these circumstances to determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that such mechanism, model or procedure results in a fair and objective assessment. There were therefore no prescribed mechanisms or procedures at the time.

[42] The pre-credit assessment in this case was carried out during or about September 2007. When the application was made on 30 July 2007 Mortgage SA, on behalf of the plaintiff, requested proof of the defendant's income. I have set out earlier the proof of income submitted by the defendant. The assessment was carried

out on an acceptance of such income save that the plaintiff disregarded the income generated from sales to Africa React (UK) and the rentals received from Ms Bell and the defendant's sister. Whilst it is not clear why the plaintiff disregarded such income Ms de Klerk postulated that it must have been considered to be sufficiently uncertain so as to exclude it from the reliable income to which plaintiff had regard. This approach suggests a fair and objective approach to the assessment carried out.

[43] Whether or not a credit grantor has taken the required reasonable steps to meet its assessment obligations is to be determined objectively on the facts and circumstances of any given case (see ***Horwood v Firstrand Bank Limited*** [2011] ZAGPJHC 121 (21 September 2011) para [5]). The defendant bears the onus to establish that credit was recklessly granted.

[44] It is the defendant's primary case that the plaintiff knew or ought to have known that her income would fluctuate and was dependent upon the receipt of donations to the charities. The foundation for this contention is two-fold. Firstly, the defendant contends that the H.O.P.E Foundation banked with the plaintiff and had the plaintiff perused the bank statements of the H.O.P.E Foundation it would have seen that the plaintiff did not earn R12 000 per month from the H.O.P.E Foundation. Secondly, she contends that she advised an employee at the bank that her salary was not guaranteed and it was dependent upon donations to the charities.

[45] The evidence establishes that the H.O.P.E Foundation did indeed bank with the plaintiff. Defendant testified further that she had provided three months bank statements of her own to the bank at their request. The defendant is however

unable to advise what her bank statements revealed. The difficulty with this argument is that the letter of proof of income which was provided by the defendant to the plaintiff states categorically that only a portion of her salary would be paid into her bank account and that the remainder would be paid either in cash to her or by payment to service providers to whom she was indebted. A perusal of the bank statements would therefore not have advanced the enquiry in respect of the earnings from the H.O.P.E Foundation as the undisclosed cash payments and disbursements on behalf of defendant could not be identified on the statements. It seem to me, as a matter of probability, that cash payments are unlikely to pass through the bank accounts of either the H.O.P.E Foundation or the defendant.

[46] The major refrain throughout the cross-examination of the witnesses on behalf of the plaintiff and in her own evidence was that there was an obligation on the plaintiff to carry out further investigations in order to determine whether the proof provided by the defendant was indeed true and correct. I have given careful consideration to the provisions of section 80(1) and (2), 81(1) and (2) and 82(1) of the NCA. I can find no indication in these sections which could possibly give rise to such an obligation on the part of the plaintiff and, as recorded earlier, the National Credit Regulator had published no guidelines in respect of procedures to be followed. The plaintiff, through Mortgage SA, requested proof of income from the defendant. The defendant is enjoined by section 81(1) of the NCA to answer fully and truthfully to this request. On a consideration of the evidence set out above it seems to me that "the proof of income" provided was clearly incomplete and untruthful. To the extent that resolutions existed which stipulated that remuneration would not be paid to the defendant unless funds were raised these were not

revealed to the plaintiff. In the case of each of the non-profit organisations such a resolution was allegedly taken shortly before the application for credit was made. It must have been fresh in the memory of the defendant, Ms Bell and Ms Goulding. I think that the inescapable conclusion is that they were intentionally withheld thereby creating a false impression in the mind of the plaintiff as to the financial ability of the defendant. The plaintiff was entitled to rely on the integrity of the defendant's response because the NCA specifically requires of the defendant to answer such requests fully and truthfully. The letter of Ms Goulding seems to me to be clear and unambiguous and it contains no suggestion of any fluctuation of income which would require further investigation.

[47] The second ground advanced by the defendant is that she in fact advised both Mortgage SA and an employee of the plaintiff that she has a fluctuating income. This contention may rightly be described as an afterthought. It was never suggested to any of the witnesses on behalf of the plaintiff nor did it form any part of the defendant's evidence in chief. It emerged only under cross-examination. Her evidence that she discussed it with Mortgage SA is inconsistent with her evidence in chief that Mortgage SA advised that the bank required of her to produce a letter which confirmed not only that she was employed by also that she earned "a specific amount of money". When her evidence emerged in cross-examination that she had in fact discussed her fluctuating income with an employee of the plaintiff counsel asked her which bank employee she spoke to. The reply was:

> "Well it was not with them. It was the bank official who called me in to first sign the loan. When they spoke to me I had said to them my income fluctuates, because they asked me for the documents again for the loan and they asked me for bank statements and I said to them how much bank statements do you want and they said three months and I explained to them my income fluctuates."

[48] The reply is mostly unspecific and generalised both in respect of the identity of the person she spoke to and the content of what she told such person in respect of her earnings. Later during cross-examination she again contended that she had discussed her fluctuating income with "the bank". She was again asked who she had discussed it with at the bank. On this occasion she was uncertain. She stated:

> "That was the person, I do not remember if it was the person who telephoned me to ask me for the bank statements or when I discussed it with the lady who called me in for the contract but I did discuss it with them."

[49] Yet later, it was suggested to her that it never occurred. She responded:

> "I did speak to Absa Bank about this. … I had a meeting with ABSA, I think it was home loans in the city centre when they called me regarding the loan they had approved and at the time I had this meeting I had told the lady that I am concerned about the job and income."

[50] On this occasion she was certain that it was in fact a lady that she spoke to however there is no indication of the position of the lady in the bank or the function that she was employed to perform and she still does not say that she told the lady that receipt of her salary was dependant on the receipt of donations. Even if the defendant had spoken to a clerk in the employ of the plaintiff, I do not think that it detracts from the fact that she did not fully and truthfully answer the request relating

to her income when she was asked to provide proof thereof. I am satisfied that her failure to do so materially affected the ability of the plaintiff to properly assess her creditworthiness.

[51] In all the circumstances I think that even if the defendant was over-indebted at the time that she entered into the credit agreement it occurred by virtue of the misrepresentations made by the defendant when requested to provide proof of her income. In these circumstances section 81(4) provides a full defence to this assertion.

[52] Finally, in respect of the reckless credit, the defendant asserted during her evidence that she did not understand the risks and costs of the proposed credit and the rights and obligations of a consumer under a credit agreement. In particular she did not understand the implications of section 129 and section 86 and 87 (debt review) of the NCA and therefore she did not apply for debt review. This argument too, I consider to be without merit. I referred earlier to the documents signed in the presence of Mr Lotz. Mr Lotz made particular reference to a document “Confirmation of National Credit Act (NCA) compliance in respect of rights, risks, obligations and costs”. He testified that he explained the general import of all the documents which were signed in his presence but did not explain each clause of the loan agreement and bond. With specific reference, however, to this document he testified that he took the defendant through each of the points stipulated on the document and explained it to her so that she fully understood what the loan involves and thereafter he afforded her the opportunity to ask questions relating to any of the documents. This evidence was not seriously contested in cross-examination. Defendant testified

further that shortly before receiving the section 129(1) notice an official of the plaintiff called her to advise her that it was now her last opportunity to apply for debt relief.

[53] During her evidence the defendant suggested that Mr Lotz had run through the documents rapidly and that she did not understand the implications thereof. The requirements of section 81(2) is that a credit provider should take "reasonable steps" to assess the proposed consumer's general understanding and appreciation of the risks and costs of the proposed credit and of the rights and obligations of the consumer under the credit agreement. In the present instance the plaintiff specifically appointed an experienced attorney to explain the legal implications to the defendant. One of the specific contentions raised in the said document and explained by Mr Lotz relates to the defendant's right to apply for debt review. I accept the evidence of Mr Lotz in this regard. On a consideration of the evidence I consider that the plaintiff has clearly complied with the obligation placed upon it in terms of section 80(1)(b)(i) and 81(2)(a)(i) of the NCA. I accordingly find that the defendant has failed to discharge the onus to establish that the credit was reckless.

*Section 85 of the NCA.*

[54] Section 85 of the NCA provides that in any court proceedings in which a credit agreement is being considered and it is alleged that the consumer under a credit agreement is over-indebted the court may refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7) or to declare that the consumer is over-indebted, as determined in accordance with Part D of Chapter 4 of the NCA and make an order as contemplated in section 87 to

relieve the consumer’s over-indebtedness. The defendant requests that I should make such an order.

[55] Section 85 confers a discretion on the court. In ***Firstrand Bank Limited v Olivier*** 2009 (3) SA 353 (SE) at para [14] on p. 359 Erasmus J considered the nature of the discretion. He held as follows:

> “[14] A court is not obliged to act simply on the defendant's allegation of over-indebtedness, but 'may' make an appropriate order in terms of para *(a)* or *(b)*. The court will exercise this discretion judicially with due regard to the objectives of the NCA which, in the present regard, is to assist the over-burdened consumer to rehabilitate his affairs. In doing so, the Act makes significant inroads into the credit provider's common-law rights, as well as its constitutional right of access to the courts (s 34 of the Constitution of the Republic of South Africa Act 108 of 1996). The court will restrict the statutory limitation of the credit provider's rights to the extent that it is reasonable and justifiable to do so in our democratic order while promoting the objects of the NCA.”

[56] These sentiments accord with the sentiment expressed by Cameron J in ***Sebola and Another v Standard Bank of South Africa Limited and Another*** 2012 (5) SA 142 (CC) at para [40] p. 154 where he confirmed the dictum of the SCA in ***Nedbank Limited v National Credit Regulator*** 2011 (3) SA 581 (SCA) at p. 585 para [3] stating:

> “(t)he interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider”.

(See also ***Standard Bank of South Africa Limited v Hales and Another*** 2009 (3) SA 315 (D) at 322B-C.)

[57] The discretion which section 85 confers upon a court arises when a credit agreement is considered in proceedings before it and it is further alleged by the defendant (the consumer under the credit agreement) that he/she is over-indebted. Once these two jurisdictional facts co-exist the discretion arises.

[58] In the present proceedings a credit agreement is being considered and the defendant does allege that she is over-indebted. The discretion does accordingly arise. What is required of the court at this stage is to exercise a discretion and to do so judicially with due regard to the objectives of the NCA.

[59] The objectives of the NCA are set out in section 3 of the Act. The purpose of the Act is to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers by various means set out in section 3(a)-(i). The careful balancing of the competing interests sought to be protected to which the SCA referred in the matter of ***Nedbank Limited*** *supra* clearly emerges from the provisions of subsection (a)-(i). In terms of section 3 the objectives of the Act are sought to be achieved *inter alia* by:

> "(c) providing responsibility in the credit market by-
>
> (i) encouraging responsible borrowing, avoidance of over-indebtedness and <u>fulfilment of financial obligations by consumers;</u> and
>
> (ii) <u>discouraging</u> reckless credit granting by credit providers and contractual <u>default by consumers</u>;
>
> (d)-(f) …

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) …

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

(emphasis added)

[60] Where credit is recklessly advanced the Act provides for stringent sanctions to protect the consumer (see section 83 and 84 of the NCA). Where, however, credit has not been recklessly advanced section 3 emphasises the obligation of credit consumers eventually to satisfy all consumer obligations under credit agreements. I have already held that it has not been established that the credit was recklessly advanced. It is accordingly necessary for a defendant who makes an appeal upon the provisions of section 85 to establish sufficient facts on oath to enable the court to exercise the discretion which is conferred upon it and to satisfy itself that the application for referral is *bona fide* and not made as a delaying tactic. Such a defendant should establish particulars of his financial prospects in the foreseeable future so as to enable the court to determine whether there is a reasonable prospect that he/she will be able to rehabilitate his/her affairs within a reasonable period.

[61] In the present instance the defendant has fallen far short thereof. I have alluded earlier to the outstanding balance on the loan account. As calculated on 28 July 2015 it already amounted to R770 057 upon which interest accrued at 12,95%. The defendant has not made any payment at all in respect of the loan

agreement since May 2013. The interest alone on this commitment amounts to nearly R100 000 per annum or R8 300 per month. The defendant has provided no information in respect of her current expenses and financial obligations nor has she provided any reliable indication of her current income. She has not provided any indication of other credit agreements or her liability in respect thereof. During cross-examination Mr **Beyleveld** taxed the defendant in order to establish her income over the last year. She was unable to provide any significant meaningful information. At the conclusion of a lengthy cross-examination the defendant was able to testify to an average monthly gross income of nearly R5 000 per month. She contends further that there are a number of persons resident on the property who do not pay rent and she was hopeful of persuading them to do so. There is, however, no evidence of any tangible progress made towards this goal. She has established that the non-profit organisation has made an application to the Lotto for a grant of approximately R1 million per year over the next three years to support certain projects of the H.O.P.E Foundation and ROHA. In the event that the grant materialises she is hopeful that her salary will be paid thereafter. Again there is no indication from the Lotto at the present stage of any probability that the said amount, or any amount at all would be allocated to ROHA or the H.O.P.E Foundation. Previous grants received from the Lotto were considerably smaller and ranged from R250 000 to R400 000. On a consideration of all the evidence I do not consider that any reasonable prospect has been shown to exist which would enable the defendant to rehabilitate her affairs in the foreseeable future in a manner which holds any prospect of a restructuring of her liabilities so as to satisfy the entire indebtedness to the plaintiff. On the information provided it would seem that her gross income at present is insufficient to service even the monthly interest on the bond only, while ignoring other essential living expenses and obligations. In the circumstances I decline to exercise my discretion in terms of section 85 of the NCA.

*Section 26 of the Constitution*

[62] Rule 46(1)(a)(ii) of the Uniform Rules of Court provides:

> "(1)(a) No writ of execution against the immovable property of any judgment debtor shall issue until —
>
> (ii) such immovable property shall have been declared to be specially executable by the court … Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court , having considered all the relevant circumstances, orders execution against such property."

[63] The defendant pleaded that declaring the property executable would infringe her rights in terms of section 26 of the Constitution in that the premises is her and a number of dependents primary residents including four disabled persons, two pensioners and six minors and she and them would then have no alternative adequate housing. She pleads that the premises are the source of income of various charities upon which the defendant's income and various dependents are reliant and any order declaring the property executable will render the defendant and such dependents homeless and without a source of income.

[64] At the resumed hearing of the trial, more than a year after the pleading was drafted, the defendant testified that there are now approximately forty people living there who would have nowhere to go if the property were declared executable. Herself and her husband reside there. I have set out earlier the defendant's medical

tribulations. She testified that her husband has suffered a brain injury and receives a disability grant. Her sister, who also has a psychiatric condition and receives a disability grant, also resides on the property. She states that there are more than a dozen minor children living on the property. For these reasons it is contended that an order declaring the property executable should not be granted.

[65] In ***Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*** 2005 (2) SA 140 (CC) at 162 para [58] Mokgoro J considered the sale in execution of a debtor’s primary residence and stated:

> “Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.”

[66] In ***Standard Bank of South Africa Limited v Saunderson and Others*** [2006] 2 All SA 382 (SCA) at 389 para [19] Cameron and Nugent JJA considered the provisions of section 26(1) of the Constitution in the context of the sale in execution of bonded property and declared:

> “Even accepting for present purposes that execution against mortgaged property could conflict with section 26(1) such cases are likely to be rare. It is particularly hard to conceive of instances where a mortgagee’s right to reclaim the debt from the property will be denied altogether; and it is therefore not surprising that the Constitutional Court noted in ***Jaftha*** that in the absence of abuse of court procedure – and none is alleged here – a sale in execution should ordinarily be permitted against a home bonded for the debt sought to be reclaimed. Nor can

the approach differ depending on the reasons the property owner might have had for bonding the property, or the objects on which the loan was expended."

[67] In the present matter the property was purchased in 2007 at a purchase price of R895 000. *Prima facie*, it seems to me that the property could probably not be described as "adequate housing" as envisaged in section 26 of the Constitution and more fully discussed in ***Jaftha*** *supra*. The property was given as security to raise the purchase price. No abuse of the court process is alleged in these proceedings. In these circumstances, ordinarily, an order for execution should follow unless there is an indication of bad faith on the part of the plaintiff. Thus, in ***Gundwana v Steko Developments CC and Others*** 2011 (3) SA 608 (CC) at p. 625 the Constitutional Court referred with approval to the dictum in ***Jaftha*** which I have quoted earlier herein and Froneman J went on to state at p. 625 [48]:

> "An agreement to put one's property at risk as security in a mortgage bond does not equate to a licence for the mortgagee to enforce execution *in bad faith*."
> (emphasis added)

[68] Later at para [54] at p. 626 Froneman J went on to state:

> "It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."

[69] I have considered earlier, with reference to the provisions of section 85 of the NCA, other available means by which payment of the judgment debt could be effected. I do not consider that the defendant has shown any alternative method by which the judgment debt could be satisfied.

[70] Moreover, reverting to ***Jaftha*** *supra* at 158 at para [41] Mokgoro J stated:

> "It might be that the debtor incurred debts despite the knowledge of his or her inability to repay the money and was reckless as to the consequences of incurring the debt. While it will ordinarily be unjustifiable for a person to be rendered homeless where a small amount of money is owed, and where there are other ways for the creditor to recover the money lent, this will not be the case in every execution of this nature."

[71] This dictum is particularly apposite to the present set of facts. I have found earlier that the inescapable conclusion on the evidence before me is that there has been an intentional misrepresentation of the defendant's financial means in order to obtain approval of the loan which materially affected the pre-credit assessment of her means to repay. In respect of the numerous persons living on the smallholding it is apparent that they reside there through and with the consent of the defendant. It does not seem to me to follow that they would necessarily be evicted in the event that the property is sold. Eviction is of course a very different process which would have to occur in accordance with the law. In these circumstances I consider that an order declaring the property executable must follow.

*Procedural issues*

[72] There are two procedural issues which need to be dealt with prior to the conclusion of this judgment. I have referred earlier to the evidence of Mr Fourie which occurred at the initial hearing of the matter. At the resumed hearing of the matter during November 2016 the defendant intimated her intention to request the recall of Mr Fourie in order to further cross-examine Mr Fourie. Notwithstanding the initial intimation the application to recall Mr Fourie did not arise prior to the plaintiff having closed its case. Upon enquiry the defendant intimated that she wished to further cross-examine Mr Fourie in respect of the pre-credit scoring assessment. Mr **Beyleveld** objected. I dismissed the application to recall Mr Fourie.

My reasons are the following:

[73] Mr Fourie testified that he was a risk mitigation manager at a branch of the plaintiff. In the course of his evidence in chief he made reference to certain computer printouts which were exhibits before court and identified them as being the "credit scoring" in the present matter and explained that the bank utilises an electronic printout of the score. He identified certain features appearing on the scoring system, however, when cross-examined about the evaluative mechanisms adopted by the bank he states that he did not do the application and that the scoring for purposes of the pre-credit assessment is done by the bond originating department of the plaintiff which is a totally different section from the section at which he works. He accordingly has no direct knowledge of the scoring mechanisms adopted for purposes of the present case. To that end Ms de Klerk was called to testify. She was fully cross-examined in respect of the scoring system. In respect of

Mr Fourie Ms de Klerk testified that Mr Fourie's function related to collections and that he did not fall in the same hierarchy as she does.

[74] The defendant intimated that she was in possession of certain letters from the plaintiff which were not available in the previous hearing which she wished to put to Mr Fourie. Mr **Beyleveld**, however, drew attention to the fact that the letters in question were in fact discovered by the defendant and that the letters were accordingly at all times in her possession. In these circumstances I dismissed the application.

[75] The second issue for determination relates to the filing of the replication on behalf of the plaintiff. I have dealt earlier with the circumstances under which it arose. The defendant objected to the filing of the further replication alleging that it was late in the day and that the plaintiff ought to have known that the issues would arise.

[76] As alluded to earlier the replication followed two days after the filing of a further special plea which introduced new averments relating to the basis upon which it was contended that the credit was extended recklessly by the plaintiff and particularly that the effect of granting the credit was that defendant was then immediately over-indebted. The replication deals with the provisions of section 81(4) of the NCA which have been discussed earlier herein and had not previously been raised in pleading. It is apparent from the cross-examination of the defendant and her witnesses that the plaintiff commenced these proceedings on the understanding that the "proof of income" provided by the defendant for purposes of the pre-credit

assessment was true and correct and that the credit was therefore not recklessly extended. It was only during cross-examination of the defendant and her witnesses that it became apparent that the defendant had never earned such income at the time and that the letters presented as proof of income did not represent the true position. The amendment was accordingly supported by evidence which had already been elicited and fully canvassed at the time that the application was made. In these circumstances I admitted the replication.

*Costs*

[77] For the reasons set out earlier I consider that the plaintiff has indeed established the claim which was made and that the defendant failed to discharge the onus in respect of the defence of reckless credit. There appears no reason why the ordinary rule that costs should follow the result should not find application in the present matter. The mortgage bond provides for such costs to be paid on a scale as between attorney and client.

[78] In the result:

(a) The defendant is ordered to pay to the plaintiff the amount of R770 057 together with interest calculated at the rate of 12,95% per annum on daily balances and capitalised monthly on the first day of each month from 28 July 2015 to the date of payment, both dates inclusive;

(b) It is ordered that the immovable property being portion 16 (a portion of portion 2) of the farm, Brak River, number [...], in the Nelson Mandela Metropolitan

Municipality, division of Uitenhage, Province of the Eastern Cape, which was mortgaged by mortgage bond number B4960/08, be declared specially executable.

(c) The defendant is ordered to pay the plaintiff's costs of suit, on a scale as between attorney and client.

**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**

Appearances:

Plaintiff: Adv Beyleveld SC instructed by McWilliams & Elliot Incorporated, Port Elizabeth

Defendant: In person