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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5700/2021

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

NEDBANK LIMITED	**PLAINTIFF**
and	
W[....] S[....] D[....] **[ID NR: [....]]**	**1st DEFENDANT**
D[....]2 B[....] D[....] **[ID NR:[....]]**	**2nd DEFENDANT**

CORAM: AS BOONZAAIER AJ

HEARD ON: 13 OCTOBER 2022

DELIVERED ON: 22 NOVEMBER 2022

INTRODUCTION

[1] This is an application for Summary judgment where Nedbank institutes Summary judgment proceedings against the 1st defendant, for payment of various amounts as well as an order declaring certain property specially, executable in terms of **Rule 46A** of the Rules of court.[1]

[2] The first defendant has filed a plea that consists of various special pleas as well as a plea on the merits. The first defendant has also filed an opposing affidavit in terms of **Rule 32**.

[3] Judgment has already been obtained against the second defendant.

BACKGROUND FACTS

[4] The genesis of this matter rests in the breach of two loan agreements concluded between the parties. The first loan agreement was signed on the on the 22nd June 2016 and the second loan agreement was signed on the 27th February 2017. The first defendant also signed a suretyship on behalf of the D[....] Familie Trust, on 13th March 2018 one for Ursiweb (Pty) Ltd that was signed the 5th December 2019.

[5] In terms of the agreements, the plaintiff complied with its obligations in terms of the first and second loan agreements and has amongst others lent and advanced or made available the amounts of R 2 550 00.00 and R 880 000 to both first and second defendants. Both the defendants undertook to repay the plaintiff in monthly instalments of R 25 458.69 on the first loan and the monthly instalment of R12

372.40 on the second loan.

[6] Judgment has already been obtained against the second defendant. The first defendant has neglected to effect payment of the outstanding balances on her payments and summons was issued against her in terms of **Uniform Rule 4(1)(a)(v).**

[7] The first and second defendants are registered owners of the following properties namely:

[7.1] section No.1, held by Deed of Transfer number [....], 1 B[....]Street, Bloemfontein;

[7.2] section No.2, held by Deed of Transfer, [....], 1 B[....]Street, H[....], Bloemfontein and

[7.3] Erf [....], held by Deed of Transfer [....], G[....], Kwa- Zulu Natal.

[8] Mortgage Bonds were respectively registered over the above-mentioned properties, covering the defendant`s liability to plaintiff as set out. The defendants acknowledge that they are indebted to the plaintiff in the amounts of R 2550 000.00, R 1050 000.00 and R 1100 000.00

[9] The relief sought by the plaintiff in both the Summons and the Summary judgment application is an order for payment of the outstanding amounts and entitling the plaintiff to take possession of the goods from the first defendant and or any other person who may be in possession of such goods through the defendant. The goods in this case as alluded to above is the property mentioned above.

ISSUES TO BE DECIDED

[10] The crisp issue for determination is whether the first defendant in her Plea in any of her proffered defences raises an issue for trial as envisaged in **Rule 32(2) (b).**

[10.1] **Rule 32 (2)** provides:

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[1] Uniform Rules of Court updated 26 June 2009.

"(a) within 15 days after the date of [delivery of the plea], the plaintiff [shall] deliver a notice of application for summary judgment, [together with an affidavit] made by the plaintiff or by another person who can swear positively to the facts.

(b) 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].

(c) If the claim is founded on a [liquid document a copy of the document shall be annexed to such affidavit] and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not less than 15 days from the date of the delivery thereof."

[10.2] The following areas of law need to be considered:

[11.2.1] The requirements for Summary judgment in terms of **Rule 32(2)(b).**

[10.2.2] First defendant proffers a myriad of defences. The main issue to be decided is whether the first defendant in any of her defences proffered, raises an issue for trial as envisaged in rule 32(2) (b).

ADMITTED, UNDISPUTED AND COMMON CAUSE FACTS

[11] The following is common cause between the parties that:

[11.1] *in casu*, the mentioned agreements and suretyships have been concluded.

[11.2] the first defendant, is still indebted to the plaintiff.

[11.3] the defendants would be jointly and severally liable in solidum towards the plaintiff for the due compliance with the obligations imposed in terms of the agreement.

FIRST DEFENDANT`S CASE

[12] According to the first defendant, the following special pleas are relevant.

[12.1] **<u>First Special Plea:</u>**

Lis Pendens:

[12.1.1] The first defendant has a retrenchment benefit insurance policy with the plaintiff and submitted a claim to the plaintiff on 2^{nd} July 2021.

[12.1.2] The plaintiff allocated a claim number for the consideration of the retrenchment benefit claim for all the overdue amounts due to the plaintiff.

[12.1.3] The retrenchment benefit claim submitted by the first defendant to the plaintiff is currently still pending and in respect of the same subject matter *in casu*.

[12.1.4] To date hereof the plaintiff has not accepted nor rejected the claim in terms of the retrenchment benefit and once the Insurance Benefit pays out, the plaintiff shall either be indemnified partially, alternately in full for the amounts due to it.

[12.1.5] Plaintiff submits that action under aforesaid Case Number be stayed pending the final adjudication of the retrenchment benefit insurance claim submitted by the first defendant to the plaintiff.

[12.2] **<u>Second Special Plea</u>**

Beneficium Ordinis Seu Excussionis (mis- joinder):

[12. 2. 1] The plaintiff has a secured claim against the insolvent estate of Ursiweb (Pty) Ltd (in liquidation) against the main contracting party, the principal debtor.

[12.2.2] The plaintiff in its cause of action relies upon agreements entered into with Ursiweb (Pty) Ltd (in liquidation). Despite the fact that the Liquidators attending to the administration of the Insolvent Estate is the same firm of attorneys representing the plaintiff in the current action, the Liquidators in their official capacity have not been joined as parties to this action.

[12.2.3] Effectively this entails that the plaintiff has mis- joined the parties to and relevant to the cause of action in this action to the detriment of the first defendant, who has a substantial and material interest herein.

[12.2.4] The plaintiff did not join the parties necessary to this action under the aforesaid Case Number and to this effect that Liquidators of Ursiweb (Pty) Ltd (in liquidation) in their official capacities have been mis- joined.

[12.2.5] That the plaintiff`s action be stayed until such time as the Liquidators of Ursiweb (Pty) Ltd (in liquidation) has been joined as parties to the current action.

[12. 3] **<u>Third Special Plea</u>**

Beneficium de Dubious Vel Pluribus Reis Debendi:

[12.3.1] It is further the first defendant`s case that the plaintiff has already obtained judgment against the second defendant:

[12.3.2] The plaintiff has not proceeded with any execution steps against the second defendant, as surety and co- principal debtor to reduce the amount owing to the plaintiff.

[12.3.3] The first defendant relies upon the legal exception of *beneficium de duobus vel pluribus reis debendi* in that due to the non- action of the legal representatives of the plaintiff towards the Judgment already obtained against the second defendant, the first defendant is called upon to answer to the particulars of claim.

[12.3.4] All monies recovered by the plaintiff from the second defendant shall reduce the liability of the first defendant due to the plaintiff and as a result of the non-action of the legal representatives of the plaintiff, the plaintiff is seeking to obtain full payment also from the first defendant, where it already has judgment against the second defendant.

[12.3.5] The first defendant prays that the action be stayed until such time as the second defendant has been excused and a new amount due and owing to the plaintiff has been ascertained.

[12.4] **Fourth Special Plea**

Non-Compliance with the National Credit Act:[2]

[12.4.1] A portion of the plaintiff claim is based on the suretyship by the first defendant for the indebtedness of the D[....] Familie Trust.

[12.4.2] The plaintiff cancelled all credit agreements with the D[....] Familie Trust, obtained return of the vehicles and subsequently sold the vehicles by public auction.

[12.4.3] The plaintiff failed to comply with Section 127 of the National Credit Act and specifically section 5, 7 and 8 thereof. [hereinafter called the" NCA"].

[12.4.4] The first defendant prays that the action be stayed until the Plaintiff comply with the aforesaid sections of the NCA.

[12.5] **Fifth Special Plea**

Credit Provider Certificate:

[12.5.1] The wrong Credit Provider Certificate was submitted as Annexure **"N1"** to the particulars of claim relating to ABSA bank Limited and not relating to Nedbank limited.

[12.6] **Sixth Special Plea**

Primary residence

[10.6.1] The property at 1, B[....]Street, H[....], Bloemfontein should not be declared executable as first defendant and her two minor children currently resides there.

[2] Act 34 of 2005

[12.7] **Seventh Special Plea**

Jurisdiction

[12.7.1] In terms of clause 25, Annexure **"N2"** of the first loan agreement, the action should have been instituted in the Magistrate Court*," …en die Kliënt stem hiermee tot die jurisdiksie van die Landdroshof in."*

[12.8] **Eight Special Plea**

Non- Joinder and Certificate of Balance:

[12.8.1] The certificates of balance dated the 30th May 2022 are significantly lower amounts and the Plaintiff failed to join the principal debtor.

[12.9] **Ninth Special Plea**

Dividend will reduce surety:

[12.9.1] A dividend is to be paid in due course by the Liquidators, once the Plaintiff received a dividend from the liquidators of the insolvent estate of Ursiweb (Pty) Ltd (in liquidation) the amount due and owing by first defendant, as surety towards plaintiff shall be reduced.

[12.10] **Tenth Special Plea:**

National Credit Act finds application:

[12.10.1] The NCA applies to the suretyship by first defendant in favour of the plaintiff relating to the D[....] Familie Trust as the trust, at the date of this plea had only two trustees namely the first and second defendants. Accordingly, the provisions of the NCA apply to the transaction and agreement between the Trust and the plaintiff.

[12.10.2] The Trustees of the D[....] Familie Trust are not parties to the current action.

[12.11]**Eleventh Plea:**

Mediation:

[12.11.1] The first defendant made settlement proposals in good faith which proposals have to date not been rejected, and also **Rule 41 A (2) (b)** mediation has not yet been finalized.

[12.11.2] This issue of mediation is therefore still pending between the parties.
[12.12] **Twelve Special Plea:**

Indebtedness in terms of the suretyship:

[12.12.1] For the alleged indebtedness in terms of the suretyships relating to the D[....] Familie trust and Ursiweb (Pty) Ltd, the plaintiff relies on a clause in the suretyship with the following wording:

> "Such a certificate or other form of evidence, as the case may be, will upon the mere production thereof be binding on the defendants and be proof of the contents of such certificate on the face of it and the fact that such amount is due and payable in any legal proceedings against the defendants, and will be valid as a liquid document against the defendants in any competent Court."

[12.12.2] The first defendant is relying on the case of **Nedbank Limited v Grant Stewart Mc Glashan and 10 others.**[3]

[12.12.3] The first defendant submit that the aforementioned clause is *contra bonis mores* because it purports to be conclusive truth of the debt. As it is offending public policy and hence unenforceable.

[12.12.4] In **Nedbank Limited v Grant Stewart Mc Glashan** supra, it was held that a similar worded clause in a suretyship is unenforceable.

[3] Case Number 14714/2016, in the High Court of South Africa, Gauteng Division

[11.12.4] The consequence hereof is that the plaintiff cannot rely on any certificate of balance issued in terms of the relevant suretyships.

[12.13] **Electronic signature**

[12.13.1] The first defendant contended that the signature to the Summary judgment affidavit namely the Special Power of Attorney, was an electronic signature, and thus had to comply with the **Electronic Communications and Transactions Act**[4],(herein after called "**the ECTA**")

[12.13.2] The first defendant states that she was advised that the Courts require original legal documents to be filed at Court.

[13] **PLAINTIFF`S CASE**

[13.1] In rejecting the arguments of the defence, the plaintiff submits that as the first defendant was invited to show good cause she did not succeed. Counsel for plaintiff argued that the defences were mostly spurious and without merits.

[13.2] The plaintiff was of the contention that the question remains if the first defendant in her Plea raises an issue for trial. First defendant`s opposing affidavit should be read with reference to her Plea (and cannot raise new further defences in her Plea.)

[13. 3] The Applicant further submitted that the issues raised in the special pleas is a delaying tactic by the defendant in that she is in breach of the agreement and has no plausible defence before the Court.

[13.4] the first defendant must disclose *"a fairly and arguable issue"*[5]

[13.5] *It is only when adequate information is placed before the Court that the Court*

[4] 25 of 2002 ("the ECTA").
[5] Eisenbergs v OFS Textile 1949(3) SA 1047(O) at 1054

can be satisfied that the defence is bona fide"[6]

[13.6] The plaintiff is further of the contention that *"the court will only grant summary judgment if on the disclosed facts it is clear that the plaintiff has an`unanswerable ` case"*

[13.7] The plaintiff pointed out that it is not registered as an Insurer, hence the first defendant cannot have a policy with the plaintiff. Further that the reference number provided in Annexure**" A"** is not for a claim under an Insurance Policy.

THE LAW

[14.1] **Summary judgment**

[14.1.1] The Summary judgment application calls for strict circumspection and judicial oversight in balancing the rights of both the applicant and the defendant. The summary judgment proceedings have been described as drastic and robust proceedings. In **Joob Joob Investments v Stocks Mavundla ZEK JV,**[7] it was held that Summary judgment proceedings are no longer extraordinary and the Rule must be applied properly. The Summary judgment procedure exists for the applicant to obtain a speedy judgment against the defendant in cases where the defendant has no valid defence to the claim. By short-circuiting an otherwise potentially protracted trial, the applicant avoids incurring unnecessary costs associated therewith.

[14.1.2] Naturally, Summary judgment cannot be granted where it is clear that some ventilation of evidence is required in order for the Court to come to a decision. Adopting this approach, the successful defendant who demonstrates a triable defence is not excised from further anticipated litigation. Thus, the defendant retains (all) his Constitutional Rights to access justice, as enshrined in section **34 of the Constitution**.[8]

[14.1.3] It is trite that the discretion to a Summary judgment order must be exercised

[6] Jacobson v Triton Yachting Supplies 1974(2) SA 584 (OPD) at 588 H
[7] [2009] All SA 407 (SCA)
[8] The Constitution of South Africa Act, 108 of 1996.

judicially. There is no dispute in the present matter that the 1st defendant is still indebted to the applicant, the amount of which is significant.

[14.2] ***Lis pendens:***

[14.2.1] The three requirements for a successful reliance on the plea of *lis pendens* are:

i) The litigation is between the same parties;

ii) That the cause of action is the same; and

iii) That the same relief is sought in both sets of proceedings.

[14.2.2] It has been held that the plea of *lis pendens* shares similar features to the defence of *res judicata* because their underlying consideration is to ensure finality in litigation. Once a suit has been instituted, it should be finalised before that court before another can be instituted by the same parties relating to the same cause of action.

[14.2.3] The doctrine of *lis pendens* was explained in **Caesarstone SDot -Yam Ltd v The World of Marble and Granite and others**[9],by Wallis J as follows:

> "As its name indicates, a plea of *lis alibi* pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognized by our courts for over 100 years"

[9] 2000 CC

[14.3] **The legal exception *beneficium ordinis seu excussionis.***

A waiver of this benefit by a surety entitles the financial institution to claim payment from the surety without first exhausting the legal remedies against the principal debtor.

[14.4] **The legal exception *de duobus vel pluribus reis debendi***

A waiver of this benefit by a co-debtor or surety entitles the financial institution to recover the full debt from such co- debtor `s surety, without the first requiring payment from the other debtor or the principal debtor.

[14.5] **National Credit Act, 2005**

The following sections in the National credit Act find application with regards to the surrender of goods:

"**Section 127(2)**

Within 10 business days after the later of-

(a) receiving a notice in terms of subsection (l)(b)(i);

(b) or (b) receiving goods tendered in terms of subsection (l)(b)(ii), a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.

Section 127(5)

After selling any goods in terms of this section, a credit provider must-

(a) credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods; and

(b) give the consumer a written notice stating the following:

(i) The settlement value of the agreement immediately before the sale;

(ii) the gross amount realized on the sale;

(iii) the net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and reasonable costs allowed under paragraph (a); and

(iv) the amount credited or debited to the consumer's account."

Section 127 (7)

If an amount is credited to the consumer's account and it is less than the settlement value immediately before the sale, or an amount is debited to the consumer's account, the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice required by subsection (5)(b).

Section 127 (8)

If a consumer-

(a) fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, the credit provider may commence 15 proceedings in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement; or

(b) pays the amount demanded after receiving a demand notice at any time before judgment is obtained under paragraph 8, the agreement is terminated upon remittance of that amount.

In either event contemplated in subsection (8), interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider in terms of subsection (7) from the date of the demand until the date that the outstanding amount is paid.

Section 127(10)

A credit provider who acts in a manner contrary to this section is guilty of an offence in terms of section 127(10)."

[14.6] **Primary residence**

[14.6.1] **Rule 46A** on its plain wording applies to execution against all residential immovable properties, save where appears otherwise.

[14.6.2] Where specific provision is made for additional requirements to be satisfied when the property sought to be executed against is a primary residence, this is expressly provided for in the rule, such as in **subrule (2)(b)** where it is expressly stated that a court shall not authorise the execution against immovable property which is a primary residence of a judgment debtor unless the court, having considered all relevant factors.

[14.7] **Jurisdiction**

[14.7.1] In the matter of **Standard bank of South Africa and Others v Thobejane and others,**[10] the SCA recently ruled that:

"The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrates' Court. (2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction. (3) The main seat of a Division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local seat of that Division because the main seat has concurrent jurisdiction. (4) There is no obligation in law on

[10] ZASCA 92(25 June2021)

financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings."

[14.7.2] It has nowhere been held that a principal debtor should be joined as a plaintiff in an action against a surety. An order against first defendant can be sustained and or carried into effect against first defendant without prejudicing the liquidators.[11]

[14.8] **Non- joinder and Certificate of Balance**

[14.8.1] It is now trite law that a party must of necessity be joined in proceedings if he/she/it has a **substantial direct and legal interest** in those particular proceedings; a mere commercial or financial interest itself is not sufficient as mentioned in the cases of **Amalgamated Engineering Union v Minister of Labour** [12] and in **Hartland Implemente (Edms) Bpk v Enal Eiendomme en andere.**[13]

[14.8.2] With regards to the Certificate of Balance, in **Rossouw and Another v First Rand Bank Ltd t/a FNB Home Loans (Formerly First Rand Bank of SA Ltd)**[14] it was held at para 47:

> "…To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on the facts already before the court which the court would otherwise have to perform itself. Such calculations are better performed by a qualified person in the employ of a financial institution. And to the extent that such a certificate may reflect additional payments by the defendant after the issue of summons, or payments not taken into account when summons was issued, this constitutes an admission against interest by the Bank and the Bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether a quo or on appeal) perform a useful function…".

[11] Harms, Civil procedure in the Superior Courts, p. B10B1.
[12] 1949(3) SA 637 A at 659
[13] 2002(3) SA 653 (NC) at 663 F-G.
[14] (2011) 2 All SA 56 (SCA)

[14.8.3] The Order by my sister Chesiwe J, is dated 10 February 2022 and thus after Summons was issued. The correct certificate amounts (as at 30th May 2022) for purposes of prayers 1 to 4 of the particulars of claim are set out in annexure "**C1**" to **C 4"** to the Plea and hence correct.

[14.8.4] A certificate of balance is an evidentiary tool provided for in an agreement to facilitate proof of the amount of the indebtedness. The certificate does not in itself establish liability. [15]

[14.8.5] In the matter of **Thrupp Investment Holdings (Pty) Ltd and Thomas Bernard Goldrick**,[16] Van Oosten J held the following at paragraph 6:

"As regards the effect of the absence of a certificate of balance-clause in the suretyship counsel for the appellant submitted that a proper interpretation of their certificate of indebtedness-clause contained in the lease agreement leads one to conclude that the production of such a certificate in fact established the liability of the lessee for the amount certified, which in turn was sufficient to constitute prima facie proof of eligibility of sureties. The argument in my view is flawed in its premise. A certificate-clause, it has been held in a number of cases, is designed to facilitate proof of the amount of liability (See Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others 1989 (3) SA 750 (T); Bank of Lisbon International Ltd v Venter en Ander 1990 (4) SA 463 (A) at 478 E). The certificate is therefore is merely an evidentiary tool provided for in an agreement by one contacting party to the other to facilitate proof of the amount of indebtedness. <u>It does not in itself establish liability</u>. *In casu* the clause was only valid as between the lessor and the lessee and therefore could not be invoked against the sureties. The fact that the suretyship was referred to in and in addition to that, also annexed to the lease agreement, is of no moment. The suretyship although collateral to the lease agreement, remains a separate and independent agreement and the certificate of balance-clause therefore as correctly heard by the Judge a quo, did not by reference become incorporated into the suretyship. (My emphasis)"

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[15] Thrupp Investment Holdings (Pty) Ltd v Goldrick [2007] ZAGPHC 23; 2008 (2) SA 53 (W) at para 6
[16] Witwatersrand Local Division(A5027/05) [2007] ZAGPHC 23

[14.9] **Credit Provider Certificate**

[14.9.1] The first defendant asserts that an Annexure "**N1"** pertaining to ABSA Bank Limited as a credit provider and not Annexure **"N1"** certificate relating to Nedbank limited as credit provider is attached to the particular of claim.

[14.9.2] It was however pointed out in the Plaintiff`s Summary judgment that a wrong credit providers certificate was initially attached, that on 22 March 2022 the plaintiff filed the correct Annexure "**N1".** My sister Mbhele already adjudicated on the matter when she dismissed the first defendant`s application for a **R 30** Notice of Irregular Step.

[14.10] **Mediation**

Rule 41A, introduced into the Uniform Rules of Court in February 2020, mandates that parties to a dispute consider mediation as dispute resolution mechanism.

[14.11] **Applicability of NCA to Suretyship**

[14.11.1] **Section 4 of the NCA** refers "in paragraph (a) and (b) both *to "the time the agreement is made ".*

[14.11.2] From Annexure "E" which shows that until the resignation of Mr. AM de Wet in May 2022 the Trust had three Trustees and qualified as a juristic person.

[14.12]**Indebtedness in terms of the suretyship**

[13.12.1] The **Thrupp Investment Holdings (Pty) Ltd** case supra also find application. It seems that the 1st defendant would be liable in terms of the suretyship.

[14.13]**Electronic signature**

[14.13.1] **The Concise English Oxford Dictionary**[17] defines *'*signature*'* as:

> 'a person's name written in a distinctive way as a form of identification or authorization.' Black's Law Dictionary (5th ed 1239) gives the definition of 'sign' and 'signature', which read together bring us close to the legal meaning of signature. 'To 'sign', it explains, is 'to affix one's name to a writing or instrument, for the purpose of authenticating or executing it, or to give it effect as one's act; To attach a name or cause it to be attached to a writing by any of the known methods of impressing a name on paper; To affix a signature to . . . To make any mark, as upon a document, in token of knowledge, approval, acceptance, or obligation'. 'Signature' is defined as 'The act of putting one's name at the end of an instrument to attest its validity; the name thus written . . . And whatever mark, symbol or device one may choose to employ as representative of himself is sufficient.'[18] The provisions of the ECTA have, as its objects the enablement and facilitation of electronic communications and transactions in the public interest. To this end, amongst others, it seeks to promote legal certainty and confidence in respect of electronic communications and transactions,2 and to ensure that electronic transactions in the Republic conform to the highest international standards.

[14.13.2] **Section 12** of the **ECTA** provides that a requirement in law that a document must be in writing, is met if the document is in the form of a data message and accessible in a manner usable for subsequent reference.[19]

[14.13.3] **Section 13** of the **ECTA** provides as follows:

> "(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

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[17] Concise English Oxford Dictionary 12 ed (2012) Oxford University Press.
[18] Global and Local Investments Advisors Pty ltd and Nickolaus Ludick Fouche 1/2019] ZASCA 08 (18 March 2020.
[19] Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) at 342 – 3 and Sapirstein & Others v Anglo African Shipping Co (SA) Limited 1978 (4) SA 1 (A) at 12 B – D. Section 2(e). Section2(h).

(2) Subject to (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if – a method is used to identify the person and to indicate the person's approval of the information communicated; and

(4) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

(5) Where an advanced electronic signature has to be used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.

(6) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that – (a) it is in the form of a data mass message; or

c) it is not evidenced by an electronic signature but is evidenced by other means

d) from which such person's intent or other statement can be inferred."

[14.13.4] The **ECTA** defines an electronic signature as:

"Data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature".

[14.13.5] An advanced electronic signature is defined as:

"An electronic signature which results from a process which has been accredited by the Authority as provided for in section 37, which provides that the Accreditation Authority may accredit authentication products and services in support of advanced electronic signatures. Section 38 provides that the accreditation authority may not accredit authentication products or services unless the accreditation authority is satisfied that electronic signature to which such authentication products and services relate complies with the requirements set out in section 38.

[14.13.5] Hoexter JA explained in **Jurgens Volkskas Bank**[20] :

"The function of a signature is to signify that the writing to which it pertains accords with the intention of the signatory. It conveys an attestation by the person signing of his approval and authority for what is contained in the document."

[14.13.6] **Chapter 3 of the Electronics Communications and Transactions Act** finds application.[21] In terms of **section 11** thereof information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of data message. In similar vein **section 12** thereof determines that a requirement in law that the document must be in writing is met if the document or information is in the form of a data message. Further **section 13** states that an electronic signature is not without legal force or merely on the ground that it is in electronic form.

[14.13.7]

1. **Original**

"(1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if—

(a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and

(b) that information is capable of being displayed or produced to the person to whom it is to be presented.

(2) For the purposes of subsection 1(a), the integrity must be assessed—

(a) by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display;

(b) in the light of the purpose for which the information was generated; and

(c) having regard to all other relevant circumstances."

[15] **APPLICATION OF THE LAW TO FACTS**

[15.1] ***Lis Pendens***

[15.1.1] In *casu* concerning the *lis pendens* point the first defendant contends that this application is based on the same cause of action as that in the plaintiff and first defendant`s dispute with regards to the retrenchment policy. The determination in the dispute and outcome of the retrenchment policy involves the same party and *causa*, which is substantially the same as in this application for summary judgment.

[15.1.2] In my view, the *lis pendens* point raised by the first defendant is unsustainable for the following reasons. It is not in dispute that the essential elements upon which the application for summary judgment are based on are the instalment agreements, the non -payment thereof and the subsequent cancellation thereof by the applicant. However, this does not mean that the outcome of the decision by the applicant to pay out the policy is determinative of the outcome in the present matter or vice versa. The legal force to pay what is due to the applicant remains despite the success or the failure of the policy being paid out to first respondent.

[20] 1993(1) SA214(A)at 220 E

[21] 25 of 2002

[15.1.3] In brief, the plea of *lis pendens* is unsustainable because the cause of action in each of the issues is different. The relief sought in the present application is based on the first defendant being unable to pay her debt under the instalment agreements. As indicated by plaintiff, the retrenchment policy is not a court action and is based on another alleged agreement between the plaintiff and the first defendant.

[15.1.4] The plaintiff also indicated that they are not registered as an insurer and hence the first defendant cannot have an insurance policy with the plaintiff.

[15.2] **National Credit Act**

[15.2.1] It is clear from **section 127(10)** that compliance with this provision of the NCA is compulsory. From **section 127** it is also clear that it deals with the surrender of goods.

[15.2.2] It pertains where a consumer by itself will give written notice to the credit provider to terminate an agreement.

[15.2.3] On the first defendant`s own version the plaintiff in its action against the D[....] Familie trust cancelled the credit agreements and then obtained return of the vehicles whereafter it subsequently sold the vehicle by public auction.

[15.2.4] Accordingly section **127(5), (7)** and **(8)** does not apply to the action *in casu.*

[15.3] **Non -Joinder Ursiweb**

The 1st defendant contends that the non-joinder of the Liquidators of Ursiweb (Pty) Ltd constitutes a fatal defect in the proceedings. The applicant on the other hand avers that, while Ursiweb have an indirect interest in the matted, their interest is not of the nature that requires them to be joined in these proceedings. The liquidators do not have a direct and substantial interest in any court order this court might make against 1st defendant. It is also not a situation that an order against 1st defendant cannot be sustained or carried into effect without prejudicing the liquidators.

Accordingly, the liquidators need not to be a party to this action.

[15.4]**Jurisdiction**

[15.4.1] Paragraph 14 of the Mortgage Bond stipulates that:

> "In terms of section 45 of the Magistrate`s Court Act, 1944 and at the option of the Mortgager any claim arising under this bond <u>may be</u> recovered in any magistrate's court, having jurisdiction, and the Mortgager hereby consents to the jurisdiction of the magistrate`s court." [own emphasize]

[15.4.2] Paragraph 25 of the loan agreement between the plaintiff and 1st and 2nd defendants however stipulates that:

> " Ingevolge artike 45 van die Wet op Landdroshowe ,1944 en na die keuse van Nedbank, mag enige eis wat wat uit hierdie Ooreenkoms voortspruit, in enige landdroshof met jurisdiksie verhaal word., en die Kliënt stem Hiermee tot die jurisdiksie van die landdroshof in ."

[15.4.3] It is Applicant`s contention that consent to the magistrate court`s jurisdiction by 1st Defendant, does not have the effect that action must be instituted in the magistrate`s court. The fact that clause 25 mentioned that "*na die keuse van Nedbank "which implies that Nedbank, by agreement, also had the choice as to* where to institute action.

[15.4.4.] It is my interpretation of the above case law that the High court has concurrent jurisdiction and that this defence does not raise any issue for trial.

[15.5] **Non -Joinder & COB**

The liquidators do not have a direct and substantial interest in an order by this court against first defendant. The fact that the first defendant in any case renounced her benefit of excussion, the issue of misjoinder of the liquidators falls away as irrelevant.

[15.6] **Beneficium de Dubious Vel Pluribus Reis Debendi**

[15.6.1] The benefit of division entails the right to demand that a debt be divided between all solvent co -sureties.

[15.6.2] A co- surety may expressly renounce this benefit. In case the first defendant as surety has indeed renounced the benefit of division as can be seen from Clause 11 of Annexure "N11".

[15.6.3] This means that she is no longer entitled to claim that her obligation to plaintiff be divided proportionally between her, co -surety and principal debtor.

[15.7] **Beneficium Ordinis Seu Excussionis**

[14.7.1] Clause 11 of the suretyship Annexure" **N 11'**, the first defendant renounced the benefit of *excussion* and in which it was described that she no longer will be entitled to claim that plaintiff first exhaust its remedies against Ursiweb (Pty) Ltd.

[15.7.2] In this clause it is described that it means that she will no longer be entitled to claim that plaintiff first exhaust its remedy against the principal debtor before proceedings against her in terms of the suretyship. Important to note further that the benefit of *excussion* is only of assistance to a surety as such, whereas the 1st defendant, respondent bound herself both as surety and co-principal debtor.

[15.8] **Certificate of Balance**

The Order by my sister Chesiwe J, is dated 10 February 2022 and thus after Summons was issued. The correct certificate amounts (as at 30th May 2022) for purposes of prayers 1 to 4 of the particulars of claim are set out in annexure "C1" to C 4" to the Plea and hence correct.

It is clear that the Credit provider Certificate was correct and updated at the time of the application for the summary judgment.

[15.9] **Dividend will reduce the suretyship.**

[15.9.1] The first defendant claims that a dividend to be paid by the liquidators of Ursiweb (Pty) ltd in liquidation shall dramatically reduce her liability towards the plaintiff, in this she accordingly relies on the benefit of excussion.

[15.10]**Mediation**

[15.10.1] The first defendant at the arguing stage submits that the defendant was willing to negotiate settlement and there was no response or rejection from plaintiff. In terms of **rule 41A** of the uniform rules of court makes provision for mediation. The nub of mediate *in casu* would be to re- negotiate a new instalment or payment policy.

[15.10.2] I am of the opinion that mediation will not assist the parties any further. There is no point in further negotiation, especially since application for Summary judgment is claimed, due to the non-performance of the first defendant.

[15.10.3] As of 9 March 2020 a court may "direct the parties to consider referral of a dispute to mediation" in terms of rule 41A. Although mediation has been described as a voluntary process, the court may direct the parties to consider mediation as a dispute resolution mechanism when it is clearly evident that such a procedure will benefit the parties and move them closer to better resolving the dispute by such mechanisms. From the facts before this court, I am of the view that it is counter-productive to force the plaintiff into mediation on the basis that they have already been negotiating since the signing of their contract and have reached a stage of impasse.

[14.10.4] Therefore, this is no defence. [15.11] **Primary residence**

[15.11.1] In the cases involving the execution of residential immoveable property of a judgment debtor **Rule 46A (2)** requires the court to determine whether the property is a primary residence of the judgment debtor before ordering execution.

[15.11.2] First defendant is of the contention that this court need to take into account that the property (without mentioning which one of the two properties in Ben Tindall) where the first applicant stays with her children is the primary property and that the execution of the property would definitely infringe on their residing in the property.

[15.12.3.] The plaintiff/applicant nevertheless has to comply with the requirements of **Rule 46A** when a proper application in terms of **Rule 46A** is before court.

15.12 **NCA APPLICABLE**

[15.12.1] The first defendant in her Plea over pleads that at the date of the Plea, the D[....] Familie Trust had only two Trustees, therefore the provisions of the NCA applies to the transactions between the D[....] Familie Trust and plaintiff, and thus applies to the suretyship by first defendant in favour of plaintiff for the debts of the D[....] Familie Trust. It is thus denied that the D[....] Familie Trust is a juristic person.

[15.12.2] The plaintiff however denies that the D[....] Familie Trust is not a juristic person. It is only after the resignation of De Wet that in May 2022 that the Trust does not qualify as a juristic person for purposes of the NCA.

[15.12.3] Relevant to these proceedings is the fact that at the time of entering into the four-loan agreement as set out in **N"10"** the trust was a juristic person.

[16] **Certificate of Balance**

[16.1] **Prima facie proof or ex facie**

[16.1.1] In **Nedbank Limited v Grant Stuart Mc Clashan and 10 others,[22]** a bank sued on a standard suretyship containing a clause providing for a certificate of balance which stated that:

> …" on the mere production thereof is binding on us and be proof of the contents of such certificate on the face of it…"

[22] And ten others

[16.1.2] Defendant argued that the clause was unenforceable because it did not allow the prospect of rebuttal, and relied on the decision in **Nedbank v Binder,** [23]which struck down the identical clause. The Bank argued that **Nedbank v Binder** was wrongly decided because the phrase `on the face of it ` means `prims facie ` and thus a rebuttal was possible.

[16.1.3] It was however held in **Nedbank v Binder** that:

> "On the face of it ...` means `ex facie` ~ not `prima facie ` is conclusive and not admitting of a rebuttal."

[16.1.4] It was further held that:

> "The argument had to fail in summary judgment proceedings in respect of proceedings based on suretyship because a defendant was not called upon to meet a case premised on the underlying contractual obligation of another person towards the creditor."

[16.1.5] It is clear from the **Thrupp Investments Holdings** case supra, that where there is not a dispute of indebtedness and only the amount of such indebtedness falls to be determined, a Certificate of Balance can be used as evidentiary proof.

[16.1.6] As I have already mentioned, the liability of the respondent towards the applicant in this matter is not disputed. It is in fact conceded.

17. THE COURTS DISCRETION

[17.1] The court has an overriding unfettered discretion which it must exercise judicially and not arbitrarily. I have the discretion to exercise whether I should on the facts averred by the plaintiff, grant summary judgment or whether, on the basis of the defence raised by the defendants, I should refuse it. If the court has any doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should accordingly, be refused.

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[23] 1483/20111[7 April 2016,per van der Linde J]

[17.2] The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met [11].

[17.3] Considering the extraordinary and drastic nature of the Summary judgment remedy in **Maharaj v Barclays National bank v Barclays National Limited Bank**[24], Corbett JA stated:

> "The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus and bad in law"[25]

[17.4] The test is whether on the set of facts before me, I am able to conclude that the defence raised by the defendant is a sham, a bogus or is bad in law. What I have to decide on is whether, on the facts alleged by the applicant in its particulars of claim, I should grant summary judgment or whether the defendant's opposing affidavit discloses such a *bona fide* defence that it should refuse Summary judgment.

[17.5] Due to the peremptory nature of **Rule 32**, courts are extremely reluctant to grant summary judgment unless satisfied that the applicant has an unanswerable case. This is because summary judgment is a drastic and robust remedy in that it permits a judgment to be given without trial. It closes the doors of the Court to the defendant[26]. It is only when there is no doubt that the applicant has an unanswerable case that it should be granted.[27] In **Shepstone v Shepstone** [28] Miller J said:

> "The court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case" and that… "a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on

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[24] 1976 (1) SA 418 (A)

[25] Ibid footnote 6 at 424G-[6] Todt v Ipser paragraph 11, LAWSA 3rd Edition vol 4, LexisNexis, 2012 at paragraph 94

[26] Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd SA 662 OPD at 666A and the authorities quoted therein

[27] Breitenbrach v Fiat S.A. (EDMS) Bpk 1976 (2) SA 226 AT 229

trial".

[17.6] Considering the above authorities, which established the legal principles relating to summary judgment as well as **Rule 32**, I see no reason to deviate from such principles.

18. **Rule 46 A**

Is execution against the immoveable property warranted

[18.1] In arriving at an appropriate order, in accordance with **R 46A (5**), I need to consider, amongst other factors which may be necessary to give effect to **subrule 8**, the market value of the property, the local authority valuation, the amount owing on the mortgage bond, the amount owing to the local authority as rates and other dues. In terms of a valuation report, the market value of the property and the forced sale value is not known. The local authority valuation of the property must also be attached.

[18.2] The mortgaged property was also not described or mentioned as for example a residential dwelling comprising of, *inter alia*, number of bedrooms, a number of bathrooms, a single or double garage and a normal or heated pool with solar panels if any?

[18.3] In terms of subrule 8(d) a court considering an application under **R 46A**, may order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt. The plaintiff did not mention that any other satisfactory means exist.

[18.4] Having considered all the circumstances of the matter I am persuaded that another reasonable alternative exists for the plaintiff to enforce its rights. A declaration of the immovable property as executable, would in the present matter constitutes an abuse of process and would infringe on the first defendant`s fundamental right to access to adequate housing in terms of s **26 of the**

[28] 1974 (2) SA 462 E-H

Constitution. There appears to be a disproportionality between execution against the property and other possible means to exact payment of the judgment debt –No other possible means, not even an opportunity to privately sell the property, has been proffered by the plaintiff. I am inclined to exercise my discretion in favour of the first defendant.

[19] **RULING**

[19.1] In evaluating the evidence, I have considered the applicable law as well as the facts before me.

[19.2] When I consider what is required in terms of **Uniform Rule 32(2)(b),** including the special pleas I am satisfied that the plaintiff has proof its case.

[19.3] When I consider the application in terms of **Rule 46 A** in its totality, there is no merit to grant an order in this regard.

[20] **COSTS**

[20.1] As a general rule the award of the costs remains in the discretion of the Judge.[29] The basic rule of costs was described by J Innes in: **Kruger Bros. Wasserman v** Kuskin [30] as follows:

> "the rule of our law is that costs- unless expressly otherwise enacted – are in the discretion of the Judge"

[20.2] The general rule is that such costs should follow the result, being that costs are awarded to a successful litigant[31].

> "Success" means substantial success not only the form but the substance of a judgment must be considered in establishing who is the successful party"

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[29] Kruger Bros. & Wasserman v Ruskin 1918 AD 63 at 69); Ward v Sulzer 1973 (3) SA 701 , Ward v Sulzer 1973(3) SA701 A.
[30] 1918 AD 63 69
[31] Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd 2003 (1) SA 204 (T)

as it was explained in **The Law of Costs**[32]

[20.3] A value judgment of the situation should be made. The court retains its discretion.[33]

[20.4] The invariable consequence of this is that, having regard to what was placed before me, and in view of the fact that the plaintiff is substantially successful in its claim for Summary judgment and the first defendant is substantially successful in rebating the claim of the R 46 A. I am of the view that it would be fair and just that each party pay their own costs.

[21] **ORDER**

In the event the following order is made:

(i) Summary judgment is granted against the first defendant in terms of prayers 1 to 7 of the Notice of Application for Summary Judgment.

(ii) Prayers 8 (a) to (e) to stand over for application procedure in terms of **Rule 46 A.**

(iii) No order as to costs.

S BOONZAAIER, AJ

For the Plaintiff : Adv.HJ Benade

[32] AC CILLIERS, THE LAW OF COSTS, Butterworths, 5th edition

	Chambers Bloemfontein
Instructed by:	Symington & de Kock
	169 B Nelson Mandela drive
	BLOEMFONTEIN
Counsel for the First Defendant:	MJH Steenkamp
	Chambers Bloemfontein
Instructed by :	Badenhorst attorneys
	Groenvlei
	BLOEMFONTEIN

[33] Westbrook v Genref Ltd 1997(4) SA 216D