Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1206 & 1207/2020
Heard: 27/05//2021
Delivered: 30/07/2021

In the matter between:

Case No: 1206/2020

TRANSACTION CAPITAL BUSINESS SOLUTIONS (PTY) LTD — Applicant

And

JACOBUS SCHALK VAN DER WALT N.O. — First Respondent

KARIN VAN DER WALT N.O. — Second Respondent

MARTIN DU PLESSIS N.O. — Third Respondent
1st to 3rd Respondents cited as trustees of the
Kobus van der Walt Familie Trust (IT423/2002)

JACOBUS SCHALK VAN DER WALT N.O. — Fourth Respondent

KARIN VAN DER WALT N.O. — Fifth Respondent

ARNOLDUS JACOBUS VAN DER WALT N.O. — Sixth Respondent
4th to 6th Respondents cited as trustees of the
SAVUTI BOERDERY TRUST (IT1195/2007)

JACOBUS SCHALK VAN DER WALT — Seventh Respondent

KARIN VAN DER WALT — Eighth Respondent

In the matter between: Case No: 1207/2020

TRANSACTION CAPITAL BUSINESS SOLUTIONS (PTY) LTD — Applicant

And

JACOBUS SCHALK VAN DER WALT N.O.	First Respondent
KARIN VAN DER WALT N.O.	Second Respondent
ARNOLDUS JACOBUS VAN DER WALT N.O. 1st to 3rd Respondents cited as trustees of the **SAVUTI BOERDERY TRUST (IT1195/2007)**	Third Respondent
JACOBUS SCHALK VAN DER WALT	Fourth Respondent
KARIN VAN DER WALT	fifth Respondent
MARTIN DU PLESSIS N.O. 4th to 6th Respondents cited as trustees of the **Kobus van der Walt Familie Trust (IT423/2002)**	Sixth Respondent
JACOBUS SCHALK VAN DER WALT	Seventh Respondent
KARIN VAN DER WALT	Eighth Respondent

JUDGMENT

MOSES AJ:

Introduction

[1] On or about 20 July 2020 the Applicant herein launched its application in this Court under case number 1206/2020, wherein it seeks a monetary judgment against the Respondents as cited, both in their capacities, respectively, as trustees of the Kobus van der Walt Family Trust (IT143/2002), as sureties and in their personal capacity/ies. Herein the Applicant also seeks an order declaring certain properties of the Respondents executable.

[2] In this application, the deponent to the founding affidavit, one Hermias Cornelius Niewoudt Theron, ("Theron"), describes the First to Third Respondents, including the Kobus van der Walt Family Trust, as the principal debtor, the fourth to sixth

Respondents, including the Savuti Boerdery Trust, as the first surety, the seventh Respondent, as the second surety, and the Eighth Respondent as the third surety.

[3] It is common cause on the papers filed of record, that on or about 12 August 2019 the Applicant and the Respondents as above stated entered into a revolving credit agreement, in terms of which the Applicant lent and advanced to the Principal Debtor the amount of R3,9 million in terms of a revolving credit facility. In addition, the Principal Debtor caused a covering bond to be registered over its immovable property, namely sections 53 and 54, Hartenbos, Mossel Bay, Western Cape as security for its indebtedness to the Applicant in the amount of R5 million and an additional sum of R1,25 million. The other respondents signed as sureties for their indebtedness.

[4] It is common cause on the papers that on or about 27 June 2019 the same Applicant also concluded with the same Respondents another but similar written revolving credit agreement with identical terms, to which I return hereunder. This time however, the Applicant lent and advanced to the first to third Respondents, including the Savuti Boerdery Trust, referred to by the same deponent, Theron as the Principal Debtor, the amount of R1,7 million on a revolving credit facility. The fourth to sixth Respondents (the Kobus van der Walt Familie Trust), referred to as the first surety, the seventh Respondent, referred to as the second surety, and the eighth Respondent, referred to as the third surety, all signed as sureties for the indebtedness of the principal debtor. The agreement is subject to surety guarantees being signed by the above stated sureties, and subject to a covering bond being registered over the first surety's immovable property, namely Erf 2851, Kimberley, also known as 45 Long Street, Albertynshof, Northern Cape, for a covering amount of R2,1 million to serve as security for its indebtedness, together with the sum of R525,000.00 which security guarantees were signed, and the said covering bond registered.

[5] This claim forms the subject matter of the other application launched by the Applicant against the said Respondents, on or about 23 July 2020, out of this Court under case number 1207/2020 (the second application).

[6] Since the parties to both these applications were the same and the subject matter thereof being substantially similar, the two (2) applications were heard and argued together in this court on 27 May 2021. After having heard counsel of both the Applicant and the Respondents, judgment was reserved in respect of both applications, pending finalisation of this written judgment.

[7] I interpose briefly to point out that before the hearing date, on 16 April 2021, on which date the matter was postponed for hearing to 27 May 2021, I addressed a letter to the parties' legal representatives, dated 14 April 2021, along the following lines, *inter alia*:

> *"9. Lastly, given the reference to, and hence the common cause existence of the Covid 19 pandemic and national lockdown in the Republic of South Africa, with effect from 27 March 2020, the day on which the Applicant issued its first letter of demand to the Respondent, do/would the parties consider this to be akin to "Force Majeure" or "an act of God" rendering it impossible for many people, in certain circumstances to perform in accordance with their obligations, contractually and/or otherwise?*
>
> *10. The Applicant refers to this aspect (Covid-19 pandemic) in paragraph 22 of the founding papers, the respondents, refer to it, inter alia, in paragraph 13, 14, 15, 16, 17, 18, 29 – 32 of their Opposing Affidavit.*
>
> *11. Differently put, in such scenario, would it constitute a bona fide defence and/or an instance in which an application for summary judgment is excluded?*
>
> *12. The parties will have to address me on these issues at the hearing of this matter should it proceed on Friday 16 April 2021."*

[8] Subsequently the parties filed and served their supplementary heads of argument, addressing the said issue comprehensively in their respective heads of argument, for which I thank them, and in court during oral submissions.

[9] After the last adjournment, pending this written judgment, I caused another letter to be addressed to the respective legal representatives of the parties, dated 3 June 2021, wherein the parties were invited to make additional submissions, if any, regarding the specific question posed, which was as follows:

> "1. *Are the parties still engaged in settlement negotiations with each other regarding both these matters as above-mentioned? And if so, is there a reasonable prospect of settlement thereof?*

2. *In the event of this Court being inclined to find in the Applicant's favour, and further be inclined to grant the Respondents a period of time to repay their/its debts/amounts due to the Applicant, what time period would the parties, respectively, submit to be a reasonable time in the circumstances of this case? It would be appreciated if the parties could revert before 18th June 2021.*"

[10] Following the last letter to the parties, I did not get a reply by the end of term, 18 June 2021, when my terms of office also expired. Subsequently, upon my re-appointment and my return to start the new term with effect from 19 July 2021, I was furnished with the parties' reply, which reads as follows:

> *"Consequently we wish to advise that the parties were unable to reach a settlement in this matter.*
>
> *We therefore request that the Honourable Judge Moses render Judgment based on the papers filed on record as well as the oral argument made by the parties legal representatives on 28 May 2021".*

In the circumstances I proceedED henceforth to complete and finalise this judgment.

The pleadings and issues for determination: the First Application

[11] The Applicant's case is based on the terms of the written revolving credit agreement (which is/was annexed as "F1" to the founding papers) concluded on 12 August 2019 between it and the principal debtor. The salient terms hereof include the following, *inter alia*:

> "*17.1 The Applicant lent and advanced the sum of R3,900,000.00 ("the capital") to the Principal Debtor (vide part A).*
>
> *17.2 The Principal Debtor is to pay interest on the capital at the prime interest rate as determined from time to time, plus 9.25 %, calculated daily and compounded monthly in arrears (vide Part A and clause 4).*
>
> *17.3 The capital and interest are repayable upon demand (vide Part A and clause 7).*
>
> *17.4 The Principal Debtor chose 31 Carrington Road, Belgravia, Kimberley, Northern Cape as its domicilium citandi et executandi address (vide clause 15.1).*
>
> *17.5 The agreement is subject to surety guarantees being signed by the First, Second and Third Sureties and subject to a covering*

bond being registered over the Principal Debtor's immovable property (vide Part A and clause 2).

17.6 A certificate under the hand of any director of the Applicant, whose designation and status need not be proved, constitutes prima facie proof of the Principal Debtor's indebtedness (vide clause 12).

17.7 The Principal Debtor shall pay the Applicant's legal costs on a scale as between attorney and client in the event of default (vide clause 6.1.4).

17.8 The agreement constitutes the sole record of the agreement between the parties and supersedes any other discussion, agreements and/or understandings in relation to its subject matter. No addition to, variation, novation or agreed cancellation shall be of any force or effect unless in writing and signed by or on behalf of the parties. (Vide clause 18.1 – 18.2).

18. Pursuant to the revolving credit agreement, the Principal Debtor caused a covering bond to be registered over its immovable property. A copy of the covering bond is enclosed as ***Annexure "F2"*** *("the covering bond").*

19. In order to avoid this application being unnecessarily prolix I ask that the terms set out in the covering bond be deemed repeated herein. I paraphrase only those provisions which I deem to be most relevant to this application:

19.1 Sections 53 and 54 situated in the sectional title scheme known as De Branders, Paardekraal Road, Hartenbos, as more comprehensively described in the covering bond ("the immovable properties"), shall serve as security for its indebtedness vis-à-vis the Applicant for the covering amount of R5,000,000.00 and an additional sum of R1,250,000.00.

19.2 The nature and amount of the Principal Debtor's indebtedness towards the Applicant may be determined and proved by a certificate signed by the Applicant's director which shall constitute prima facie proof of the indebtedness.

19.3 The Principal Debtor shall be liable for the Applicant's costs on a scale as between attorney and client in the event of enforcement of the security.

20. All the suspensive conditions were met, and the revolving credit agreement became operative, whereupon the Applicant complied with all its terms, including by making payment to the Principal Debtor of the capital sum.

21. On 27 March 2020 the Applicant addressed a letter to the Principal Debtor in terms of which it demanded that the outstanding amount in terms of the credit agreement be repaid within 30 days. A copy of the letter is enclosed as ***Annexure "F3"****.*

22. *On 15 April 2020, 29 April 2020 and 17 June 2020 the Applicant addressed similarly worded letters to the Principal Debtor. These letters indicated that, in view of the Covid-19 pandemic and the subsequent lockdown regulations, the Applicant afforded the Principal Debtor with an option to extend the time period to repay the debt, alternatively to convert the debt to a fixed term loan facility over a maximum of 24 months, subject to vetting. The options were provided ex gratia and without derogating from the Applicant's rights. Copies of which are enclosed as* ***Annexure "F4"****,* ***"F5"*** *and* ***"F6"*** *respectively.*

23. *The Principal Debtor did not accept the Applicant's proposed options, nor did it make payment of the claimed amount, which remains in default.*

24. *A final demand was addressed by the Applicant's attorneys on 15 May 2020, a copy of which is enclosed as* ***Annexure "F7"****. This demand was also not met.*

25. *As at 16 July 2020 the Principal Debtor was indebted to the Applicant in the amount of R3 884 297.31, which is due and payable, as is envisaged by a certificate of balance signed by one of its directors, enclosed as* ***Annexure "F8"****.*

<u>Claim against the sureties</u>

26. *On 12 August 2019, and in conjunction with the revolving credit agreement, the First, Second and Third Sureties each signed a written surety agreement. The respective surety guarantees are enclosed as* ***Annexure "F9"****,* ***"F10"*** *and* ***"F11"*** *respectively.*

27. *The terms of the respective surety guarantees mimic each other save for the description of the surety. In order to avoid this application being unnecessarily prolix I ask that the terms set out in the surety guarantees be deemed repeated herein. I paraphrase only those provisions which I deem to be most relevant to this application:*

    27.1 *The Sureties irrevocably and unconditionally guaranteed, jointly and severally, as principal and independent obligations in favour of the Applicant to perform any obligations due for performance by or to pay any amount owing by the Principal Debtor (vide clause 1).*

    27.2 *The Sureties acknowledged that their obligations are principal obligations and they renounced all benefits of excursion, division and cession of action and the benefits of "no value received", "non numeratae pecuniae", "non causa debiti" and "errore calculi" (vide clause 9).*

    27.3 *A certificate under the hand of any director of the Applicant, whose designation and status need not be proved, shall constitute prima facie proof of the Sureties' indebtedness (vide clause 10).*

27.4 *The surety guarantee constitutes the sole record of the agreement between the parties and supersedes any other discussion, agreement and/or understandings in relation to its subject matter (vide clause 15).*

27.5 *The Sureties shall pay the Applicant's legal costs on a scale as between attorney and own client pursuant to the Applicant having to enforce its rights (vide clause 20).*

28. *As at 16 July 2020 the Sureties were indebted to the Applicant in the amount of R3 884 297.31, which is due and payable, as is evidenced by certificates of balance signed by one of its directors, enclosed as* ***Annexure "F12"***, ***"F13"*** *and* ***"F14"*** *respectively.*

29. *The Sureties remain in default of payment, in spite of demand*[1]."

Relevant factors: Declaring the immovable property executable

[12] The Applicant's case in respect of declaring the immovable property(ies) of the Principal Debtor executable, appears to be the following, in summary:

"30. *The Principal Debtor, a trust, is the owner of the immovable property. As a juristic person, the immovable properties cannot serve as the Principal Debtor's primary residence. I am advised that Uniform Rule 46A(2)(a) is therefore not applicable.*

31. *I shall, ex abundanti cautela, nonetheless deal with the factors favouring execution against the immovable property. This should however not be construed as a concession that Uniform Rule 46A(2)(a) is applicable.*

32. *It would seem that the immovable properties, albeit residential, serve as a holiday home of sort. It is not clear who benefits from its use.*

33. *The fact that the Principal Debtor had to incur debt in the amount of R3.9 million, as recently as August 2019, is indicative that it does not have sufficient liquidity. In addition to the current debt, the Principal Debtor also signed as surety in respect of another credit facility provided by the Applicant in the amount of R1.7 million. This facility has also been called up and parallel proceedings will be instituted against it. It is therefore highly unlikely that the Principal Debtor will have sufficient movables to satisfy the Applicant's claim.*

34. *To execute against movables first will not only be futile, but will simply serve to run up avoidable costs. In the meantime, interest will accrue even further. As it stands, interest on the outstanding amount accrues at*

[1] Record p. 11 – 16, paras 17.1 to 29

more than R53,000.00 per month. If execution of the immovables is stayed for several month (if not longer), as it invariably will be if one first executes against the movables, then the Principal Debtor's indebtedness will increase exponentially. This will not only be to the Principal Debtor's detriment, but also to the detriment of the Sureties.

35. *As for the First Surety: It too has concluded a similar revolving credit agreement with the Applicant, which has since also been called up. Parallel proceedings will be issued against it in conjunction with this application. An attempt to first execute against its movables will likely result in the same outcome for the same reason why execution against the Principal Debtor will be futile, viz it too will have insufficient liquidity or movables to satisfy the claim.*

36. *As for the Second and Third Sureties: They have been cited in their personal capacities. While it is fair to assume that they own some movables, it is unlikely to be sufficient to satisfy the entire claim. They too are sureties in respect of the proceedings mentioned earlier.*

37. *I further respectfully submit that it is not within the spirit of the Constitution to first execute against a natural person's effects when immovable property of a juristic person is available for execution. I point out that it is highly unlikely that the immovable properties (which are in any event not owned by them) serve as the Second and Third Sureties' primary residence. The immovable properties are situated near Mossel Bay, while the Second and Third Sureties reside in Kimberley. They in fact own various other immovable properties, as is evidenced by reports enclosed herewith, marked* ***Annexure "F15"*** *and* ***"F16"*** *respectively.*

38. *The Second and Third Sureties' right to housing will therefore not be affected if this application is granted. It is further evidenced from the aforesaid reports that the Second and Third Sureties hold stakes in various commercial enterprises.*

39. *Considering the Respondents' circumstances holistically, it is clear that one is not dealing with typical indigent people, but rather with a family who is familiar with commercial enterprise.*

FACTORS LISTED IN RULE 46A(5)

40. *The Applicant has caused the immovable properties to be appraised by a qualified property valuer. Her report is enclosed as* ***Annexure "F17"****.*

41. *From the report the court will note that the immovable properties (which have been combined to form one residential unit) are valued at about R6,600,000.00 (open market value) and R4,950,000.00 (forced sale value).*

42. *The Applicant's attorneys have also obtained electronically generated valuation reports (Lightstone Scheme Valuation Service), printouts of which are enclosed as* ***Annexure "F18"*** *and* ***"F19"****.*

43. From these reports, the court will note that the immovable properties are valued (combined) as follows:

43.1 Expected low market value: R4,350,000.00

43.2 Expected high market value: R5,260,000.00

43.3 Municipal valuation (as at 2016): R3,399,000.00[2]"

[13] It is the Applicant's contention that in as much as the owner of the immovable properties is a juristic person – the Trust – and not a natural person, and furthermore that the listed properties seem to be holiday homes and not the primary residence of any of the Respondents, neither section 26(1), section 26(3) nor the provisions of Rule 46A of the Rules of Court are applicable to the property and/or an order declaring the said property executable. The Applicant has, however, referred to these sections and the two provisions of Rule 46A, and without conceding its applicability, pointed out the Respondents' rights and obligations flowing from these provisions, should it/they be opposed to such order declaring the said immovable property executable.

[14] It is also the Applicant's case that:

51. by virtue of the fact that the principal debt arose from what is deemed to be a "large agreement" and the Principal Debtor is a "juristic person" as defined by the National Credit Act 34 of 2005 ("the NCA"), the provisions of the NCA are not applicable to this matter.[3]" This was not disputed by and/or on behalf of the Respondents.

[15] In the circumstances, the Applicant has cancelled the said agreement, called up the loan amount, and pray for an order in terms of the Notice of Motion, which reads as follows:

"*1. That judgment be granted against the First to Eighth Respondents, jointly and severally, the one paying the others to be absolved, in the following terms:*

*1.1 Payment of **R3,804,805.00**.*

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[2] Record pages 16 – 19, paras 30 to 43

[3] Record page 21;, para 51

1.2 Interest on the aforesaid amount calculated at the prime rate of interest determined from time to time, plus 9.5 % per annum, calculated daily and compounded monthly in arrears on a 365 day year, from 30 June 2020 to date of final payment.

1.3 Costs of suit on a scale as between attorney and client.

2. That the following immovable properties be declared specifically executable:

2.1 The Unit, held by Deed of Transfer Number ST20172/2007, consisting of:

2.1.1 Section number 53 as shown and more fully described on Sectional Plan No SS 83/2000 in the scheme known as De Branders, in respect of the land and building or buildings situated at Hartenbos, in the Municipality of Mossel Bay, of which section the floor area, according to the said sectional plan is 103 square metres in extent; and

2.1.2 An undivided share in the common property in the aforesaid scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

2.2 The Unit, held by Deed of Transfer Number ST30214/2005, consisting of:

2.2.1 Section number 54 as shown and more fully described on Sectional Plan No SS 83/2000 in the scheme known as De Branders, in respect of the land and building or buildings situated at Hartenbos, in the Municipality of Mossel Bay, of which section the floor area, according to the said sectional plan is 99 square metres in extent; and

2.2.2 An undivided share in the common property in the aforesaid scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

hereinafter "the immovable properties"

3. That no reserve price be set in the event of the immovable properties being sold in execution, alternatively that a reserve price be set in the amount as the court may deem reasonable.

4. Further and/or alternative relief".[4]

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[4] Record pages 2 – 3, paras 1 to 4

A summary of the Respondents' Grounds of Opposition

[15] According to the Respondents, in their opposing papers, the opposing affidavit whereof was deposed to by Jacobus Schalk van der Walt ("Van der Walt"), they obliged with the material express terms of the revolving credit facility agreement concluded between the Applicant and the Kobus van der Walt Familie Trust ("the Trust"), which terms included, *inter alia*, the following:

"*6.1 Applicant would lend and advance credit to the Trust in the amount of Three Million Nine Hundred Thousand Rand* ***(R3 900 000.00)****;*

6.2 In accordance with clause 7 of the Standard Terms and Conditions of the agreement, the monies would be repaid in accordance with Part A of the agreement which set a monthly repayment instalment of Sixty-Four Thousand Rand ***(R64 000.00)****;*

6.3 The agreement was subject to certain suspensive conditions, which were to be concluded by no later than 31 December 2019. The suspensive conditions were:

6.3.1 First Respondent was to sign as surety in his personal capacity on the Trust's behalf,

6.3.2 Second Respondent was to sign as surety in her personal capacity on the Trust's behalf;

6.3.3 The Savuti Boerdery Trust was to sign as surety on the Trust's behalf;

6.3.4 A first covering bond in the amount of Five Million Rand ***(R5 000 000.00)*** *in Applicant's favour over the immovable property known as 53 and 54 Sectional Title Units in De Branders, Paardekraal Road, Hartenbos;*

6.3.5 There was to be a cession of the requisite property insurance over the subject properties;

7. Respondent complied with all suspensive conditions and the amount of ***R3 900 000.00*** *was accordingly advanced to the Trust.*

8. The Trust abided by the repayment schedule and paid the monthly instalment to Applicant.[5]"

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[5] Respondents' Heads of Arguments (HoA) dd 9 April 2021; paras 6.1 to 8

[16] The Respondents then also referred to the Covid-19 pandemic and its impact on the citizens of this country. In this regard, they made the following submissions:

"9. By virtue of the Covid-19 virus and in order to limit the spread thereof, the Government of the Republic of South Africa placed the country under a stringent lockdown with severe economic implications of the citizens of the country, which has caused substantial fiscal hardship for millions of South Africans.

10. The effect of this lockdown resulted in all forms of commerce, save for extremely limited designated services, being prohibited. Resultantly, an unprecedented level of economic strife has ensued and millions of South African losing their employment and livelihood.

11. Apart from economic assistance from government, and various acts of philanthropy on part of captains of industry and certain sectors of commerce, the so-described "Top Five" banking institutions, as well as other banking institutions, provided various measures to assist its clients in alleviating the increased financial burden/s they would encounter by virtue of the lockdown.

12. This assistance included "payment holidays", whereby clients would be given a period of approximately three months grace on repaying the monthly instalments on, inter alia, the loans and overdrafts they have with the designated banks.

13. The President of the Republic of South Africa likewise emphasised that the unprecedented period required all to act in accordance with a spirit of cooperation and magnanimity, including inter alia, commercial and residential landlords and financial institutions, so as to prevent the incurrence of any further emotional and financial hardship.

14. Notwithstanding the above, Applicant did precisely the opposite to other financial institutions, and caused a letter to be sent to all and/or most of its clients, dated 27 March 2020, being the day the lockdown in South Africa commenced.

15. In accordance with this letter, Applicant advised that the Trust should deem the letter to be a demand, in that, it reads:

*'**It is a material and essential term** of the Facility Agreement that we (Applicant) shall be entitled, at our sole and absolute discretion, to demand repayment of any and all amounts due in terms of the Facility Agreement on demand.'* (emphasis in the original)

16. The letter further advised, inter alia, that the Trust was to repay to Applicant the outstanding amount of One Million Six Hundred and Seventy-Eight Thousand Nine Hundred and Seven Rand and Ninety

*Five Cents **(R1 678 907,95)** within Thirty **(30)** days from receipt of the letter.*

17. The manner in which Part A of the agreement is expressed, would allow any reasonable contracting party to presume that the money would be repaid in entirety until such time that they(sic) monthly instalment repayments extinguished the debt.

18. In the event the Honourable Court were to find that Applicant was entitled to rely on the demand, it is settled that a degree of reasonableness must be exercised when a right of this nature is implemented.

19. In light of the unprecedented position the country and its citizens found themselves in, it is incontrovertible that Applicant exercised its demand unreasonably and capriciously.

…

28. Of importance in the present matter is the fact that the agreement in question was concluded in June 2019 and the notice of cancellation was provided in March 2020.

29. Accordingly, in the light of the substantial amount advanced to the Trust, and the fact that the demand was made less than a year after the conclusion of the contract, coupled with the unprecedented lockdown, a circumstance which cannot have been foreseen by the parties at the time the agreement was concluded, the cancellation cannot be seen as reasonable.[6]"

[17] With regard to the surety agreements signed by the Respondents, they disputed their liability on the following grounds:

"34. Respondents deny that they had the intent to bind themselves insofar as the renunciations of the suretyship agreements are concerned.

35. At the time of entering into the surety agreements, they were unaware and/or failed to completely understand the far-reaching consequences of this agreement and the ramifications for not adhering to its terms.

36. What is more, Respondents were never appraised of or advised as to the meaning of the terms as contained in paragraph 9 of the agreement, and only signed the agreement as a matter of course.

37. The true meaning of the renunciations were only made aware to Respondents after having consulted with their legal representatives. Unbeknownst to them, they renounced any and all forms of benefit or protection afforded to them and were not appraised of this when entering into the suretyship agreement.

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[6] Respondents' HoA paras 9 to 19 and 28 to 29

38. *Respondents would not have signed the suretyship agreement with the inclusion of paragraph 9, had they understood the meaning thereof.*

39. *Moreover, the language and terminology utilized in the suretyship agreement would be difficult for an English speaker to comprehend let alone someone who is Afrikaans speaking, as Respondents are.*

40. *In light of the above, consensus could not have been reached between the Applicant and Respondents, as they did not have the animus contrahendi to enter into agreements of this nature.*

41. *Moreover, the basis of Respondents' opposition in this respect is factual in nature. Given the fact that Applicant seeks final relief in these proceedings, the applicable legal principles germane thereto apply. Consequently, there is a material factual dispute manifest herein which goes to the epicenter of the dispute.*

...

50. *As aforementioned, the version advanced by Respondents in relation to the suretyship agreements is by no means "far-fetched" or "clearly untenable" to warrant their immediate rejection.*

51. *Accordingly, a material factual dispute is manifest in the parties' versions which cannot be resolved on the affidavits alone.*[7]"

[18] In the circumstances the Respondents' opposition to the relief claimed can be summarised as follows:

"3.1 *Applicant's cancellation of the agreements in question is in the circumstances unreasonable;*

3.2 *The renunciations contained in the suretyship agreements should be struck pro non scripto therefrom, as the sureties did not understand the ramifications of these renunciations; and*

3.3 *Insofar as that stated in paragraph 3.2 is concerned, there would in any event be a material factual dispute in this respect, and the application procedure would accordingly be the incorrect process to resolve a dispute of this nature*[8]."

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[7] Respondents' HoA paras 34 to 41 and 50 to 51
[8] Ibid: paras 3.1 to 3.3

[19] As pointed out above (in paragraph 4) the Second Application is substantially similar to the First Application, except for the date this agreement was concluded, namely 27 June 2019, the amount advanced and lent by the same Applicant to the same Respondents, on a revolving credit facility namely R1,7 million rand, and the immovable property of the Kobus van der Walt Familie Trust – the First Surety – being Erf 2851, Kimberley, also known as 45 Long Street, Albertynshof, Kimberley, Northern Cape, over which a covering bond in the amount of R2,1 million had to be registered as security for the Respondents' indebtedness to the Applicant. Hence the verbatim quotations in extenso.

[20] In the result the Applicant's grounds advanced in support of its claims against the Respondents in the second application are identical to those advanced in respect of the First Application, and the Respondents' grounds of opposition also a mirror image of those advanced in respect of the First Application. The Applicant's prayers are also similar to its prayers set out in respect of the First Application, save for those differences referred to in paragraph 19 above and, which are reflected in its prayers in the Second Application. That being so, I deal with both applications based on these similar facts and the submissions made and advanced on behalf of the parties herein.

<u>The common cause facts</u>

[21]. It is common cause that the Applicant lent and advanced R3.9 million to the First to Third Respondents, in their representative capacities as trustees of the Kobus van der Walt Familie Trust ("the Principal Debtor"), (Case 1206/2020) and R1,7 million to the First to Third Respondents in their representative capacities as trustees of the Savuti Boerdery Trust ("the Principal Debtor") (Case 1207/2020), at an agreed interest rate of prime plus 9.25 % in terms of a revolving credit facility agreement ("the agreement"). In addition, the Principal Debtor caused a covering bond to be registered over its respective immovable property/ies, as security for the respective loans.

[22] It is further common cause that the other Respondents signed as sureties for the said indebtedness.

[23] The Respondents failed to repay the monies, in spite of several demands, to date hereof.

[24] The Applicant thereupon launched these applications for repayment of the capital and interest, and to have the respective Principal Debtor's immovable property/ies declared executable[9]."

[25] The Respondents mainly rely on two alternative defences. They are:

5.1 that the Respondents did not breach the agreement and that the Applicant therefore do not have unilateral right to call up the loan;

5.2 alternatively, if the Applicant did have a unilateral right to call up the loan, that it had to be preceded by a reasonable demand[10].

[26] These constitute the main issues for determination regarding both applications. I deal with these in turn hereunder.

<u>The Respondents' objections to the Applicant's unilateral right to demand payment:</u>

[27] It was conceded, correctly, that the founding papers do not rely on a breach on the part of the Respondents. It was however pointed out in the replying papers that the Respondents were in fact in default from March 2020 onwards and that this serves as an additional, independent basis for the termination of the agreement. The founding papers are instead premised on clause 7.1 of the agreement, which reads that:

> "7.1 The outstanding amount must be repaid in full on or before the expiry of the facility terms as set out in Part A of the loan schedule".

[28] The facility term component of Part A in turn reads: "Fluctuating – repayable on demand."

[29] The Respondents interpreted Part A to mean that it would allow any reasonable contracting party to presume that the money would be repaid in entirety until such time that the monthly instalment repayments extinguished the debt.

[30] The Respondents further interpreted this to mean that, as no date of repayment had been specified, the Applicant does not have a unilateral right to demand payment.

[31] This Court was referred to the case of **Panama Prop 103 (Pty) Ltd v Land & Agricultural Dev Bank of SA 2016 (1) SA 202 (SCA)** in which the SCA emphasised that there is a presumption against superfluity when interpreting

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[9] Applicant's HoA, dd 9 April 2021; paras 1 to 4
[10] Applicant's HoA, dd 9 April 2021; para 5

contracts. (para 35) This follows the traditional approach, as explained by **Christie**[11]:

> 'It is ... a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe – should not without necessity or some sound reason impute – to its language tautology or superfluity, and should rather at the outset inclined to suppose every word intended to have some effect or be of some use.

[32] The Applicant submitted that the Respondents' interpretation also disregards the modern locus classicus on interpretation, viz **Natal Joint Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)**[12]:

> *'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. <u>Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed</u> and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. <u>The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document</u>".*

[33] This Court agrees with the submissions on behalf of the Applicant that the difficulty with the Respondents' interpretation is that it will necessarily result in the court having to ignore an express provision of the agreement, viz the words "repayable on demand" and thereby contravene the trite principles of interpretation, as referred to and set out above.

<u>The Respondents' demand for reasonableness/reasonable notice</u>

[34] The Respondents' alternative contentions are (a) that the demand had to be reasonable and (b) that the Applicant's demand was indeed unreasonable in the circumstances.

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[11] Christie, The Law of Contract in South Africa, 6th Edition, p229.
[12] At para [18]: emphasis added.

[35] The difficulty with the former contention is that it requires the reading into the agreement a word that simply does not appear therein, namely "reasonable." In so doing, it is expected of the court to ignore the agreement's sole memorial and non-variation clauses, which, based on the above-stated legal principles, and which apply, mutatis mutandis, herein, this Court cannot do.

[36] The Respondents' position is not helped by the common law either.

[37] In **Damont NO v Van Zyl 1962 (4) SA 47 (C)** it was held that: '*In law it is clear that when no time is specified it is liable to become payable from the moment when it is advanced*[13]'.

[38] It was held in **Trinity Asset Management (Pty) Ltd v Grindstone Inv 132 (Pty) Ltd 2018 (1) SA 94 (CC)** that: '...the long-standing common-law rule that a loan without stipulation as to a time for repayment is 'repayable on demand'. But what does 'repayable on demand' mean? The court said that 'although by no means linguistically clear', the phrase means that 'no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred'. The practical effect is this. When suing for repayment the creditor doesn't need to allege a demand: demand is not part of the plaintiff's cause of action. After considering English, Canadian, Australian and New Zealand law, the court held that, unless the parties agree otherwise, a loan 'repayable on demand' is repayable from the moment the advance is made and that no specific demand for repayment need be made for the loan to be immediately due and repayable[14]."

[39] In ***Beadica 231 CC and Others v Trustees, Oregon Trust and Others 2020 (5) SA 247 (CC)***[15] *it was held that: '...a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce i*[16]*t*'.

[13] Damont NO v Van Zyl 1962 (4) SA 47 (C), p52
[14] At para [102]: emphasis added.
[15] ***Beadica 231 CC and Others v Trustees, Oregon Trust and Others 2020 (5) SA 247 (CC)***
[16] At para [80]: emphasis added.

[40] In ***Endumeni Municipality***[17] *it was held that: "Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used*[18]*".*

[41] It was furthermore submitted on behalf of the Applicant, that insofar as the Respondents seek to rely on the so-called factual matrix of the agreement, it is notable that they have provided the court with no factual matrix which can possibly sway it from the literal interpretation of the agreement. The Respondents largely relied on generic allegations pertaining to the Covid-19 lockdown and how other financial institutions have treated their clients in this period. It was submitted that these allegations, even if one assumes them to be accurate, have no bearing on how one is to interpret the agreement. The Respondents, it was argued, have, for instance, provided no details as to what they say transpired during the negotiations and/or details regarding the parties' subsequent conduct from which one can infer that the parties intended for the word 'reasonable' demand to be incorporated in the agreement.

[42] It was also submitted on behalf of the Applicant that the Respondents' reliance on the Code of Conduct promulgated in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 is, misplaced. The Act applies to financial service providers, who are defined as:

> *"financial services provider' means any person, other than a representative, who as a regular feature of the business of such person –*
>
> *(a) furnishes advice; or*
> *(b) furnishes advice and renders any intermediary service; or*
> *(c) renders an intermediary service;"*[19]

[43] The Applicant, it was submitted, is a financial institution. This should not be confused with financial services providers, who are typically brokers and intermediaries. There is no authority to suggest that financial institutions are bound by the Financial Advisory and Intermediary Services Act 37 of 2002, as is

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[17] ***Endumeni Municipality*** (supra)
[18] See paragraph 32 above, at para 18 of that judgment, emphasis added.
[19] Section 1 of the Act 37 of 2002.

suggested by the Respondents[20]." The Respondents did not pursue this ground as part of their defences during oral submissions in Court.

[44] The Respondents and counsel on their behalf also did not pursue their allegations of the existence of a factual dispute during oral argument, correctly so[21]. In the circumstances and for purpose's of this judgment it is not necessary for this Court to deal with that aspect.

[45] In the result, based on the facts and circumstances of this case and the clear crystalized legal principles set out above, which militate against the contentions advanced on behalf of the Respondents, I must find against the Respondents and in favour of the Applicant in respect of the first and second applications. I find accordingly.

The impossibility of performance: *Vis Major / Force Majeure*

[46] This was an issue raised by this Court subsequent to the parties having served and filed their respective Heads of Argument and to which I have referred to herein above. The issue was raised because both the Applicant and Respondents have referred to the Covid-19 pandemic in their respective papers in both applications. It was therefore considered prudent to afford the parties an opportunity to address this aspect in more detail, which they did by their respective supplementary Heads of Argument, which were very helpful and for which I similarly express my appreciation herewith.

[47] The Applicant's case, in this regard, is quite simple:

> "*5. Nowhere in the Respondents' papers did they allege that performance was impossible, nor did they rely on force majeure or vis major. Instead, the Respondents' defence is rather premised on an interpretational argument that one is to read the word 'reasonable demand' into the agreement. It is submitted that the two defences are not to be equated with each other*[22]*.*"

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[20] Applicant's HoA paras 22-23.
[21] See para 17 above.
[22] Applicant's supplementary Heads of Argument dated 14 May 2021, P 4; para 5.

[48] This Court was referred to the approach to be adopted by a court raising an issue(s) mero motu, as authoritatively set out by the Supreme Court of Appeal in **Fischer v Ramahlele**[23] as follows:

"*[13]* *Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court mero motu raise a question of law that emerges full from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.*

[14] *It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.*"

[49] Accordingly, so it was submitted, the court should adjudicate the application on the papers, as they stand, and that the issue of impossibility of performance is not one of those issues[24]."

[50] It was also argued by Mr Steenkamp, on behalf of the Applicant, in the alternative, and should the Court have regard to the Covid-19 pandemic as a

[23] 2014 (4) SA 614 (SCA).
[24] Applicant's Supplementary HoA, supra, Page 4, para 7.

relevant factor in the context of the defence of impossibility of performance, that in the event, the Respondent only made generic statements and generalisations about the impact of Covid, without stating anywhere in their/its papers specifically how they were affected by it, and in which way, and to what extent, if any, the Covid-19 pandemic made it impossible for them, the Respondents, at the time, to date hereof, to comply with their obligations in terms of the respective contracts, to make payment, which became due and payable to the Applicant.

[51] Mr van Tonder, who appeared on behalf of the Respondents in both applications, and who was briefed subsequently as counsel on their behalf, was constrained to concede that no specific allegations of impossibility of performance due to the Covid-19 pandemic was pleaded by and/or on behalf of the Respondents. He argued however, that given the reference to Covid-19 in the respective papers of the Respondents and the Applicant, this court was justified to raise the issue to be dealt with by the parties before court.

[52] He furthermore referred this court to paragraph 29 of the Respondents' Heads of Argument already filed where reference was made of the fact as follows:

"*Accordingly, in light of the substantial amount advanced to the Trust, and the fact that the demand was made less than a year after the conclusion of the contract, coupled with the unprecedented lockdown, a circumstance which cannot have been foreseen by the parties at the time the agreement was concluded, the cancellation cannot be seen as reasonable*[25]."

[53] The Respondents' case, he submitted, is/was not one of absolute impossibility, and therefore the final and complete extinguishing of their obligations in respect of, and towards, the Applicant. It was rather one of temporary impossibility of performance, in the light of the Covid-10 pandemic. With reference to the case of **Niemand v Okapi Investments (Edms) Bpk**[26] he submitted, in the circumstances, that for the period during which the impossibility continues, the debtor's obligation is not extinguished, but merely suspended as the law does not compel the impossible.

[25] Respondents' Supplementary Heads of Argument dated 27 May 2021, page 3, para 7.
[26] 1983 (4) SA 762 (T) at 766 A – B.

[54] He accordingly submitted that:

> "*15. It is submitted that not only was the Applicant's conduct and manner in which it demanded payment, on the very day of the start of the Lockdown, as well as shortly thereafter, utterly unreasonable in the circumstances, but also not in accordance with the terms of the agreements between the parties.*
>
> *16. It is furthermore submitted that these demands were made while, in view of the extraordinary circumstances in existence since the 27th of March 2020, and even to date hereof, it is impossible for the Respondents to comply with these unreasonable demands, under circumstances where the Respondents' performance have become temporarily impossible, wherefore their obligations are temporarily suspended[27].*"

[55] Mr van Tonder's submissions could not, and did not, however, overcome two insurmountable hurdles; firstly the Respondents' omission to have pleaded this defence of impossibility due to the Covid-19 pandemic and its effect on them specifically; and, secondly, as pointed out by the Applicant, in spite of the Court's query having been raised more than a month earlier, no attempts have been made by the Respondents to supplement and/or amplify their papers so as to rely on this defence.

[56] In the circumstances, I must find, as I do, that no facts and/or circumstances have been placed before this court to justify a finding that due to the Covid-19 pandemic, the Respondents have been rendered absolutely, partially and/or temporarily impossible to perform their obligations in terms of the agreements, towards the Applicant.

[57] I now turn briefly to the Applicant's allegations and prayers in respect of the Respondents' immovable properties, and for this court to declare same specially executable in the circumstances, there being compliance with the provisions of Uniform Rule 46A(2)(a).

[58] It is the Applicant's case that the immovable properties *in casu*, besides being owned by a juristic person(s), namely the two (2) Trusts, these properties did/do

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[27] Ibid Pages 5 to 6; paras 15 and 16

not serve as the Respondents' primary residence(s). Hence the application of Rule 46A(2)(a) is not triggered.

[59] I was also referred to the case of **NPGS Protection and Security Services CC and Another v Firstrand Bank Ltd**[28] wherein it was held that

> "*31. ...the onus is on the debtor to, at the very least, provide the court with information concerning whether the property was his or her personal residence; whether it was a primary residence; whether there were other means available to discharge the debt; and whether there was a disproportionality between the execution and other possible means to exact payment of the judgment debt. The Respondents in casu provided no such information.*"

[60] In the circumstances I must find, as I do, that the Applicant has made out a case for this relief in respect of both applications.

<u>What order should be made</u>

[61] What remains to be considered, in the circumstances of these cases, is what order should be made that is legally compliant and factually appropriate.

[62] It is common cause that the Applicant, in its founding papers in both applications, did not rely on any breach of the respective agreements on the part of the Respondents. It is so that in its replying papers it sought to make out a case, belatedly so, that the Respondents were in fact in default as from March 2020 onwards, which according to the Applicant, served "*..as an additional, independent basis for the termination of the agreement*[29]."

[63] The Applicant's contention in this regard, to my mind, does not hold water. Firstly, they did not make out a case for this contention in their founding papers, as they should have done but failed to do so. The Applicant could in any event not assert this allegation at that stage because, as the Respondents have demonstrated, they have complied with all their legal obligations in terms of the two agreements until and up to the date when these applications were served on them. Secondly,

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[28] 2020 (1) SA 494 (SCA); page 10, para 31.
[29] (Record p. 283, para 17)

the Applicant had elected to forthwith cancel the agreements, despite the fact that there was no breach on the part of the Respondents up to that point, unilaterally so, as was its right, as demonstrated by them. It therefore follows that, there being now a legal dispute in existence, brought about by the Applicant, not by the Respondents, with the contracts henceforth having been cancelled by the Applicant, that the Respondents would, in these circumstances be inclined to stop making any further payments, as they did, understandably so, until this dispute, initiated by the Applicant, is resolved. Thirdly, the Respondents have demonstrated on the papers before this court, that, in the circumstances of both cases, that unilateral cancellation of the agreements and the Applicant's demand for immediate payment of the amounts lent and advanced – which are not small amounts, it being R3,9 million and R1,7 million respectively, which became due and payable, was indeed, objectively, unreasonable, albeit legally permissible and enforceable, as I have found.

[64] This Court has canvassed its inclination to suspend the orders declaring the respective properties specially executable, with counsel during argument in court, and subsequently as per the letter addressed to the parties referred to hereinabove[30].

[65] During the said hearing and submissions in court, Mr Steenkamp, for the Applicant, referred me to what is called the "Roger's Order", emphasising that he had no specific instructions in that regard, and that the said order mainly applies to situations where people, who do/did not really have the requisite financial means, are faced with applications to have their primary residences declared specially executable. In short, the "Roger's Order" involves, *inter alia*, the granting of an order declaring such immovable property executable, but suspending such order, subject to periodic payments made by the debtor to satisfy the arrear instalment amount, in which event the executability of the property will lapse or be further suspended.

[30] See paragraph 10 above.

[66] Mr van Tonder argued for the postponement for a period of time, of the matter, in the discretion of the Court, and for the matter to be heard and the parties to return to the court, at such future/later date. He conceded that it was an unusual request, but, he said, these were unusual circumstances we find ourselves in. According to him the Applicant would not suffer any significant prejudice, whereas the Respondents will suffer serious prejudice in the circumstances.

[67] To summarize:

[67.1] The Applicant was legally entitled to cancel the agreement, and to demand payment, which became due and payable.

[67.2] such cancellation and call up of the payment was indeed unilateral and just after +_ 8 months since concluding the contracts.

[67.3] At that time the Respondents did not breach any term of the agreement, they were paying their monthly instalments timeously, in accordance with their obligations in terms of the contract.

[67.4] Covid- 19 played a role, objectively, by affecting all people, not only in the world, but also in the Republic of South Africa, although people were affected differently. Respondents did not specify how exactly Covid-19 affected them in not being able to comply with their obligations in terms of the contract.

[67.5] In the circumstances the unilateral cancellation of the agreements and call up of the facilities, namely payment of the R3.5 million and R1.7 million which as a result, became due and payable, was clearly unreasonable. Yet that is not in the circumstances of this case, a valid defence in law, but it is an important factor for the Court to take into consideration in terms of the Order which should be issued.

[68] After careful consideration, I have come to the conclusion that, in the circumstances of this case, the following order should be issued:

ORDER

1. The Application in respect of both cases, No 1206/2020 and 1207/2020 succeeds.

2.The First Application: Case No 1206/2020

Judgment is granted against the First to Eighth Respondents, jointly and severally, the one paying the others to be absolved, in the following terms:

2.1 Payment of 3, 804, 805.00.

2.2 Interest on the aforesaid amount calculated at the prime rate of interest determined from time to time, plus 9.5% per annum, calculated daily and compounded monthly in arrears on a 365 day year, from 30 June 2020 to date of final payment.

2.3 Cost of suit.

3.That the following immovable properties be declared specifically executable, which order is suspended for a period of six (6) calendar months from date of this judgment;

3.1 The Unit, held by Deed of Transfer Number ST20172/2007, consisting of:

3.1.1 Section number 53 as shown and more fully described on Sectional Plan No SS 83/2000 in the scheme known as De Branders, in respect of the land and building or buildings situated at Hartenbos, in the Municipality of Mossel Bay, of which section the floor area, according to the said sectional plan is 103 square metres in extent, and

3.1.2 An undivided share in the common property in the aforesaid scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

3.2 The Unit, held by Deed of Transfer Number ST30214/2005, consisting of:

3.2.1 Section number 54 as shown and more fully described on Sectional Plan No SS 83/2000 in the scheme known as De Branders, in respect of the land and building or buildings situated at Hartenbos, in the Municipality of Mossel Bay, of which section the floor area, according to the said sectional plan is 99 square metres in extent, and

3.2.2 An undivided share in the common property in the aforesaid scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan;

Hereinafter "the immovable properties".

4. That a reserve price of R4 million (R4 000 000.00) be set in the event of the immovable properties being sold in execution.

2. The Second Application: Case No 1207/2020

Judgment is granted against the First to Eighth Respondents, jointly and severally, the one paying the others to be absolved, in the following terms:

5.1 Payment of R1, 753, 920.76.

5.2 Interest on the aforesaid amount calculated at the prime rate of interest determined from time to time, plus 8.25% per annum, calculated daily and compounded monthly in arrears on a 365 day year, from 30 June 2020 to date of final payment.

5.3 Cost of suit.

6. That the following immovable property be declared specifically executable, which order is suspended for a period of six (6) calendar months from date of this judgment; Erf 2851, Kimberley, situated in the Sol Plaatjie Municipality, District of Kimberley, Province of the Northern Cape, in extent 892 square metres and held by Deed of Transfer number R100/2005 ("the immovable property")

7. That a reserve price of R1.800 000.00 be set in the event of the immovable property being sold in execution.

MOSES, AJ

ACTING JUDGE OF THE HIGH COURT

REPRESENTATION:

Counsel for the Applicant:	**Adv. J.P. Steenkamp** **Instructed by:** **Elliott, Maris, Wilmans & Hay**
Counsel for the 1st – 8th Respondents:	**Adv. A.G. van Tonder** **Instructed by:** **PMGO Attorneys**